

**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-

Caralis Investments Inc. operating as  
Il Forno Della Roccia Bianca

(“Caralis” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE NO.:** 98/135

**DATE OF DECISION:** June 3, 1998

## DECISION

### OVERVIEW

This is an appeal filed by Laura Delmaestro on behalf of Caralis Investments Inc. operating as Il Forno Della Roccia Bianca (“Caralis” or the “employer) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on February 11th, 1998 under file number 84-770 (the “Determination”).

The Director determined that Caralis owed its former employee, Richard Tompkins (“Tompkins”), the sum of \$859.78 on account of unpaid wages and interest.

### FACTS

According to the uncontested information set out in the Determination, Tompkins was employed as a host and pizza cook at the employer’s restaurant from May 5th, 1997 until his employment was terminated on or about June 28th, 1997. The employer’s restaurant has now gone out of business.

### ISSUE TO BE DECIDED

The Director’s delegate determined that the employer paid Tompkins a total of \$2,580 on account of wages actually owed of some \$3,400, whereas the employer maintains that Tompkins, in fact, received \$4,742 in wages and, thus, the Determination should be cancelled as Tompkins was paid all of the wages to which he was entitled.

### ANALYSIS

The employer has produced payroll records, which were apparently not made available to the Director’s delegate (although there is a dispute about this point), which suggest that Tompkins was paid substantially more than the \$2,580 which was credited to him in the Determination. These payroll records, if accurate, corroborate the employer’s position that Tompkins does not have a valid claim for unpaid wages. I note that neither Tompkins nor the Director’s delegate has challenged the accuracy of the employer’s documents or calculations.

The Director’s delegate, in a written submission to the Tribunal dated March 6th, 1998, maintains that the employer simply failed to produce, during the course of her investigation, any of the information that is now before me. The delegate further submits that since the employer “failed to participate in the investigation...her appeal [should] be dismissed”. The employer, on the other hand, adamantly denies that she failed to produce the relevant records and maintains that the records *were* produced as demanded.

On the basis of the parties' written submissions (and in the absence of any *viva voce* evidence tested through the crucible of cross-examination), I am simply unable to determine which of the two positions before me is accurate. Indeed, it is possible that *both* positions are accurate. In other words, the employer may well have attempted to transmit the relevant records, as she maintains she did, by fax, but for some reason the transmission was not received by the delegate.

For his part, Tompkins has not filed *any* response to the employer's submission although requested to do so in a letter from the Tribunal dated March 5th, 1998. As noted above, the Director's delegate, in her submission to the Tribunal dated March 6th, 1998, simply asks that the employer's appeal be dismissed because the employer failed to produce any payroll records to her and otherwise "failed to participate in the investigation".

As noted in the Determination, a "Demand for Employer Records" was issued on October 21st, 1997 and delivered to the employer by certified mail. A postal receipt indicates that the Demand was received on October 28th, 1997. The employer, for her part, does not deny having been served with the Demand--she admits she received the Demand. The Director's delegate maintains that the employer refused to produce any payroll records whereas the employer maintains that the relevant payroll records were sent, by fax, to the delegate a few days before the November 4th, 1997 deadline. Either way, however, there *is* evidence in the material before me of dilatory conduct on the part of the employer.

Given the dispute regarding the employer's efforts to comply with the Demand for Records, and the lack of a substantive, or indeed any, challenge to the veracity of the employer's records that are now before me, I am of the opinion that it would not be appropriate to simply dismiss this appeal out of hand. Nor, however, am I of the opinion that I should simply accept the veracity of the employer's records and cancel the Determination. If, in fact, the employer did not comply with the Demand, the Director is free to issue a monetary penalty against the employer. However, I do not think that the employer's alleged failure to produce records should, in the circumstances of this case, influence my decision with respect to Tompkins' wage entitlement, if any. A Determination should reflect, as far as possible, the wages to which Tompkins is entitled--no more and no less.

## **ORDER**

Pursuant to section 115 of the *Act*, and in light of the payroll records that have now been produced to the Tribunal, I order that Tompkins' original complaint be referred back to the Director for further investigation.

In referring the matter back for further investigation, I would not wish my order to be taken as an implied criticism of the Director's delegate who proceeded as best she could with the limited information that was available to her and in the face of a recalcitrant employer.

**Kenneth Wm. Thornicroft  
Adjudicator  
Employment Standards Tribunal**