

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

-by-

The Mongolie Grill Ltd. operating as Mongolie Grill
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	E. Casey McCabe
FILE NO.:	98/623
DATE OF HEARING:	January 29, 1999
DATE OF DECISION:	March 18, 1999

DECISION

APPEARANCES

Greg Bardon	for the Appellant
Arthur Fisher	for herself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated September 8, 1998 which found that the complainant, Arthur Fisher, was entitled to certain amounts on account of regular wages owing, vacation pay owing, statutory holiday pay owing and termination pay owing with interest.

ISSUE(S) TO BE DECIDED

Did the complainant work the hours upon which the Determination was based?

Was the complainant terminated for just cause?

FACTS

The employer operates a restaurant on West Broadway in Vancouver known as the Mongolie Grill. The owner of the restaurant is Mr. Marc Drapeau. The Manager is Mr. Greg Bardon and the Assistant Manager is Ms. Murielle Suronen. Generally speaking the restaurant is open for lunch and dinner every day of the year except Christmas. The complainant worked primarily as a dishwasher but would occasionally work preparing the food. Those duties might include the set up of the buffet or cooking at the grill.

ANALYSIS

I turn firstly to the issue of the hours worked. Neither the employer nor the complainant were able to produce work schedules or pay stubs showing the actual hours worked. The complainant testified that for the first six months of his employment he worked eight hour days. He further testified that for the final six months of his employment he worked six to seven hour days. He testified that he was paid in cash. It appears that his rate of pay was the minimum allowed by law.

With respect to the statutory holidays the complainant testified that on the statutory holidays of May 19, 1997 (Victoria Day), July 1, 1997 (Canada Day), August 4, 1997 (B.C. Day), September 1, 1997 (Labour Day), and October 13, 1997 (Thanksgiving Day) he worked 8 hours. He further testified that on November 11, 1997 (Remembrance Day), January 1, 1998 (New Years Day), and April 10, 1998 (Good Friday) he worked only 6 hours. The Director's Delegate made her calculations on that basis. However, it should be noted that the Director's Delegate also included 6 hours pay for the day of December 25, 1997 which was Christmas Day. The complainant agreed during the course of the hearing that the restaurant was not open that day and that he did not work. The complainant further testified that he had not been paid vacation pay on his earnings for the period of his employment and there was also a discrepancy of \$3.68 for a difference in pay during the week of April 4-6, 1998.

The employer called Mr. Drapeau, Ms. Suronen and one Mr. Vasquez as witnesses. However, those witnesses were not able to provide factual evidence to contradict the complainant's claims to the hours that he had worked. None of the witnesses kept records or a diary. Ms. Suronen and Mr. Vasquez were quite frank in their recognition that they could not rely on memory due to the lapse in time. Likewise Mr. Drapeau was not able to conclusively contradict Mr. Fisher's evidence on these points.

Mr. Drapeau was candid in his admission that he paid the complainant in cash and did not provide pay stubs. Mr. Drapeau explained that he considered the complainant as casual labour and not a regular employee. That is why he paid the complainant in cash and did not keep payroll records.

This case is an example of a recurring and fundamental problem in the area of Employment Standards. The problem is the failure by the employer to keep proper records. The Act specifically requires employers to keep such records. Section 28 reads:

28. Payroll Records

(1) For each employee, an employer must keep records of the following information:

- a) the employee's name, date of birth, occupation, telephone number and residential address;
- b) the date employment began;
- c) the employee's wage rate, whether paid hourly, or on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
- d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
- e) the benefits paid to the employee by the employer;
- f) the employee's gross and net wages for each pay period;
- g) each deduction made from the employee's wages and the reason for it;
- h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

- i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing; and
- j) how much money the employee has taken from the employees time bank, how much remains, the amounts paid and dates taken.

(2) Payroll records must

- a) be in English,
- b) be kept at the employer's place of business in British Columbia, and
- c) be retained by the employer for five years after the employment terminates

It is clear that the employer in this case has breached Section 28. As a result there is a dispute over the hours that were worked by the complainant. The statute places the obligation on the employer to keep the records. The reason is obvious – when disputes arise there will be a record of the pertinent payroll information. That information is absent and its absence is detrimental to the employer in this case. The employer was not able to lead evidence to rebut the findings of the Director's Delegate as set out the Determination. The employer is the appellant in this matter and bears the onus of showing that the Determination is incorrect. That onus could have been easily discharged had proper payroll records been kept. However, the records were not kept and the employer's witnesses, through loss of memory due to the passage of time, were not able to rebut the complainant's evidence or the findings of the Director's Delegate on this point.

TERMINATION PAY

The employer appeals the finding that the complainant was entitled to termination pay pursuant to section 63(2)(a). The employer argues that it had just cause for terminating the complainant. The employer argues that the complainant had a history of failing to arrive for scheduled shifts, leaving work early and consuming or being under the influence of alcohol while at work. Mr. Drapeau testified that he had informed the complainant on three occasions that he would no longer tolerate the complainant's behavior while at work. He decided that the complainant should be terminated the day that the complainant arrived at the restaurant allegedly under the influence of alcohol. Mr. Drapeau acknowledged that the complainant was not scheduled to work that day but nonetheless was offended by the fact that he would come to the restaurant in that state. The complainant was terminated approximately 2 days later by Mr. Greg Bardon.

Unfortunately Mr. Drapeau was not able to provide particulars of the dates when he had given the complainant the warnings. Likewise there is no evidence from Mr. Drapeau that any disciplinary action was taken at those times. It appears that the issue was raised with the complainant at the time but he was allowed to continue to work.

The complainant denied that on the day in question he arrived at the restaurant under the influence of alcohol. The complainant testified that he arrived at the restaurant to request his holiday pay. The complainant testified that he had made arrangements with Mr.

Drapeau weeks earlier to take two weeks vacation in April. He testified that when he arrived Mr. Drapeau informed him that he would be unable to allow the complainant to take his holidays at that time due to the operational needs of the employer. Instead he informed the complainant that he could have 5 days off and that he should then report to work. It was approximately 2 days after this conversation that Mr. Bardon terminated the complainant.

Evidence was adduced about the working relationship the complainant held with other employees in the restaurant. The evidence lead by the employer indicated that it felt that Mr. Fisher was a problem because of his personal behavior and his inability to get along with certain of the other employees. Mr. Bardon testified that it was his decision to terminate Mr. Fisher and that he relayed that decision to Mr. Drapeau. Mr. Bardon was not present when Mr. Fisher arrived at the restaurant to request his holiday pay.

I am not prepared to find that the employer had just cause to terminate the complainant. I cannot find that the employer had implemented a proper system of progressive discipline which would have had the effect of putting the complainant on notice that his job was in jeopardy. Even accepting the employer's evidence that it had spoken to the complainant on three previous occasions I am not convinced that the employer had adequately conveyed to the complainant the seriousness of his behavior nor is it apparent that those verbal warnings were disciplinary in nature. Rather, I find that the employer had decided that the personality conflicts between the complainant and the other employees were such that the employer could no longer continue to employ the complainant. However, I do not find that the circumstances constituted just cause. I therefore uphold the Delegate's finding that the complainant is entitled to pay in lieu of notice for his termination.

One matter remains. An issue arose about an alleged payment of \$300.00 to the complainant by Mr. Drapeau. There was a question as to the amount and the purpose of the payment. I accept the complainant's evidence that the amount paid was \$120.00 rather than \$300.00 and I also accept his evidence that it was an advance on pay rather than a loan. The complainant further testified that he thought it was appropriate that the amount of \$120.00 be deducted from the Determination as the monies paid were an advance. The complainant has been candid on this issue. The Determination will be varied to reflect this deduction.

ORDER

I order that the Determination dated September 8, 1998 be varied to deduct from the total the amounts of \$42.00 on account of the Christmas Day statutory holiday pay; that the calculation for vacation pay be adjusted proportionately with a further deduction of \$120.00 on account of the advance. I remit the matter back to the Director's Delegate for calculation. It is so ordered.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal