

An appeal

- by -

George Dumitrache  
("Dumitrache")

- 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:** M. Gwendolynne Taylor

**FILE No.:** 2002/127

**DATE OF DECISION:** June 4, 2002

## DECISION

### OVERVIEW

This is an appeal pursuant to section 112 of the *Employment Standards Act*, filed by George Dumitrache “Dumitrache” from a Determination by the Director of Employment Standards (the “Director”) dated February 19, 2002. The Director found that Dumitrache was not owed wages for statutory holiday pay, compensation for length of service, or commission amounts.

Dumitrache appealed on the grounds that the Director erred in fact and law. Dumitrache maintained that the employer was required to demonstrate just cause for dismissal and to pay commission.

### ISSUE

Did the Director err in finding that the employer gave proper notice of termination, that statutory holiday pay was calculated correctly and paid, and that there was no agreement for the employer to pay Dumitrache commissions?

### FACTS

The employer, Alex Gourgiotis, operates two restaurants – Julia’s and La Pasteria Ltd. Dumitrache was employed as a signboard artist from May to September 2001. His job was to greet potential customers on the street and recommend the restaurants. At the time of termination, his salary was \$8.25 per hour.

In the Determination, the Director discussed the evidence of both parties and noted that they were both engaging and persuasive in their arguments. The Director preferred the evidence of the employer on the issues of service of termination notice, payment of statutory holiday pay, and commissions. The Director noted the employer provided records promptly and provided supporting documentation. On the issue of the agreement for payment of commissions, the Director noted that Dumitrache had discussed this with the employer who denied entering into an agreement and who indicated that the proposed commission structure would be impossible to accurately realize.

### ARGUMENT

Dumitrache submitted that he had been persuaded by the employer to accept employment on the basis that commissions would be paid. The commission was to be \$.25 per customer, which was an incentive to bring more customers into the restaurants.

Dumitrache denies having received a termination notice dated September 7, 2001. He submits the Director erred in law by not requiring the employer to demonstrate just cause. He submitted that the employer hired another employee to do the job and, therefore, the employer’s reason of “lack of work” was not justified. In his submission, the employer had the onus of demonstrating that he terminated Dumitrache for just cause and, therefore, must demonstrate that there was lack of work.

Dumitrache did not pursue his allegation that he was owed statutory holiday pay.

The employer submitted that Dumitrache had not established an error in fact or law to justify the tribunal in interfering with the Director’s Decision. The employer submitted that Dumitrache was laid off for lack

of work because of the decline in business at the end of the tourist season. The employer maintained that he had given Dumitrache a letter of termination dated September 7, 2001, by handing it to him at the restaurant, in the presence of another employee; Dumitrache said he didn't have his glasses and the other employee offered to read it to him. He declined and left without taking the letter with him. The employer mailed it to his residence.

The person who Dumitrache referred to as having been "hired" was an employee who had taken a month off and returned. That employee had been employed since March 25, 2001. The employer submitted that by the *Act*, the notice requirement was one week and the employer gave three weeks.

The Director responded to the appeal noting that there was no need for the employer to establish just cause for termination because the Delegate found that the employer gave working notice and there is no requirement in the *Act* for an employer to justify termination. The Director reiterated the finding that there was no agreement for the employer to pay commissions. The Director had found that the commission structure suggested by Dumitrache was not reasonable or workable and would be impossible to accurately calculate.

## **ANALYSIS AND REASON**

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has not been met.

It was open to the Director to weigh the evidence, and the credibility, of both parties in coming to a conclusion on whether the employer served a termination notice. The Director accepted the employer's evidence that the letter of termination was handed to Dumitrache in the restaurant, and that another employee was a witness. The Director is entitled to make determinations on a balance of probabilities. Dumitrache has not brought forward evidence or submissions that satisfy me that the Director erred in weighing the evidence. There is no requirement for the employer to establish just cause for termination when the employer has given the notice required by the *Act*.

Similarly, the Director weighed the evidence of the commission agreement. Dumitrache agreed it was not in writing. The Director considered the evidence and the workability of the proposed structure and concluded that there had been no agreement reached. I find no fault with the reasoning.

I find that Dumitrache has not established that the Director erred in fact or law.

## **ORDER**

The appeal is dismissed.

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**M. Gwendolynne Taylor**  
**Adjudicator**  
**Employment Standards Tribunal**