

**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 -

Grammy's Place Restaurant & Bakery Ltd.  
("Grammy's")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 97/928

**DATE OF HEARING:** February 25, 1998

**DATE OF DECISION:** March 3, 1998

**DECISION**

**APPEARANCES**

George Angelomatis	on behalf of Grammy's
Sukhinder K. Gill	on her own behalf
Frank Karogiannis	on his own behalf

**OVERVIEW**

This is an appeal by Grammy's Place Restaurant & Bakery Ltd. ("Grammy's"), under Section 112 of the *Employment Standards Act* (the "Act"), against a Determination which was issued on December 8, 1997 by a delegate of the Director of Employment Standards (the "Director").

The Determination requires Grammy's to pay a total of \$4,614.69 to two former employees, Sukhinder Gill (\$975.25) and Frank Karogiannis (\$3,639.44) on account of unpaid wages, vacation pay, compensation for length of service and interest under Section 88 of the *Act*.

In his Reason for Appeal, counsel for Grammy's submits that the employer had paid Karogiannis' personal debts and that his employment was terminated "...for being lazy..." but offers no reasons for Gill's employment being terminated.

A hearing was held in Chilliwack, BC on February 25, 1998. Paraskevi (John) Grammatikos did not appear at the hearing which was adjourned for approximately thirty minutes pending his arrival. The hearing proceeded in his absence as I denied counsel's request for an adjournment.

In his closing argument at the hearing, counsel for Grammy's acknowledged that there was "...insufficient evidence at this hearing" for the employer to meet the onus of establishing that it had just cause to terminate Ms. Gill's employment. He also acknowledged that Grammy's owed Ms. Gill the amount set out in the Determination. This will be reflected in the Order set out below.

Counsel for Grammy's submitted as evidence a sworn statement by Denise Bonson (a former employee) and an unsworn statement by Jerry Schmiegel (also a former employee). I have attached no weight to either statement in making this decision.

**ISSUES TO BE DECIDED**

The sole issue to be decided (given the submission by Grammy's counsel in respect of Ms. Gill's entitlement to receive the wage amount set out in the Determination) is whether Frank Karogiannis is entitled to receive the wage amount set out in the Determination.

**FACTS**

Mr. Karogiannis was employed by Grammy's as a cook effective June 1, 1996. He had been employed in a similar capacity between August, 1992 and October, 1995. This appeal is only concerned with his employment after June 1, 1996. His last date of employment is in dispute and I shall address that matter later. Mr. Karogiannis was to be paid a salary of \$2,000.00 (gross) per month. However, by agreement, Grammy's made monthly cable vision and car loan payments on behalf of Karogiannis and he was to receive the remaining amounts directly.

At page 3 of the Determination the Director's delegate records the employer's position that it has paid all wages owing to Karogiannis. The Determination continues:

The employer advised that he had paid the Karogiannis all wages owed (sic). In addition to paying towards his car, his cable vision and giving him cheques, he had paid Karogiannis consistently in cash. When he returned from Greece in late September he produced a cheque, not cashed, made payable to Frank Karogiannis in the amount of \$6500.00. This cheque, was endorsed by Karogiannis and the Employer takes the position that this is an acknowledgment/receipt of the \$6500.00 in cash, he claimed he gave to Karogiannis. He advised me that he had a special arrangement with Karogiannis to pay him, as he had worked on and off from home for a number of years and considered him like a family member. He claims to have fired Karogiannis for being lazy, but there is no evidence to support and demonstrate that the Employer followed the steps of progressive discipline leading to Termination.

There are no records to substantiate the payment of cash to Karogiannis except for the cheque/receipt in the amount of \$6500.00. Interestingly, I had written to the Employer in early August indicating that Karogiannis may be owed \$6800.00. My reasoning at that time was based on calculations of Gross Wages. I now realise that since there has been deductions to Revenue Canada, any wages left owed would be Net Wages. After getting that letter, the receipt for \$6500.00 was produced.

Mr. Karogiannis testified that he signed two cheques on December 31, 1996 in the amount of \$2,500.00 (two thousand five hundred dollars) when asked to do so by John Grammatikos in order to "...balance the books." He also testified that he did not sign a cheque in the amount of \$6,500.00 (six thousand five hundred dollars). He testified, further, that he had never received any payment of wages in cash from Grammy's. Counsel for Grammy's submitted into evidence two cheques drawn on Grammy's bank account and made payable to Frank Karogiannis:

- Cheque #0989 (undated) in the amount of \$2,500.00 which was changed to \$6,500.00 subsequently
- Cheque #0990 (dated December 31, 1996) in the amount of \$2,500.00

Both cheques are endorsed on the reverse by Mr. Karogiannis but neither cheque was presented for payment at Grammy's bank. Mr. Karogiannis testified that he was unaware that his employment was about to be terminated when he endorsed the cheques.

The Determination contains the following findings:

Karogiannis' payroll records are very complete and constantly demonstrated that he was to receive net pay of \$796.41 twice a month, a total of 13 cheques. The payroll reflects that deductions of CPP, Income Tax and UIC would have been forwarded on his behalf. He should have received cheques totaling \$10,353.33 for the time he worked there. When I reviewed all the cheques involving Frank Karogiannis I noted the following.

\$5070.00 (Cheques issued to Frank Karogiannis in varying amounts)  
\$2277.22 (Cheques issued for car payments and cable vision)  
Total \$7347.22

Note: I did not find any cheque in the amount of \$796.41

Frank Karogiannis informed me that on termination, he was asked to endorse a cheque (which he never received) for \$2500.00.. He was told by the Employer that this was needed to bring the books up to date. When one examines this cheque/receipt it is quite clear that the numerical two (2) has been gone over to look like a six(6). I am satisfied that this receipt is not correct and without any other documentation to support the payment of cash to Mr. Karogiannis, he is still owed wages.

The employer has failed to substantiate a case of just cause and compensation pay is owed.

Based on these and other findings, the Director's delegate concluded that Mr. Karogiannis was owed wages as follows:

Gross wages earned - \$13,520.00 (Net \$10353.33)	\$10,353.33
less: Cheques issued on behalf of Karogiannis	<u>\$7,347.22</u>
sub-total	\$3,006.11
plus: Compensation pay (Termination) (One week)	\$461.53
Vacation pay (4% of \$461.53)	\$18.46
Interest	<u>\$153.34</u>
TOTAL	\$3,639.44

Mr. Karogiannis testified that his employment was terminated on January 4, 1997 rather than December 31, 1996 (as shown in the Determination). He could recall that January 4th was a Saturday and that his employment was terminated by Mr. Grammatikos on that day. He also testified that the Director's delegate had erred in finding that payments totaling \$7,347.22 (above) had been made on his behalf by his employer. Mr. Karogiannis explained that the \$7,347.22 amount includes cheque #0992 dated January 3, 1997 in the amount of \$850.00 which he testified, included \$500.00 reimbursement to him because he had paid the apartment rental on behalf of Luigi ("Gino") Tersigni and Jerry Schmiegel: an expense for which Grammy's was liable.

## ANALYSIS

### *Just Cause*

A principal ground of this appeal is that Grammy's alleges there was just cause to terminate Mr. Karogiannis employment.

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause.

The tribunal has addressed the question of dismissal for just cause on many occasions. The following principles may be gleaned from those decisions (see for example, *Kenneth Kruger*, BCEST #D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
  1. A reasonable standard of performance was established and communicated to the employee;

2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
  3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
  4. The employee continued to be unwilling to meet the standard.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
  4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

There is no evidence before me which would support a finding that there was just cause to terminate Mr. Karogiannis' employment. I therefore confirm that aspect of the Determination.

*Amount of Wages Owing*

A second ground for the appeal is that the Director's delegate erred in calculating the amount of wages owed to Mr. Karogiannis. Counsel for Grammy's submits that the Director's delegate erred in finding that Mr. Karogiannis was asked to endorse only one cheque in the amount of \$2,500.00 (two thousand five hundred dollars). This is supported by Mr. Karogiannis' testimony that he signed two cheques, each in the amount of \$2,500.00 on or about December 31, 1996.

The Director's delegate did not include in his calculations of the total value of cheques (\$7,347.22) issued by Grammy's on behalf of Mr. Karogiannis the disputed, undated cheque/receipt (#0989) nor the disputed cheque/receipt (#0990, dated December 31, 1996).

It is trite law that the appellant (Grammy's in this appeal) bears the onus of proving that the Determination contains an error. The Director's delegate found that "...this receipt is not correct and without any other documentation to support the payment of cash to Mr. Karogiannis, he is still owed wages." I have no evidentiary basis on which to overturn that finding by the Director's delegate. On the contrary, Mr. Karogiannis' evidence that he "never received any payment of wages in cash" is uncontroverted. I am not satisfied that either document (cheque/receipt #0989 and cheque/receipt #0990) is a reliable basis for concluding that Mr. Karogiannis was paid wages in cash. With respect to #0989 I note that the words "six thousand five hundred" are written with a different pen than the other words and numbers on the document. I also note that "\$2,500.00/xx" was changed to "\$6,500.00/xx" with only one initial beside it rather than two initials. With respect to #0990 I note that the date (December 31, 1996) is written in a different coloured ink than the remaining words and numbers in the document.

After the hearing, I received a written application by counsel for Grammy's in which he requested permission to make further submissions to the Tribunal in respect of a document/receipt dated July 5, 1996. I have decided to deny counsel's application and have not considered it in making this decision. In making that ruling, I rely on and adopt earlier decisions of the Tribunal (see, for example, *Tri-West Tractor* BCEST #D268/96):

This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

This reasoning applies equally to Mr. Karogiannis' submissions and evidence concerning his last date of employment and the amount of wages owed to him by Grammy's. Mr. Karogiannis did not appeal the Determination and, under cross-examination, testified that he would accept the amounts calculated by the Director's delegate as the amount of wages owed to him. In addition, I note that in Mr. Karogiannis' written reply to the appeal (January 19, 1998) he makes no mention of the \$850.00 cheque dated January 3, 1997 nor does he dispute the finding that his employment terminated on December 31, 1996. In

short, Mr. Karogiannis concluded his written reply as follows: "...there is, in our opinion, no basis for Appeal; further, the Determination by Mr. Bull should stand." (sic)

All original documents which were submitted to the Tribunal by counsel for Grammy's are returned to him with his copy of this decision.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination dated December 8, 1997 be confirmed with respect to the amount of wages owing to Ms. Gill and to Mr. Karogiannis with any further interest calculated according to Section 88 of the *Act*.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**