



An appeal

- by -

567254 B.C. Ltd. operating as “Athens Restaurant”
 (“Athens” or the “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: Kenneth Wm. Thornicroft

FILE No.: 2001/163

DATE OF DECISION: May 16, 2001

DECISION

OVERVIEW

This is an appeal filed by 567254 B.C. Ltd. operating as “Athens Restaurant” (“Athens” or the “appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Athens appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on February 5th, 2001 under file number ER#103986 (the “Determination”).

The Director’s delegate determined that Athens owed its former employee, Timothy A. Demore (“Demore”), a total amount of \$1,202.21 on account of unpaid wages (\$923.50), one week’s wages as compensation for length of service (\$256.88) and section 88 interest (\$21.83). Further, by way of the Determination, the Director assessed a \$0 penalty against Athens pursuant to section 98 of the Act and section 29 of the *Employment Standards Regulation*.

In a letter dated February 26th, 2001 the Tribunal’s Vice-Chair advised the parties that this appeal might be adjudicated based on the parties’ written submissions and that an oral hearing would not necessarily be held (see section 107 of the Act). Having reviewed the material before me, I am satisfied that it is appropriate to decide this appeal based solely on the written submissions of the parties. In this latter regard, I have before me, in addition to the appellant’s original notice of appeal and supporting documents, Mr. Demore’s submission filed March 19th, 2001 and the Director’s delegate’s submission dated March 26th and filed March 28th, 2001.

ISSUES ON APPEAL

In a one-page letter appended to the notice of appeal, Mr. Gus Pitaoulis (the self-described “Owner/Manager” of the two Athens restaurants located in Trail and Castlegar, B.C.), asserts that Mr. Demore did not work diligently throughout his shifts (Demore was a cook at the Trail location) and that Demore was dismissed due to his poor work performance. The foregoing represents my rewording of the appellant’s grounds of appeal--the actual allegations against Demore are reproduced below:

“Tim [Demore] would take breaks during scheduled work hours, during which time he would have friends over to visit, take his dog for walks, and frequently take smoke breaks, all when he should have been taking care of the work that needed to be done that day. Tim would come to work for a few hours, not sign down for his hours worked that day, and instead I agreed he could take a pizza home in exchange for pay. Tim did not care about his job, or my restaurant, as he repeatedly called in the Health Inspector to look at the conditions created by Tim neglecting his duties to clean and maintain the restaurant in a sanitary running order. This caused me troubles, and which led to his firing.”

ANALYSIS

I commence my analysis by observing that it is the appellant's burden of proving that the Determination is incorrect as to a material finding of fact or an interpretation of the governing legal principles. In my view, the appellant in this case has simply not met its evidentiary burden.

There are two general issues that need to be addressed, namely, Demore's hours of work and whether Athens had just cause for termination. I shall address each in turn.

Hours of work

The appellant made a number of comments about the practice of exchanging food (pizza) for pay. However, whether this practice did or did not occur (the delegate found it did) is not relevant inasmuch as the delegate held that "there is not enough evidence to verify the number of hours worked on each of those days" (i.e., where a wage payment was taken in kind) and thus "these amounts will *not* be included in the final calculation" (my italics; Determination, page 4).

In reaching his conclusions as to Demore's working hours, the Director's delegate relied on the evidence of some four witnesses that he interviewed--this evidence is reported at page 3 of the Determination. Clearly, there was independent corroboration that Demore worked more hours than those recorded in the appellant's payroll records. The delegate, it should also be noted, did not simply accept, at face value, Demore's assertions as to his total working hours. Indeed, the delegate did not credit Demore for all of the working hours he claimed to have worked.

By his own statement, Mr. Pitaoulis, admitted that he "was busy with my Castlegar location" and thus, by reasonable inference, was not particularly well-situated to comment on Mr. Demore's working hours. Mr. Pitaoulis' assertions about Demore's working hours--and Demore's work performance--amount, in large measure, to nothing more than hearsay evidence.

While there is some evidence before me--in the form of an undated and unsworn statement from a former co-worker, and current Athens employee, Mr. Travis Rhodes--that Demore was perhaps not a very productive or diligent worker, *this evidence does not suggest that the delegate incorrectly determined Demore's working hours.*

Similarly, an unsworn and undated letter from Ms. Elaine Cooke, also a current Athens employee, suggests that Demore was often doing things at the restaurant other than his assigned tasks but, again, this statement does not seriously challenge the delegate's determination as to Demore's actual time at work. Finally, another unsworn and undated statement from another current employee, Ms. Wendy Oakley, does not call into question the delegate's findings as to Demore's working hours.

It should be noted that employees are entitled to be paid while on the job and subject to the employer's direction and control; if an employee is not working productively, or refuses to carry

out lawful tasks, then that employee's supervisor must either more closely supervise the employee or mete out some sort of appropriate discipline.

There is nothing in the material before me that would lead me to conclude that the delegate incorrectly determined Demore's working hours.

Just Cause

Athens appears to rely on two alternative grounds in support of its position that it had just cause to dismiss Demore. First, Demore was a poor performer. Second, Demore "repeatedly called in the Health Inspector".

For the reasons given by the delegate at page 6 of the Determination, which I adopt, I am not satisfied that Athens has proved just cause based on poor work performance or incompetence.

As for Demore "calling in the health inspector", there is no evidence before me to corroborate that assertion, however, even accepting that to be so, I do not see how such action constitutes just cause for dismissal. If there was a health or safety problem at the restaurant--as there appeared to be; indeed, the food-handling problems, and the accompanying risk to public safety, continued even after Demore's departure (see the health inspector's letter dated January 19th, 2001 appended as Attachment 3 to the Determination)--I am of the view that a "whistleblowing" employee such as Demore ought to be congratulated for ensuring that public safety is not unduly put at risk rather than being summarily terminated.

ORDER

This appeal is dismissed.

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$1,202.21** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Further, in light of my confirmation of the Determination as it relates to Demore's unpaid wage claim, it follows that the \$0 penalty must be similarly confirmed.

KENNETH WM. THORNICROFT

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