

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Natalie Enterprises Ltd.
("Natalie")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 96/218

DATE OF DECISION: July 3, 1996

DECISION

OVERVIEW

This is an appeal by Natalie Enterprise Ltd. operating Macs Milk (“Natalie”) under Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 001400. The Determination was issued by a delegate of the Director of Employment Standards on March 1, 1996.

The Director’s delegate determined, following his investigation, that Natalie owed Ghezai Kibret (“Kibret”) wages in the amount of \$2,306.05 representing regular pay, overtime, statutory holiday and vacation pay, and compensation for length of service. Natalie claims it only owes \$425.72 for statutory holiday pay and vacation pay.

I have completed my review of the information provided by Natalie and Kibret on this appeal, as well as the information provided to the Tribunal by the Director’s delegate, and have decided to vary the Determination.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is what wages are owed to Kibret by Natalie.

FACTS

Kibret filed a complaint with the Employment Standards Branch on July 7, 1995. He claimed that he had worked for Natalie as a clerk from April 16, 1994 to June 30, 1995. On July 1, 1995 he was to start a 2 week vacation. He went to work on July 2, 1995 to pick up his vacation pay. He stated he was fired at that time. Kibret further stated that his rate of pay was \$7.50 per hour and that he worked 8 hours per day from Sunday to Thursday. He claimed Natalie owed him wages and severance pay.

On February 20, 1996, the Director’s delegate sent a Demand for Employer Records letter to Natalie. On February 26, 1996, a one page document was received by the Employment Standards Branch from Natalie. The document is for Kibret and it is titled “Pay-Roll Details from April 16, 1994 to June 30, 1995”. The document reads that Kibret’s normal schedule was Tuesdays to Saturdays, from 11 a.m. to 7 p.m.

On March 1, 1996, the Director's delegate issued a Determination against Natalie. The Director's delegate makes the following statements on the Reason Schedule which is attached to the Determination:

I find the complainant is owed the wages (regular pay, overtime, statutory holidays and vacation pay) as set out in the attached Calculation Schedule. The calculations are based entirely on the employer's records.

I find the employer has failed to establish the complainant was dismissed with cause. The complainant denies having ever received any verbal reprimands or warnings of termination. I accept the complainant's evidence. The employer owes compensation pay as set out in the attached Calculation Schedule.

The Calculation Schedule indicates that Kibret is owed regular wages for the period April 16, 1994 to May 15, 1994; overtime for the period April 16 to July 15; pay for 10 statutory holidays between May 23, 1994 and July 1, 1995 inclusive; vacation pay for 1994 and 1995; and 2 weeks compensation for length of service.

In its reasons for the appeal, Natalie states the following:

Error made on employee records number of hours for periods April 16 to 30th, May 1-15 are incorrect. Kevin Blakely demanded the report in two working days.

- 1) *Overtime wages were hours worked prior to employee being entered on records as employee was on social assistance.*
- 2) *Re: Statutory holiday pay*
Employee only entitled to three statutory holidays as his shift was Tuesday - Friday. July 01, 1994, November 11, 1994, April 14, 1995.
- 3) *Compensation Pay*
Employee was warned several times for not putting on uniform. He also was responsible for several cash shortages.
- 4) *Overtime Wages*
Employee started working and did not wish to be on the records as he was on government assistance. The hours were then added to later periods i.e. April 1-16, 1994 and July 16-31, 1994.

Conclusion: Request Tribunal to rule that employee be allowed for vacation pay \$144.92 and three statutory holidays at $90 \times 3 = 270.00$ plus vacation pay at $10.80 = \$425.72$.

In a submission dated May 1, 1996, Kibret denies he was on social assistance, and he states he is owed pay for statutory holidays and he never received any verbal or written warnings from his employer.

In a submission dated May 17, 1996, Parvis Hosseinpour, on behalf of Natalie, writes that several warnings were given to Kibret including "...the one made by the Mac's Head Office as filed."; Kibret was terminated on June 30, 1995 and "...there is a six month time limit allowed in which to make a claim. The claim was made on February 26, 1995, almost two months after the deadline."; and Kibret indicated that he was on social assistance and did not wish to be on payroll.

ANALYSIS

The onus in this appeal rests with the appellant, Natalie.

Natalie claims it does not owe compensation to Kibret as he was warned for not putting on a uniform; he was responsible for cash shortages; and he filed his complaint out of time.

The *Act* states that an employee must file a complaint within 6 months after the last day of employment. Kibret's last day of work was on June 30, 1995. He claims he was dismissed from his employment on July 2, 1995. Kibret filed his complaint on July 7, 1995. Therefore, Kibret's complaint is not out of time.

An employer does not have to pay compensation to an employee if the employee's employment was terminated for just cause. The concept of just cause obliges an employer to warn employees, clearly and unequivocally, that their performance is unacceptable and that failure to meet the employer's standards will result in termination of employment. In this case, Kibret denies he received any warnings. Furthermore, Natalie has not provided any proof to substantiate its claim that Kibret was warned and was responsible for cash shortages. Accordingly, I do not accept that Natalie had just cause to terminate Kibret's employment. Kibret is, therefore, entitled to compensation in the amount shown on the Determination.

Natalie claims it does not owe Kibret any regular wages and overtime. Natalie states that its own payroll record for Kibret is incorrect. I do not accept this argument. The *Act* requires an employer to keep accurate payroll records for each employee. Natalie's own records formed the basis for the calculations made by the Director's delegate. Natalie has provided no objective evidence which would cause me to conclude that these calculations are in error.

Natalie claims it only owes Kibret pay for 3 statutory holidays - all of which fall on a Friday. In its appeal Natalie states that Kibret worked Tuesdays to Fridays. On the payroll record provided by Natalie it shows that Kibret worked Tuesdays to Saturdays. Kibret claims he worked from Sundays to Thursdays. The Director's delegate determined that Kibret was owed pay at one and one-half times his regular rate for 10 statutory holidays. This implies Kibret worked all 10 statutory holidays. Of the 10 statutory holidays in question, 5 fell on a Monday, 3 fell on a

Friday and 2 fell on a Sunday. I prefer Kibret's evidence that he worked Sundays to Thursdays, principally because Natalie's evidence concerning Kibret's shift schedule is inconsistent. Therefore, Kibret worked 7 of the statutory holidays and should be paid one and one-half time his regular wage. He is also owed wages for the 3 statutory holidays he did not work. The *Act* states that if a statutory holiday falls on a non-working day then the employee is entitled to another day off with pay. Therefore, Kibret is owed a regular days pay for 3 of the statutory holidays. I find that the calculation of the Director's delegate needs to be changed as follows:

$$7 \text{ days} \times \$90 \text{ per day} + 3 \text{ days} \times \$60 \text{ per day} + 4\% \text{ vacation pay} = \$842.40.$$

Finally, Natalie acknowledges that it owes Kibret vacation pay in the amount calculated by the Director's delegate.

In summary, I conclude that Natalie owes Kibret the amounts listed on the Determination for regular wages, overtime, vacation pay and compensation for length of service, and that the amount owed for statutory holidays should be changed to \$842.40.

ORDER

I order, under Section 115 of the *Act*, that Determination No. CDET 001400 be varied as indicated above.

Norma Edelman
Registrar
Employment Standards Tribunal

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