

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 -

323573 BC Ltd. Operating as Saltair Neighbourhood Pub
("Saltair Pub")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Niki Buchan

FILE NO.: 97/29

DATE OF HEARING: April 28, 1997

DATE OF DECISION: May 12, 1997

DECISION

APPEARANCES

Vernon John Byers
Shelia Ferguson
Elizabeth Lyle

For Saltair Pub
For Herself
For the Director

OVERVIEW

This is an appeal brought by 323573 BC Ltd. operating as Saltair Neighbourhood Pub (“Saltair Pub”), pursuant to Section 112 of the Employment Standards Act (the “Act”), against a Determination dated December 31, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). In this appeal Saltair Pub claims that no wages are owed to Shelia Ferguson (“Ferguson”).

Vernon Byers (“Byers”) of Saltair Pub argues that Ferguson misunderstood his job offer. He says that the facts are untrue in that this employee and any other employee interviewed for the position was offered a position at a wage of \$9.50 per hour and were informed that bar tips were split with the kitchen which would increase their incomes.

Ferguson alleges that she was offered a position as head cook with a wage rate of between \$14.00 and \$15.00 per hour plus a share of tips.

ISSUE TO BE DECIDED

Whether Byers offered Ferguson a position with a wage rate of \$14.00 or \$15.00 per hour?

FACTS

- Ferguson was offered a position as head cook at the Saltair Pub. She resigned her job with White Spot in Duncan where she had been receiving a rate of \$10.50 per hour.
- During the investigation the former employer confirmed that she told him she was leaving to take a job at a higher rate of pay.
- She started work on January 10, 1996 believing she was to receive wages of \$14.00 or \$15.00 per hour plus a share of tips.
- When she received her first pay cheque she was paid at a rate of \$9.50 per hour.
- She requested Byers to make up the difference between that rate and what she had been promised when hired. Byers claims she misunderstood the offer and refused to change the wage rate.
- Ferguson quit the job. Her last day of work was February 3, 1996.

- She was unable to return to her position at White Spot in Duncan because her position had been filled. Unable to find another position in the area she took an entry level position at \$10.50 with White Spot in the Vancouver area.
- She suffered expenses for moving costs and wage loss. Byers made no comment or argument with respect to the Determination that Ferguson is entitled to compensation for wage loss and expenses.
- There is uncontested evidence that another employee began work on February 1, 1996 at Saltair Pub to share the head cook position with Ferguson. He believed he was to receive wages of \$13.00 per hour plus tips. After learning of the Ferguson situation, he challenged Byers who said that he had misunderstood the offer and was to be paid \$9.50 per hour plus tips which would average \$13.00 per hour. This employee quit his job on February 3, 1996.

ANALYSIS

In support of his argument that Ferguson misunderstood his offer of a head cook position at a wage rate of \$9.50 per hour plus tips he provided the following information:

1. A copy of the Income Tax directions noting that employees must declare income such as tips not reported on T-4 slips. This he offered to prove that tips are included in income. This information has no relevance to the issue. Byers admitted that he does not add tips as employment income when he produces T-4 slips.
2. An undated letter to another employee offering a kitchen position stating “Your starting wage will be \$9.00 per hour with tips you should average approximately \$12 to \$13 per hour as we split our food table tips 50/50 with the kitchen.” This employee was to begin work March 1, 1996. Byers could not give a date when the letter was sent. He interviewed over a two week period. He says that this employee is the only one to request a written letter. This letter does not indicate that this was a head cook position and Byers did not suggest that it was. This letter does not persuade me that the same offer was made to Ferguson. Even the wage rate is less than what Byers said he offered to her.
3. An undated letter from five employees who all have been employed for at least three years stating they were never misled about hourly wages. They say it was explained right at the beginning what their wages would be and that they were aware that tips plus wages are your total remuneration. This information is not helpful in that none of these employees statements prove what job offer was made to Ferguson.

On a balance of probability, I agree with the reasons given in the Determination that it would not be logical for Ferguson to take a position which would pay \$1.00 less per hour than she was receiving at her previous job. Byers made no comment or argument over the amount awarded as compensation for wage loss and expenses. This employer has not met the requirement to show that the Determination should be cancelled or varied.

ORDER

In summary, I order under Section 115, of the *Act*, the Determination dated December 31, 1996 be confirmed.

Niki Buchan
Adjudicator
Employment Standards Tribunal