

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 -

Periklis Enterprises Ltd operating Periklis Restaurant

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1999/93

DATE OF HEARING: April 16, 1999

DATE OF DECISION: April 27, 1999

DECISION**APPEARANCES**

Paul Vasilakopoulos On behalf of Periklis Enterprises Ltd.

Dale W. Orr On his own behalf

Gerry Omstead Delegate of the Director

OVERVIEW

This is an appeal by Periklis Enterprises Ltd ("Periklis") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. 051822) dated February 05, 1999 by the Director of Employment Standards (the "Director").

Paul Vasilakopoulos ("Vasilakopoulos") is the President of Periklis which employed Dale W. Orr ("Orr") as a waiter for approximately one and one half years until October 1998 when Orr's employment came to an end. Orr claimed for compensation for length of service and for wages owing and not paid in accordance with the requirement for employers to pay a minimum of 4 hours. The Director found that Orr was terminated without notice and had not been paid the minimum 4 hours per shift. The Director found that Orr was entitled to \$343.62 plus interest.

Periklis appealed on the grounds that Orr terminated his own employment and that any hours less than 4 was at Orr's request and with the understanding that he would not ask for payment for leaving work early.

ISSUES TO BE DECIDED

The issues to be decided in this case are:

1. whether Orr was dismissed or whether he terminated his own employment.
2. whether Orr is entitled to the minimum 4 hours pay under the circumstances where he himself requested to leave work early and agreed to do so without pay.

PRELIMINARY MATTER

I addressed at the outset with the parties the similarity in names between the employee and this adjudicator. Dale Orr, the employee, testified under oath that he was not related to me and that we had not met on any prior occasion. The Parties agreed that the hearing of this appeal could proceed and that there was no actual or perceived conflict of interest arising from the similarity of names.

FACTS

Periklis Enterprises Ltd operates a Greek restaurant in Victoria called "Periklis". Dale Orr was a waiter in the restaurant for about 1.5 years prior to the termination of his employment in October, 1998.

The restaurant would usually be busy over the supper hour but then often would be nearly empty after for about 3 to 3.5 hours. The waiters were paid minimum wages and relied on tips as their major source of income. Often Orr would work 2.5 to 3.5 hours and then ask if he could go home. If there were no customers there would be no tips and further work would not be very lucrative. He always agreed that he would not be paid for the times when he went home early. Mr Vasilakopoulos managed the restaurant and would usually agree to Orr's request to go home early but it was always on the basis that Orr would not be paid for that time. If Orr stayed to the end of his 4 hour shift there would always be some work to do such as clean-up. Orr agreed that he did not like the clean-up work and preferred to go home early.

A number of other staff were called as witnesses who confirmed that it was the normal practice for waiters to wish to leave early if there was no further likelihood of tips. None of these staff have ever claimed wages for the times that they voluntarily left their shift early. However, it was always within the control of the employer whether staff would be allowed to leave early.

There were no circumstances under which work was suspended for reasons beyond the employer's control. If Mr Vasilakopoulos had requested or directed the employee to remain for the full shift he would have done so.

The facts around the termination of employment are more difficult to ascertain. This is in part due to some communication difficulties between the parties.

In the Fall of 1998 Orr was working Sundays and Mondays. On Saturday October 11, 1998 Orr telephoned Vasilakopoulos and said that he had hurt his leg and could not work on Sunday. Vasilakopoulos said that he was upset by the short notice but would try to get somebody in to work Orr's shift. He asked Orr if he would be able to do his Monday shift and Orr said that he would try.

On the Sunday October 12, 1998 Orr attended the restaurant and told the acting manager (Vasilakopoulos was in Vancouver) that he would not be able to work on the Monday and he confirmed that the shift was covered.

On the following Saturday Orr again called Vasilakopoulos and said that he would not be able to work on the Sunday. Vasilakopoulos was quite upset again about the short notice. He says that he told Orr that he required a doctor's certificate or Orr would be fired. Orr says that he was told to come in and pick-up his cheque. He says he asked what Vasilakopoulos meant and he was told "I don't need you any more". Vasilakopoulos says that it was Orr who asked for his cheque and separation slip. I will deal with these differences in the evidence in the next part of this decision.

ANALYSIS

The Termination Issue:

The issue here is whether Orr terminated his own employment or whether it was terminated by his employer. The employer's position is that Orr quit his employment when he was asked to produce a doctor's certificate to justify his failure to report for work. The employer claims that Orr insisted on being given his separation slip and final pay cheque. Orr says that it was the employer who told him he was not needed any longer and to come in and pick-up his cheque.

Where the evidence conflicts the Adjudicator must make a decision based on an assessment of the more likely version of events. In this task I am guided by the British Columbia Court of Appeal decision Faryna v.Chorny (1952) 2 D.L.R. 354 at 357 where they say as follows:

"the credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of it's consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and those conditions."

In this case Mr Vasilakopoulos admits he was upset and angry when Orr gave short notice for the second week in a row that he was not reporting to work as scheduled. During his evidence Mr Vasilakopoulos indicated at one point that he told Orr that if he produced a doctor's note he could have his job back. This would seem to indicate that Orr had already lost his job and is not consistent with Orr having quit.

Although Orr had commenced part time work elsewhere and certainly made things difficult for the employer by giving such short notice I conclude that he never intended to quit his position at Periklis. There was no clear and unequivocal evidence that the employee had resigned and intended to resign and therefore I can not find that he did resign. The only other alternative is that his employment was terminated by the employer.

The onus on an appeal to the Tribunal is on the appellant and he must satisfy the Tribunal that the determination is in error and I cannot be satisfied in this case that the employee resigned.

I find on the totality of the evidence and applying the tests as set-out above that in fact Orr's employment was terminated by the employer and that he is entitled to compensation for length of service.

The Four Hour Minimum:

On the facts set out above and all of the evidence heard, I find that it was completely the choice of the employee to cut short his 4 hour shifts on all of the many occasions he worked less than 4 hours. The employer agreed solely at the request of the employee and for the sole benefit of the employee. There was no benefit to the employer as the employer had work that could have been performed by the employee for the balance of the shift.

The employee stipulated, undertook and agreed that he would not be paid for the times when he left work early. It was solely on this understanding that the employer consented to the employee leaving early. In all respects it was a clear and unequivocal understanding, agreement, word of honour, and waiver of all rights by the employee to be paid for that time. There is no moral or ethical basis upon which he should now be paid for all of those hours he did not work completely of his own free will and choosing and the good graces of his employer.

However, it is incumbent upon this Tribunal to apply the law as it is found in the *Act*, the relevant parts of which are as follows:

Minimum daily hours

- 34** (1) *If an employee reports for work on any day as required by an employer, the employer **must** pay the employee for*
- (a) *at least the minimum hours for which the employee is entitled to be paid under this section, or*
 - (b) *if longer, the entire period the employee is required to be at the workplace.*
- (2) *An employee is entitled to be paid for a minimum of*
- (a) *4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions*

In this case the employee started work. The work was not suspended for a reason completely beyond the employer's control. In other words, the employer did not have to allow the employee to go home early. The employer could have insisted that the employee work the full 4 hour shift. As the employee reported to work on the days in question as required by the employer Section 34 says that the employer **MUST PAY** the minimum entitlement being 4 hours regular wage whether or not the employee actually works for 4 hours. That is the law as set out in the *Act*.

But what of the employee's word of honour, stipulation, agreement, and waiver of any claim for such wages ? What of the unjust enrichment of now being paid for work never done ? All for naught, unfortunately. Section 4 of the *Act* provides as follows:

Requirements of this Act cannot be waived

- 4 *The requirements of this Act or the regulations are the minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69 (provisions relating to collective agreements).*

The stated purposes of the *Act* indicate, amongst others, principles that seem to conflict in this type of case.

Purposes of this Act

2. *The purposes of this Act are as follows:*
- (a) *to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*
 - (b) *to promote the fair treatment of employees and employers;*
 - (c) *to encourage open communication between employers and employees;*

The minimum 4 hour wage would appear, in most cases, to be one of those basic standards of compensation contemplated by section 2(a). Nevertheless, it may be questionable that this is true in cases where the employee's main source of income comes from gratuities earned as opposed to the basic wage itself. When such an employee and his employer engage in "open communication" and the employee decides that it is not in his economic interest to complete a four hour shift the strict enforcement of the 4 hour minimum does not tend to "promote the fair treatment of the employer" and can result in a later windfall to the employee. I must assume, however, that the Provincial Government considered these matters and took them into consideration in enacting the legislation.

This Tribunal is created by the statute and its mandate is to interpret and apply the legislation as it is enacted. The sections set out above leave no ambiguity about the requirement for the employer to pay the 4 hour minimum in the circumstances of this case despite the employee's unequivocal agreement to the contrary.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal