

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 -

Bistro! Bistro! Restaurants Ltd.
("Bistro")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman
FILE NO.: 1998/413
DATE OF HEARING: March 3, 1999
DATE OF DECISION: March 12, 1999

DECISION

APPEARANCES

Zbigniew Ciura	on behalf of Bistro! Bistro! Restaurants Ltd.
Scott Mitchell	on his own behalf
Cheryl Alexander	on her own behalf
Larry Ng	on his own behalf

OVERVIEW

On June 15, 1998, the Director of Employment Standards (the “Director”) issued a Determination which found Bistro! Bistro! Restaurants Ltd. (“Bistro”) liable for a number of contraventions of the *Employment Standards Act* (the “Act”), including compensation for length of service, overtime, and statutory holiday pay, with respect to 20 employees.

Bistro appealed the Determination pursuant to Section 112 of the *Act*. On September 1, 1998, the Tribunal issued Decision BC EST #D386/98 in connection with the appeal which referred the matter back to the Director for further investigation.

On November 6, 1998, the Tribunal received a submission dated November 4, 1998 from the Director’s delegate. The delegate found that Bistro owed its former employees a total of \$20,052.46 (including interest).

Zbigniew Ciura (“Ciura”), on behalf of Bistro, argues that the delegate’s calculations are in error with respect to 4 employees. Ciura agrees that Bistro is liable for the remaining amount of wages and interest. Ciura, and his wife Norene Ciura, do not agree that they are personally liable under Section 96 of the *Act* for the latter amount. It appears the delegate has not issued any Determinations against the Ciuras under Section 96 of the *Act*. If the Director’s delegate issues Determinations against the Ciuras personally, they intend to appeal the Determinations. One of the grounds of their appeals will be that they ceased to be officers/directors of Bistro on February 16, 1997 and therefore are not liable for any wages that became payable after that date.

A hearing was held on March 3, 1999 to determine Bistro’s liability in this matter. Evidence was given under oath. Although duly notified of the time and place of the hearing, the 4 employees whose claims are disputed by Bistro, did not attend and offered no explanation for their failure to attend the hearing. The Director’s delegate advised the Tribunal that she would not attend the hearing.

FACTS AND ARGUMENTS

Bistro ceased operating in Gastown on October 4, 1997. Subsequently, several complaints concerning unpaid wages were filed with the Employment Standards Branch. The delegate conducted an audit of the employer's payroll using records to September 28, 1997. In her November 4, 1998 submission, the delegate found Bistro liable for \$20,052.46 (including interest) with respect to 20 employees. As indicated above, the delegate's calculations pertaining to 16 of the 20 employees are not in dispute. The calculations pertaining to the following 4 persons are in dispute: Richard Ellison ("Ellison"), Claude Tremblay ("Tremblay"), Eustace Rathnasamy ("Rathnasamy"), and Martin Lavigne ("Lavigne").

The delegate says that Ellison was employed from April 1995 to October 15, 1997 and is owed \$6,039.08 (including interest). She says that the records she reviewed did not show that Ellison received any compensation for length of service or vacation pay, or that he took any vacation time. She further says that Ellison told her prior to the issuance of the Determination that he was owed this amount. The delegate provided a copy of Ellison's Complaint Form which was received by the Employment Standards Branch on January 28, 1998 but is dated January 28, 1997. On the Form, Ellison indicates he started work on April 1, 1995 and ceased work on October 17, 1997 and that he is owed vacation pay and compensation for length of service.

Ciura argues that Ellison was paid in full. He submitted a letter dated October 8, 1998 from Ellison in which Ellison says he commenced work on April 1, 1996, worked until October 4, 1997, and was paid until October 31, 1997 (with the final payment being in cash). Ellison further states that he took two weeks paid holiday in 1996 and in 1997 and received all his vacation pay. Ciura submitted a copy of Ellison's Record of Employment which shows the first day worked as April 1, 1996 and last day paid as October 4, 1997. He also provided copies of cheques issued to Ellison and his predecessor at the restaurant to confirm that Ellison started on April 1, 1996 and that he was paid when he went on two weeks vacation in 1996 and 1997.

According to the delegate, she contacted Ellison after October 8, 1998 and Ellison said his former employer asked him to sign the October 8, 1998 letter and he was concerned about losing his job with his new employer if he refused to sign the letter. Ciura says that it is a blatant lie that Ellison was coerced into signing the letter. Ellison signed the letter voluntarily and it is mystery to him how he could influence Ellison's current employer as he has absolutely no connection with this employer. Ciura says he is astounded by Ellison's claim since Ellison said on numerous occasions that he had informed the delegate to remove his name from the claim because he had been paid in full. Ciura also says that he and his wife lent Ellison \$1000.00 on March 2, 1998 because he said he was broke. Ciura provided a copy of the cheque made out to Ellison. He says that Ellison has made no effort to repay the amount.

The delegate also says that Tremblay is owed compensation for length of service in the amount of \$525.14 (including interest). She says that the records she reviewed during the audit did not indicate that Tremblay quit his employment prior to September 28, 1997. Ciura says that Tremblay quit voluntarily on September 28, 1997 to return to Quebec and he was paid all monies owing to him at that time. The records were not completed as the restaurant closed shortly after Tremblay quit. Ciura also states that the manner in which the delegate calculated Tremblay's

wages supports his position. Specifically, the delegate did not conclude, as she did for the other employees, that Tremblay was owed vacation pay other than the amount owed on the compensation for length of service.

The delegate further says that Rathnasamy is owed vacation pay in the amount of \$885.74 for the period May 25, 1994 to October 4, 1997 plus compensation for length of service. She says that the records she reviewed did not specify if or when vacation time was taken or paid. Ciura says Rathnasamy was paid vacation pay in the amount of \$456.46 on August 11, 1995 by BNS cheque number 1051 in the amount of \$511.93, which included \$55.47 for wages. Ciura provided a copy of an Employee Detail Record which indicates \$456.46 was paid to Rathnasamy on August 11, 1995 as vacation pay.

Finally, the delegate says that Lavigne is owed statutory holiday pay for July 1, 1997, vacation pay and compensation for length of service. She says that the records she reviewed showed he was paid \$12.00 per hour. Ciura says Lavigne was paid \$7.00 per hour on July 1, 1997 and not \$12.00 per hour. Ciura provided a Record of Employment Records which shows that Lavigne was paid \$7.00 per hour until September 1, 1997.

ANALYSIS

The burden in this appeal rests with the Appellant to show that the delegate's calculations respecting Ellison, Tremblay, Rathnasamy and Lavigne are in error.

Neither Ellison, Tremblay, Rathnasamy or Lavigne made any written reply with respect to the delegate's calculations as outlined in her November 4, 1998 submission, nor did they attend the hearing. The Director's delegate also did not attend the hearing.

The Hearing Notice that was sent to all parties included the following statements:

If the Appellant fails to attend the hearing, the Tribunal will consider the appeal to be abandoned. For any other party, non-attendance may or may not be fatal depending on the circumstances of the case, the issues on appeal and whether the Appellant meets the burden to persuade an Adjudicator to vary or cancel a Determination.

My analysis of the evidence in this appeal leads me to conclude that the Appellant, Bistro, has met the burden to show that the delegate's calculations are in error with respect to the 4 employees. I find the uncontradicted oral evidence of Ciura and his wife Norene Ciura to be credible and persuasive.

I am satisfied that Ellison commenced work in 1996 and not 1995. The only document which supports the delegate's position is Ellison's Complaint Form and I find it to be unreliable since it is dated incorrectly. I am also satisfied that Ellison has been paid in full. First, there is no dispute that Ellison signed the October 8, 1998 letter. Second, there is no evidence to support the view that Ellison was coerced into signing the letter. Third, Ciura's evidence that Ellison told him he

did not want to proceed with a claim because he had been paid in full is supported by a telephone message received by the Tribunal from Ellison on July 14, 1998 which states he wanted his name removed from the file and that he didn't want any money. As well, the delegate wrote to Ellison on January 13, 1999 stating that he had failed to respond to her numerous telephone messages and that if she did not hear from him within one week she would consider his complaint to be abandoned. There is no indication that Ellison ever replied to the delegate. For these reasons, and in the absence of any direct evidence from Ellison, I accept that he has been paid in full and the amount of \$6039.08 (which includes interest) should be deducted from the total owed by Bistro.

I am also satisfied that Tremblay is not owed compensation for length of service. I agree with Ciura that the fact that the delegate did not conclude Tremblay was owed outstanding vacation pay, like the other employees, supports the view that his employment ceased prior to the closure of the restaurant and that he was paid all his vacation pay. Given the absence of any direct evidence from Tremblay that he was dismissed from his employment, the absence of any documents to support a conclusion that he was dismissed, including a Complaint Form signed by Tremblay, as well as the delegate's decision not to find that he was owed vacation pay on total earnings, I prefer the employer's evidence that Tremblay quit his employment and accordingly the amount of \$525.14 (which includes interest) should be deducted from the total owed by Bistro.

I am further satisfied that the delegate's calculations regarding Rathnasamy and Lavigne should be varied. Given the documents provided by Ciura, the absence of any direct evidence from Rathnasamy and Lavigne, and the absence of any documents provided by the delegate, Rathnasamy or Lavigne, I conclude that the amount of \$456.46 (which is before interest) should be deducted from the vacation pay that the delegate determined was owed to Rathnasamy and the calculation for statutory holiday pay for Lavigne should be adjusted to reflect a rate of pay of \$7.00 per hour.

In summary, the delegate's calculations of November 4, 1998 and the Determination dated June 15, 1998 are to be varied as follows:

- Ellison – deduction of \$6,039.08 which includes interest/total claim is dismissed;
- Tremblay – deduction of \$525.14 which includes interest/total claim is dismissed;
- Rathnasamy – deduction of \$456.46 from \$885.74 before interest/remainder of claim is confirmed;
- Lavigne – deduction of \$24.05 from \$57.72 before interest to reflect correct calculation of 9.25 hours X \$3.50 per hour plus 4% vacation pay/remainder of claim is confirmed; and

The claims of the other 16 employees are confirmed.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, I order that calculations submitted by the delegate on November 4, 1998 and the Determination dated June 15, 1998 be varied in accordance with the above summary.

Norma Edelman
Registrar
Employment Standards Tribunal