

An appeal

- by -

Moustache Café – 5th Avenue (1996) Ltd. (Appeal by Receiver)
("Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: W. Grant Sheard

FILE No.: 2002/064

DATE OF DECISION: May 24, 2002

DECISION

APPEARANCES:

John Bottom, Receiver	on behalf of the Appellant Employer
M. Elaine Bellamore	on behalf of the Director
No one appearing	on behalf of the Employees

OVERVIEW

This is an appeal based on written submissions by the Receiver for Moustache Café - 5th Avenue (1996) Ltd. (the “Appellant”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination issued by the Director of Employment Standards (the “Director”) on January 24, 2002 wherein the Delegate ruled that the Appellant had contravened Sections 17, 18, 58, and 63 of the *Act* by failing to pay wages, vacation pay, and compensation for length of service after terminating various Employees. The delegate ordered the Employer to pay \$17,002.95 to the various Employees for wages, compensation for length of service and interest. In a separate Determination another delegate of the Director decided not to impose a penalty for the contraventions of the *Act*.

ISSUE

1. Was the Director’s delegate correct in finding that the Appellant variously owed wages, vacation pay and compensation for length of service for each Employee?
2. Were the calculations of the Director’s delegate correct?

ARGUMENT

The Appellant’s Position

In an appeal form dated February 12, 2002 and filed with the Tribunal on February 14, 2002 by the Receiver for the Appellant along with a letter dated February 13, 2002 with a schedule of calculations and various documents in support, the Appellant acknowledges the Determination and figures calculated by the Delegate in many respects. However, in respect of one Employee the Appellant asserts that a cheque which was paid to her and returned for non-sufficient funds (“NSF”) was not for wages and that amount should not have been included in the calculations. In respect of another Employee the Appellant asserts that she was paid cash for wages due to her such that nothing further is due to her. In respect of another Employee the Appellant takes the position that she was paid in full. In respect of one further Employee the Appellant takes the position that he worked for less than three months and therefore was not entitled to severance pay. Aside from those individual issues of entitlement the Appellant otherwise simply takes issue with some of the calculations of the delegate.

The Director's Position

In a written submission dated March 12, 2002 and filed with the Tribunal on the same date the delegate notes that her calculations were based on information received from the Appellant's Receiver and expresses surprise that the amounts are now said to be inaccurate. Further, while the delegate expresses frustration in further evidence being provided at the appeal which was not provided during the investigation, the delegate is not objecting to a review of that evidence to determine the issues of entitlement and the accuracy of her calculations.

In respect of the Employees, Emily Corse, Gurpreet Parhar and Surinder Parmar the delegate asks for further information on how the Appellant calculated their wages and severance pay. In respect of the Employee Sera Ferguson and the assertion that she was paid cash by the Employer, the delegate requests copies of the cheque, front and back, to substantiate this assertion. In respect of the Employee Luke Fletcher, the Director accepts that he was owed slightly more than was found by her in her Determination as the Receiver asserts on behalf of the Appellant. In respect of Geoff Pinch, the Director accepts that, based on further information provided, his employment was under three months and he is not entitled to compensation for length of service after all. In respect of the Employee Heidi Taylor, the delegate requests further information to support the Receiver's assertion on behalf of the Appellant that a cheque for \$464.00 which was returned to her NSF was for something other than wages.

In a further written submission dated April 10, 2002 the delegate provides a revised calculation sheet based on further information she had received from the Appellant. The Director provides further calculations and submissions with respect to each Employee. In respect of Emily Corse, the Director accepts the figures asserted by the Appellant on the appeal. In respect of Sera Ferguson, the Director says that the Appellant has failed to provide any proof that Ms. Ferguson was, in fact, paid cash by the Employer and therefore maintains the figures in the Determination for her. In respect of Luke Fletcher, the Appellant's calculation on the appeal is accepted. In respect of Gurpreet Parhar, the delegate notes that Ms. Parhar still maintains that she was owed wages for the period April 16 to 24, 2001 and the delegate has received no records which contradict this such that the Director maintains the calculations in the Determination with respect to her. In respect of Geoff Pinch, the Director notes that Mr. Pinch has since acknowledged he was employed less than three months and therefore agrees that no compensation for length of service is owed to him. In respect of Heidi Taylor, the Director notes that Ms. Taylor has maintained that, to her recollection, the \$464.00 cheque which was returned NSF was originally for wages. The Director says that the Appellant has not shown any written evidence to contradict this assertion and therefore maintains the calculations in the Determination in respect of her. Lastly, in respect of the Employee Katerina Thompson, the Director wished to add her surname, Thompson, to the Determination (which was unknown at the time of the Determination).

THE FACTS

Moustache Café - 5th Avenue (1996) Ltd. ("the Appellant") is a restaurant which ceased operating on April 24, 2001 and, on May 17, 2001 a Receiver, Bottom & Associates ("Bottom") was assigned. Bottom has advised the delegate that it is not expected that the Appellant will file for bankruptcy.

During the course of her investigation the delegate received a variety of documents and verbal evidence from the Employees and the Appellant. In the case of the Appellant, the verbal evidence appears to have been hearsay evidence which the Receiver, Bottom, received from the Employer and relayed to the delegate. In a determination dated January 24, 2002 the delegate found that most of the Employees were

owed various amounts for either wages, vacation pay, compensation for length of service and interest, the details of which were set out in a calculation sheet appended as “Attachment 1” to the Determination.

ANALYSIS

After all of the submissions are considered, the only Employees for which there is any dispute regarding entitlement or the calculations of their entitlement are Sera Ferguson, Gurpreet Parhar, Surinder Parmar, Geoff Pinch, and Heidi Taylor. It is well settled that on appeal the onus is on the Appellant to demonstrate an error in the Determination in the facts found or law applied.

In respect of the Employee Sarah Brown, the parties are agreed that she is owed wages in the amount of \$371.48 (plus interest of \$16.42) for a total due of \$387.90. In the case of Vince Chapman, the parties agree that wages are owed of \$802.25 (plus interest of \$35.45) for a total due of \$837.70. With respect to Anju Chawla, the parties agree that there are wages due of \$3,059.99 (plus interest of \$135.23) for a total due of \$3,195.22. Regarding David Collins, the parties are agreed that he is owed \$328.02 for wages (plus \$15.86 interest) for a total due of \$343.88. In respect of Emily Corse, the parties are agreed that there are wages due of \$2,795.00 plus compensation for length of service (“CLOS”) of \$537.50 for a total of \$3,332.50 (plus interest of \$146.90) for a grand total due of \$3,479.40. Regarding Luke Fletcher, the parties are agreed that he is owed \$1,069.02 (plus interest of \$47.12) for a total due of \$1,116.14. Lastly, in respect of the Employee, Katerina Thompson, the parties are agreed that she is owed wages of \$150.17 (plus interest of \$6.64) for a total due of \$156.81. Wherever these figures differ from those stated for the respective Employees in the Determination I find that the delegate erred in her Determination and that the correct figures are as above.

Regarding the Employee Sera Ferguson, the delegate found that she was owed \$55.33 for wages plus \$2.45 for interest for a total due \$57.78. The Appellant alleges that she was paid cash for this amount due. As there is no further evidence offered on this appeal to substantiate that payment, I cannot find that the Appellant has established, on a balance of probabilities that, the delegate erred in preferring the evidence of the Employee in this regard.

Regarding the Employee Gurpreet Parhar, the delegate found that she was owed \$511.86 for wages, \$592.80 for vacation pay and CLOS and \$48.82 in interest for a total due of \$1,153.48. The Appellant says and it is recorded in this Employee’s Record of Employment that she was paid \$269.80 for “Severance”, but the Employee denied this in her statement to the delegate. However, she acknowledged to the delegate that she was paid for the week of April 1 to 15 which formed part of the wage award the delegate had made for her in the Determination. The Appellant says that it should receive credit for the payment in the Appellant’s Record of Employment for this Employee. In the revised calculation sheet submitted with the Director’s second submission on this appeal, the Director appears to agree with this to the extent that she calculates that the Employee is owed \$242.86 for wages, \$522.39 for CLOS plus \$33.70 in interest for a total due of \$798.15. Regarding the Appellants assertion that the Employee was paid \$269.80 for “Severance”, the Director says that the Appellant has not produced any further evidence to corroborate this assertion. In view of the Employee’s acknowledgement of receiving one week of pay which was included in the Determination but denying that she received any “Severance” I find that the Determination should be varied to the extent that she received this partial payment for wages but the appeal is denied to the extent that there should be any deduction for the payment of CLOS as the Appellant has failed to meet the onus on it to show, on a balance of probabilities, that the delegate erred in preferring the Employee’s evidence with respect to the payment of CLOS. I find Ms. Parhr is owed \$242.86 for wages, \$522.39 for CLOS, and \$33.70 interest for a total due to her of \$798.15.

Regarding Surinder Parmar, the delegate ruled that the Employee was owed \$1,036.49 for wages plus \$948.48 for vacation pay and CLOS plus \$87.72 for interest for a total due of \$2,072.69. In the calculation submitted with its appeal, the Appellant says that Parmar was owed only \$272.69 for wages and \$763.80 for CLOS for a total due of \$1,036.49. The Appellant says that this Employee's claim "included severance unpaid and should not be included twice". In the Director's submission of March 12, 2002, the director says "the information previously supplied by Bottom did not separate out "severance pay" from unpaid wages for Parhar and Parmar. How was the amount of "severance pay" calculated for each of these Employees? What does Bottom say is the total of unpaid wages for each of them?" In the calculation sheet submitted by the Director with its second submission of April 10, 2002 the Director says that Parmar should receive \$1,036.49 for wages plus \$50.21 interest for a total due of \$1,086.70, apparently accepting the explanation provided and figures set out in the Appellant's Record of Employment for this Employee. Accordingly, I find that the delegate erred in the calculations made for this Employee in the Determination and accept the revised figure for this Employee as set out in the revised calculation sheet with the director's submission of April 10, 2002.

Regarding the Employee, Geoff Pinch, the delegate found that he was owed \$1,677.00 for wages, \$1,007.99 for vacation pay and CLOS plus \$118.65 for interest for a total due of \$2,803.64. The Appellant says that he was employed less than three months and so is not entitled to CLOS. The delegate made a further enquiry with the Employee and confirmed the accuracy of this information. Accordingly, the Director says that, as the Employee accepts the Appellant's figures (as does the Director), Pinch is owed \$559.00 for wages plus \$24.64 interest for a total due of \$583.64. Accordingly, I find that the Delegate erred in her Determination ruling that Pinch was entitled to CLOS and in her calculation that he was owed \$2,803.64 and that, rather he is owed \$583.64.

Regarding the Employee, Heidi Taylor, the Delegate ruled that she was owed \$805.19 for wages, \$189.70 for vacation pay and CLOS plus \$43.97 interest for a total due of \$1,038.86. The Appellant says that a cheque earlier given to the Employee for \$464.00 which was returned NSF was "non-payroll" and should not be included. The Appellant says that the Employee is only entitled to \$545.38 wages and \$154.83 severance for a total due of \$700.21. The Director says that the Employee still maintains that the NSF cheque was for wages and the Appellant has not provided any further evidence to demonstrate an error in this regard. I find that the Appellant has failed to demonstrate, on a balance of probabilities, that the delegate erred in her findings and preferring the evidence of the Employee in this regard.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated January 24, 2002 and filed under number ER105357, is confirmed in part and is varied in part. I order that the various Employees involved be paid for wages and compensation for length of service (if any) plus interest, the figures set out in the table which follows for a total due by the Employer of \$13,082.18.

Employee	Wages and CLOS	Interest	Total Due
Sarah BROWN	371.48	16.42	387.90
Vince CHAPMAN	802.25	35.45	837.70
Anju CHAWLA	3,059.99	135.23	3,195.22
David COLLINS	328.02	15.86	343.88

Emily CORSE	3,332.50	146.90	3,479.40
Sera FERGUSON	55.33	2.45	57.78
Luke FLETCHER	1,069.02	47.12	1,116.14
Gurpreet PARHAR	764.45	33.70	798.15
Surinder PARMAR	1,036.49	50.21	1,086.70
Geoff PINCH	559.00	24.64	583.64
Heidi TAYLOR	994.89	43.97	1,038.86
Katrina THOMPSON	150.17	6.64	156.81
Total Due	12,523.59	558.59	13,082.18

W. Grant Sheard
Adjudicator
Employment Standards Tribunal