

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Anthony Robert Ethier Operating as Trees Restaurant  
("Ethier")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Niki Buchan

**FILE NO.:** 96/620

**DATE OF HEARING:** February 17, 1997

**DATE OF DECISION:** February 22 ,1997

**DECISION**

**APPEARANCES**

Anthony Robert Ethier	For Himself
Peter Glemnitz	For the Director
Sharon Manzer	Observer

**OVERVIEW**

This is an appeal filed by Ethier pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination of a delegate of the Director , NO. CDET 004172 dated October 1, 1996. The Determination found that Ethier had contravened Section 58(2) and Section 63(2) of the *Act* by failure to pay:

1. Compensation pay including interest in the amount of \$ 648.92 to the Complainant Sharon Walls (“Walls”);
2. Wages and vacation pay including interest in the amount of \$ 102.31 to the Complainant Angela Hugh (“Hugh”);
3. Severance pay and vacation pay including interest in the amount of \$ 617.59 to the Complainant Becky Perron (“Perron”).

Total amount payable is \$ 1368.82.

Ethier argues that the Determination was not properly investigated. He claims that he was the landlord and did not take over a business. He says he received no explanation when he requested information as to how the amounts were set. He also states that it was impossible to obtain any records from the previous employer.

A preliminary matter arises in this case. In submissions to the Tribunal before this hearing, Ethier states he would like to appeal the \$ 500.00 penalty Determination CDET No. 001562 dated March 22, 1996 pursuant to Section 98 of the *Act* and Section 28 of the Employment Standards Regulations (production of documents). An Appeal to that Determination was never filed.

**ISSUE TO BE DECIDED**

1. Whether this panel should entertain a request by Ethier to appeal the penalty Determination No. CDET 001562 that was not appealed within the time limit allowed (by April 15, 1996)?
2. Whether Ethier was a successor employer to Hilltop Hideaway Restaurant Ltd.?

3. Whether severance pay and vacation pay including interest in the amount of \$ 617.59 are owed to Perron?
4. Whether wages and vacation pay including interest in the amount of \$ 102.31 are owed to Hugh?
5. Whether compensation including in the amount of \$ 648.92 is owed to Walls?

## FACTS

Ethier did not file an appeal to Determination No. CDET 001562 within the time limit allowed and admits there was no further communication or production of documents prior to the present appeal of Determination CDET No. 004172 being issued on October 1, 1996.

The first complaint was filed by Perron dated November 28, 1995 claiming vacation pay from June 16, 1994 to January 31, 1995. She was advised by letter that S. 97 of the *Act* would apply to her as per successorship of the business. Also, that vacation pay accumulated would therefore be paid before the beginning of the employee's vacation or on termination which ever occurs first. She was advised that the file was being closed and if she did not receive proper vacation pay to notify the office. The complaint arose again after the business was sold in February, 1996 when the new employer told her there was no work for her.

The delegate of the Director gave oral evidence that he spoke with Ethier in early December 1995 concerning his responsibility to inherited employees and explained the operation of S.97 of the "Act" This discussion was followed by a letter dated December 15, 1995 which was returned; it was remailed to a new address on January 4, 1996. Ethier denies he ever saw these letters. Another letter was sent February 13, 1996 with a copy of Section 97. He also denies he spoke to the Industrial Relations Officer prior to January or February 1996 when he received a call to produce records. Ethier responds that he informed the officer that he was unable to produce records of the previous employer since they were not in his possession and that owner had left town. He states that he did not get a proper explanation where the numbers came from.

In 1995 Ethier had owned the lands and restaurant building for approximately six years in the name Ethier Investments Ltd. He was the sole owner. He leased the restaurant to Hilltop Hideaway Restaurant on a five year lease. About two years into the lease Richard Swanson bought this restaurant and operated it for about three years. In late 1994 or January, 1995 Swanson was in financial difficulties. He was three months behind in the lease payments therefore Ethier "closed the doors" on him and made him issue lay off notices to all employees.

Ethier is unclear about the exact time but he paid out Swanson's chattel mortgage and took over the equipment assets from Hilltop Hideaway Restaurant. His intention was to lease the restaurant to someone else but decided to operate it himself with Sharon Manzer. He closed the doors the end of February for three to four weeks of remodeling and opened as Trees Restaurant in March of 1995.

Ethier sold the restaurant and the new owners took over operations the end of February, 1996. All employees were given verbal lay off notice on February 13, 1996. Employees who were not to be kept on by the new employer were given written notice. The Complainant Walls was given two weeks written notice dated February 12, 1997. A copy of this notice was submitted to the Tribunal prior to the hearing. The Complainant Perron was not given written notice because she was to be kept on by the new employer. In fact, she was not recalled. The Complainant Angela Hugh was fired for alleged theft. When she was challenged she left and did not return. Ethier denied she worked the 13.5 hours but later withdrew this denial confirming that she had in fact worked those hours.

None of the Complainants made written submissions to the Tribunal, except those comments filed with the Complaints. The Complainants did not attend at the hearing. Only Hugh telephoned to say that she would not appear at the hearing.

### ANALYSIS

On the preliminary matter, the appellant requests to file an Appeal to a penalty order. A penalty Determination CDET No. 001562, dated March 22, 1996, in the amount of \$500.00 for non-production of documents was not appealed by April 15, 1996, the time limit set for appeal. This appeal of Determination CDET No. 004172 was filed on October 10, 1996. The reasons for appeal did not include a request to appeal the penalty Determination. That request came in a later submission prior to this hearing. Ethier argues that documents from the previous employer were not in his possession thus he could not provide them. He states that no investigation was made as stated in the penalty Determination. While he may not have been able to produce all the documents demanded, he clearly chose not to produce those which were in his possession. Where an employer chooses to ignore clear and unequivocal notices to respond to a requirement to produce records with respect to Complaints, he will be penalized in accordance with the *Act*. In the absence of fraud or new evidence which was unavailable at the time of the penalty Determination this panel will not hear this new issue.

The second issue arises because the Appellant disputes the determination that he is a successor employer or that he owes accumulated vacation pay. By Ethier's own evidence he "closed the doors" on the lessee (Hilltop Hideaway Restaurant), paid out the chattel mortgage and took over the assets of that business. He made the owner lay off all of the employees. He then decided not to lease the restaurant but to remodel it and to rehire a number of the employees who had been laid off. On this evidence he has not met the onus to prove that he should not be deemed a successor to Hilltop Hideaway Restaurant.

The only Complaint that relies on this deemed successorship involves the non-payment of Perron for accumulated vacation pay between June 16, 1994 and January 31, 1995. The best evidence before me is from the delegate of the Director who spoke to Ethier before he took over the restaurant. He confirmed that discussion by the letter dated December 15, 1995 and was remailed to the new address on January 4, 1995 after the first was returned. Another letter was sent on February 13, 1996. Discussions were held between Ethier and the Industrial Relations Officer on or about February 16, 1996. While I am satisfied that Ethier could not produce records relating to the previous employer, his obligation under the *Act* requires

payment of accumulated vacation time to an employee from the initial date of employment. The officer had to rely on the only information available. That information was contained in the Complaint. The reasons for the Determination are not unreasonable. Perron is entitled to be paid for the vacation pay accumulated by her with the previous employer.

The third issue is whether severance pay and vacation pay including interest in the amount of \$ 617.59 is owed to Perron. I have dealt with the vacation pay issue above. Ethier's evidence is that she was not given written notice because she was to be kept on by the new employer. The Complaint reveals that Perron was informed by the new employer on February 27, 1996 that there was no work available for her and that she did not receive written notice from her old boss. Since Ethier admits she was not given written notice the Determination is not in error or unreasonable. I conclude Perron is entitled to her claim as set out in the Determination.

The fourth issue is whether wages and vacation pay including interest in the amount of \$102.31 are owed to Hugh. At the hearing, Ethier initially denied that she had worked the hours claimed but later confirmed that she had worked those hours. I conclude that there is no error in the reasons or amount set out in the Determination with respect to the claim by Hugh. She is entitled to her claim.

The last issue is whether compensation pay including interest in the amount of \$ 648.92 is owed to Walls. Her Complaint states that she was not given written notice and that she was told on February 27, 1996 by the new employer that she did not have a job. Ethier disputes this statement and gave oral evidence that all employees who were not to be kept on by the new employer were given written notice. Walls was one of the employees given written notice. He also submitted a written lay off notice, dated February 12, 1996, with his reasons for appeal.

I am not satisfied that a full investigation was made into this complaint. All discussions between the delegate and Ethier took place prior to the Demand for Documents issued on February 26, 1996. Walls complaint was not filed until February 29, 1996; therefore, there would not have been discussions relating to her written notice. No further demand for documents was made after the penalty Determination and no further discussions took place prior to issuing the Determination under appeal on October 1, 1996.

In the notice of hearing, Walls was informed that she was expected to be at the hearing. She did not make a written submission nor did she attend. She was unavailable for cross examination on her complaint. The delegate of the Director remarked during the hearing that he would like to have cross examined the complainants. He did not contest the evidence from Ethier with respect to this complaint. The best evidence before me is the sworn evidence from Ethier. I conclude that the Determination with respect to Walls should be canceled.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. 004172 be confirmed with respect to Perron in the amount of \$ 617.59 and with respect to Hugh in the amount of \$102.31 together with whatever further interest may have accrued to be calculated by the Director pursuant to Section 88 of the *Act*.

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 004172 be canceled with respect to Walls.

**Niki Buchan**  
**Adjudicator**  
**Employment Standards Tribunal**