

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 -

Ingrid Augustin
("Augustin")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE NO.: 1999/156

DATE OF HEARING: May 18, 1999

DATE OF DECISION: June 7, 1999

DECISION

APPEARANCES

Ingrid Augustin	for herself
Roman Augustin	for Augustin
Goldie Stock	for Augustin

The employer did not attend.

The delegate of the Director did not attend.

OVERVIEW

This is an appeal by Ingrid Augustin (“Augustin”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated March 5, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Augustin complained Shortee’s Canadjun Rastaurant Ltd (Shortee’s) did not return money that had been deducted from her pay, had not paid the proper amount for vacation pay and did not pay severance for a layoff without proper notice.

The delegate of the Director found Shortee’s owed money to Augustin for wages, vacation pay and compensation for termination. He issued a Determination ordering Shortee’s to pay \$174.92. The delegate of the Director later recalculated the amount owing and issued a revised calculation on April 15, 1999 showing the amount owed to be \$335.54 including interest to April 06th.

Augustin appealed the Determination claiming the delegate had failed to calculate the correct amount owed.

Shortee’s did not appeal the Determination.

ISSUE TO BE DECIDED

What compensation is Augustin entitled to receive?

FACTS

Shortee's employed Augustin from April 14, 1998 to July 23, 1998. She was first hired to paint a mural on the fence and later as a server. The two jobs overlapped during the course of the painting. If someone did not report for work Augustin would leave the painting and fill in for the absent server. When the painting project ended she began working regularly as a server.

Augustin was paid separately for the work on the fence. She receive two cheques, one on May 29,1998 for \$200.00 and the final cheque, issued July 03, 1998, for \$100.00. Shortee's claimed Augustin was a contractor while painting the fence and that time did not count as time to qualify for severance pay. The delegate found Augustin was an employee during this time and was entitled to compensation in lieu of notice.

Augustin received her first pay as a server on June 3, 1998. She was paid \$300.00 with \$100.00 deducted without explanation. This continued for the next three pay periods with varying amounts being deducted ranging from \$100.00 to \$102.75. On the pay period of June 18, 1998 there was an adjustment of \$41.35 returned from the \$100.00 previously deducted. All of this was done without any explanation or pay slips being issued. The only statement of earnings Augustin received was issued for the pay period June 29 to July 12, 1998.

A warning letter was given to Augustin on July 20, 1998. She worked 2 hours on July 21 and left due to illness. When she reported for work on July 23rd, her next scheduled day, she was terminated. We have no evidence of the cause of termination.

During this period the management of the business changed. One of the partners purchased the other's share and began to actively operate the business. There is a lack of proper records for the period in dispute and it was difficult to piece together the facts.

Specifically, there is a difficulty in establishing what Augustin earned. The ROE indicates Augustin earned \$1508.46 during her employment. This does not include the amount paid for painting the fence. The statement of remuneration issued by Revenue Canada indicates total earnings of \$1290.90. The pay cheques issued total \$1844.21 and the delegate for the Director say the earnings should have been \$1942.74 including vacation pay and the amount paid for the painting. The time sheets, which were eventually produced, indicate Augustin worked 234.5 hours including working one statutory holiday. At \$7.50 per hour that would produce earnings of \$1758.75 not including the premium for working the holiday and vacation pay. This is not including her earnings for painting the fence.

ANALYSIS

With all the confusion around the amount Augustin earned I believe the most accurate record to be the time sheets. The supervisor signed these and although they are difficult to decipher they do offer a fair indication of the time worked.

The delegate recreated the payroll in his revised Determination of April 15, 1999 and this differs from the time sheets therefore I believe we must use the time sheets as the basis for calculating the amount earned by Augustin.

For the pay periods from June 03, 1998 and ending July 22, 1998.

Total hours worked 234.5 X \$7.50 per hour	1758.75	
Premium for Statutory holiday	<u>22.50</u>	
Sub-total	1781.25	
Payment for painting fence	<u>300.00</u>	
Total earned	2081.25	2081.25
Cheques issued by Shortee's, including payment for fence and partial vacation pay.		<1844.21>
Amount forwarded to Federal Government		
E.I.	34.85	
Income tax	16.80	
CPP	<u>24.07</u>	
Total	75.72	<u><75.72></u>
Wages owed		161.32
Vacation pay on wages including payment for fence		
2081.25 X 4%	83.25	
less vacation pay received	<u><39.20></u>	
Vacation pay	44.05	<u>44.05</u>
Wages and vacation pay owed		205.37

Notes: On May 29 Augustin worked 6.5 hours however the time sheet was difficult to read whether she had worked 6.5 or 5.5 hours. This shift was carried over till the next pay period and appears on June 04 with 6.5 shown and no shift hours indicated. The delegate credited Augustin with 5.5 hours for May 31 and 6.5 hours for June 04. This is the same shift and is a duplication. I have reduced Augustin's hours by 5.5.

In the report of the delegate the total earnings including vacation pay are shown as \$1942.74. This amount did not include the \$300 Augustin received for painting the fence. He does include that amount in the wages paid by the employer. The delegate has reduced the total earnings by \$300.00. I have included that amount in the revised total earnings of \$2081.25.

In the reconstruction of the payroll by the delegate for the week of June 28 to July 4, 1998 he shows the weekly total to be \$255.52. The correct amount is \$210.00.

Payment in lieu of notice.

This amount is different than the delegate's report as a result of the above changes. I did not include the earnings of the week she was terminated as they were not normal hours. I find her total earnings in the 8 week period to be \$1612.50 divided by 8 equals \$201.56

Vacation pay on above		<u>8.06</u>
	Sub-total	209.62
	Total amount owed Augustin	414.99

This amount is ordered to be paid to Augustin.

ORDER

Pursuant to s. 115 of the *Act*, I order the Determination dated March 5, 1998 is amended as above. The matter is referred back to the Branch for the calculation of interest as per s. 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal