



An appeal

- by -

Baggio's Ristorante Ltd.
(the “Employer”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Sheldon M. Seigel

FILE No.: 2006A/115

DATE OF DECISION: December 13, 2006

DECISION

SUBMISSIONS

Tony Bagg	on behalf of Baggio's Ristorante Ltd.
Joanne Donaghy	on her own behalf
Carrie H. Manarin	on behalf of the Director

OVERVIEW

1. This is an appeal brought by Tony Bagg pursuant to Section 112 of the *Employment Standards Act* ("Act") of a Determination that was issued on September 1, 2006 by the Director of Employment Standards (the "Director"). The Determination found that Baggio's Ristorante Ltd. had contravened sections 18, 40, 46, 58, and 63, of the *Act* in respect of the employment of Joanne Donaghy and Kent Pellarin, and ordered Tony Bagg to pay Joanne Donaghy and Kent Pellarin the amount of \$11,692.59. This amount included accrued interest payable under s.88 of the *Act*.
2. The Director also imposed administrative penalties on Baggio's Ristorante Ltd. under Section 29(1) of the *Employment Standard Regulation* (the "*Regulation*") in the amount of \$3,000.
3. The Appellant submitted that the Director erred in law by:
 - (a) Considering an application outside of the time limitation for a complaint to be made contrary to s.74 of the *Act*.
 - (b) failing to consider the reasons for his inability to provide employment records as requested.
 - (c) failing to recognize that an agreement was made with one of the complainants, which would prohibit a determination with respect to that complainant.
4. An oral hearing was requested. The Tribunal reviewed the appeal and the materials submitted with it, and decided an oral hearing was not necessary in order to decide this appeal.

ISSUES

5. The issues in this appeal are:
6. Did the Director err in law in making the Determination?
7. Specifically:
 - Was the complaint made after the time limitation specified in s.74 of the *Act*?
 - Was the Appellant's effort to produce records relevant to the Determination?
 - Was a settlement reached with one of the complainants, which would have prohibited a Determination with regard to that complainant?

ARGUMENT

8. The Appellant submitted that the time limitation specified in s. 74 of the *Act*, specifically that the claim must be made within six months from the alleged contravention, was not met. He indicated that the complainants were terminated on November 8, 2005, and he was not notified that a claim had been filed until June 14, 2006 (38 days late).
9. The Appellant submitted that the complainants were treated fairly- even generously- during their employment. He recognized that the Director had made requests for employment records but he was unable to provide those records because he was himself unable to obtain them from either the complainant, or her subsequent employer.
10. The Appellant submitted that he had actively negotiated settlement with both complainants and did in fact come to terms with Kent Pellarin. He argued that as a result of the agreement with Kent Pellarin, the Determination as it relates to that complainant should not have been made.

THE FACTS AND ANALYSIS

11. The Appellant agreed with the Complainants and the Director, that the date of the alleged contraventions, and the date of the termination of employment of both Complainants was November 8, 2005. The Director confirmed and supported with documentation, that both employees delivered complaint forms within the six- month time frame required by s. 74. The Complaint and Information forms, included with the delegate's submissions, bear date stamps indicating: Employment Standards Branch Received May 03 2006 Prince George (Joanne Donaghy), and Employment Standards Branch Received April 28 2006 Kelowna, BC (Kent Pellarin).
12. A review of s. 74 of the *Act* confirms that complaints must be delivered to an office of the Employment Standards Branch within six months after the date of contravention. The *Act* does not require notification of the complaint to the respondent within that time frame. I find the complaints were made within the time required under the *Act*, and the Appellant was not entitled to notification of the complaint within the time limitation for filing a complaint.
13. The Director stated in the Determination that the Employer advised that he would provide payroll records. He failed to do so. In the appeal, the Appellant postulates as to why those records were not available to him, and he provides additional reasons for his failure to provide payroll records, but he does not provide any new payroll documentation.
14. For the most part, the Appellant does not deny the Director's conclusions relating to the terms of employment or the dates and hours that the Complainant's worked. The Appellant does state that an advance of \$750 was made to Joanne Donaghy, which was not reflected in the Determination. The Director's delegate, in her submission, argues that the Appellant did not mention any advance during the investigation, though he was provided with ample opportunity to do so.
15. I find that the Appellant has provided no new information which should be considered in this appeal as it relates to employment records. I find insufficient evidence that the alleged \$750 advance was made. I find that the Appellant has not significantly challenged the Director's conclusions regarding wages, vacation or holiday pay, overtime or compensation for length of service with respect to either of the Complainants.

16. The Appellant claimed to have settled his claim with Kent Pellarin. He produced a copy of an agreement to pay. It appears to have been signed by both the Appellant and the Complainant.
17. The delegate's submissions chronicle her discussions with Kent Pellarin with respect to settlement talks between him and the Appellant. The delegate's submission is consistent with the form of agreement provided by the Appellant. She points out, however, that the investigation had already been completed on the date that the agreement indicates that it was signed, and that despite her invitation to do so, the complainant neither withdrew his claim nor confirmed receipt of any settlement funds from the Appellant prior to the issuance of the Determination.
18. The Appellant did not claim to have made payment to Kent Pellarin. He merely indicated that he had agreed to pay. The date of the agreement is August 28, 2006. The date of the Determination is September 1, 2006. I find that the agreement to pay was entered into after the investigation was concluded and no payment was made prior to the publication of the Determination. Without actual payment, an agreement to pay is not relevant to the calculation of payment due or the obligation to pay imposed by the Determination. Further, the agreement indicates that the Appellant was to pay Kent Pellerin by September 7th, 2006. There is no evidence or submission by the Appellant that the said payment was made. I find that this agreement has no effect on the validity of the Determination, nor requires any adjustment to the conclusions reached therein.
19. The Appellant sought a change, variation, or cancellation of the Determination. I find there is no evidence to support any such action.
20. The appeal fails.

ORDER

21. Pursuant to section 115 of the Act, I confirm the Determination.

Sheldon M. Seigel
Member
Employment Standards Tribunal