

An appeal

- by -

Ranchview Enterprises Ltd. Operating as Roma's Italian & Continental Cuisine  
(“Roma's”)

- 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

**ADJUDICATOR:** Carol L. Roberts

**FILE No.:** 2001/851

**DATE OF DECISION:** April 12, 2002

## DECISION

This decision is based on written submissions from Mike Rose on behalf of Ranchview Enterprises Ltd., Ken Copeland on behalf of the Director of Employment Standards, and Krista Whitford, on her own behalf.

### OVERVIEW

This is an appeal by Ranchview Enterprises Ltd. operating as Roma's Italian & Continental Cuisine ("Roma's"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards (the "Director") dated November 6, 2001. The Director's delegate found that Roma's owed Krista Whitford \$300.75 in unpaid wages, vacation pay and interest.

### ISSUE TO BE DECIDED

The issue on appeal is whether the Director correctly determined the amount of wages Ms. Whitford was entitled to.

### FACTS

Ms. Whitford worked as a server for Roma's from April 9, 2000 to November 28, 2000. She complained that she did not receive her final paycheque.

Ms. Whitford advised the delegate that her residence was broken into on September 26, 2000, and a paycheque in the amount of \$216 was stolen. She says that she immediately advised Mr. Rose about the theft, and asked him to put a stop payment on the cheque. She says that he told her that he would issue her a new cheque, but, despite being asked seven or eight times, he did not. Finally, Ms. Whitford took \$216 cash out of the till, and left a note for the accountant indicating she had done so.

The delegate found that the stolen cheque was cashed by an unknown third party on October 4, 2000. Ms. Whitford stated that she was interviewed by the RCMP after the break in, but that she was never contacted about the cashing of the cheque.

In the course of investigating the complaint, the delegate issued a Demand for Employer Records on July 30, 2001. On July 30, one copy of the Demand was personally served on Ranchview Enterprises Ltd.'s place of business, and a second was personally served on an employee at Roma's. The Demand required Roma's to deliver the records at the Employment Standards Branch on or before August 7, 2001. No documents were received.

The delegate noted that Mr. Rose was "not very forthcoming" about the payment of Ms. Whitford's final outstanding wages and vacation pay. Mr. Rose advised the delegate that the

third party cashing of the cheque was unusual, and that he was waiting for the RCMP to complete its investigation before he paid the outstanding amounts.

The delegate concluded that there was no dispute that Ms. Whitford had not been paid her final wages and vacation pay. He noted that Roma's did not admonish her for taking cash to replace the stolen cheque, and issued a Determination in Ms. Whitford's favor.

## ARGUMENT

In his notice of appeal, Mr. Rose did not dispute the obligation to pay Ms. Whitford: "we were always prepared to pay out Krista." However, he says Roma's should be able to deduct the money she unilaterally kept from money owed to Roma's. He disputed the delegate's conclusion that Roma's did not admonish her for keeping money, contending that she never asked for permission to do so.

Mr. Rose argues that Roma's only owes Ms. Whitford the difference of her final cheque less the money she kept, being \$75.59.

The delegate submits that the Determination should stand, as he is not clear on how Mr. Rose arrived at the sum he feels obligated to pay.

Ms. Whitford submits that, after repeated requests to Mr. Rose to issue a replacement cheque, she removed one half of the amount owing to her from the till, leaving a note to the accountant. She says Roma's did not dispute her taking the money. She says that she took the remainder of the money owed to her from the cash on her next shift on a later date, and again received no comment. She says she received her next pay period cheques without comment or deductions.

## ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Sections 18(2) and 21 of the *Act* provide as follows:

- 18 (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.
- 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

There is no dispute that Ms. Whitford did not receive her final paycheque. However, Mr. Rose contends that he should be entitled to deduct the amount taken by Ms. Whitford to replace an earlier stolen cheque from the outstanding wages. Ms. Whitford took the money apparently

following a promise by Mr. Rose that he would re-issue the cheque, a promise he did not keep. While he advised the delegate that he was waiting for the RCMP to conclude its investigation, that time has long passed.

Ms. Whitford was open and honest about the retention of money from the cash, and Roma's did not object to her actions. I find that this constitutes acquiescence to her taking. Roma's has no basis to withhold wages for any purpose, and must pay wages within 6 days of the end of the employment.

I am unable to conclude that the delegate erred in the Determination, and deny the appeal.

### **ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated November 6, 2001, together with whatever interest might have accrued since that date, be confirmed.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**