

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 -

Beverly Fox
("Fox")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/160

DATE OF **H**EARING: May 27, 1999

DATE OF **D**ECISION: June 14, 1999

DECISION

APPEARANCES

for the Appellant	In person
for Mike Abdallah operating as Mike's Eatery	Mike Abdallah Sarah Abdallah

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Beverly Fox ("Fox") of a Determination a delegate of the Director of Employment Standards (the "Director") dated February 25, 1999. The Determination concluded that Fox was owed \$174.24 by her former employer, Mike Abdallah operating as Mike's Eatery ("Mike's"). Fox says the calculation of wages owed, which was based on the Director's conclusion that her hourly rate was \$7.15, is wrong and the calculation of wages owed should have been based on an hourly rate of \$10.00.

ISSUE TO BE DECIDED

The issue is whether Fox has demonstrated the calculation by the Director of wages owed is wrong in fact or in law.

FACTS

Based on the evidence, I make the following findings of fact:

1. Mike's is a small restaurant in Fernie, B.C. At the relevant time it opened for afternoon and evening trade, serving mainly pizza and pasta meals at its location and providing a phone in and home delivery service.
2. On September 19, 1998, Fox contacted Mike Abdallah, the owner and operator of Mike's, because she had been told by her son, Nathan, that Mike's needed a cook. On September 20, 1998, Fox met with Mr. and Mrs. Abdallah to discuss hiring her as a cook. It turned out that Mike's was planning to expand its business and develop a breakfast and lunch time trade. This would involve adding a morning shift and Fox was told of the plan and that Mike's needed someone to cook and bake for that shift.
3. According to Fox, Mrs. Abdallah left the discussion before there was any talk of what wage she would be paid for the job that was being discussed. After Mrs. Abdallah left, Mr. Abdallah told Fox that she would be paid \$10.00 an hour, \$400.00 a week as the morning shift cook.
4. Ed Wasiewicz, Fox's husband, testified that he had a discussion that same day with Mr. Abdallah in the parking lot beside the restaurant in which he was also told by Mr. Abdallah that Fox would be paid \$10.00 an hour, \$400.00 a week and indicated that he'd like that to increase if the business

“was there”. He was also told that Fox would be working the morning shift and would start as soon as Mr. Abdallah was able to get it going.

5. Fox was hired on September 20, 1998.
6. According to Mr. Abdallah, Fox was told when she was hired that the rate of pay was \$7.15 an hour and she agreed to that. She was also told that rate would go to \$10.00 an hour when the morning shift got going.
7. Fox’s first day of work was October 5, 1998. Mike’s was doing renovations, some of which related to opening for the morning trade. Fox worked 6 hours that day, during which she did some cleaning, washing utensils and generally assessing what stock and supplies might be required. She says Mr. Abdallah told her to go home and wait for a call because he was not ready for her, and she did. She did not work again until October 23, 1998. Her work on this day was prompted by a telephone call to Mr. Abdallah asking him when she could expect to start work. He told her to come for the afternoon shift. Fox continued to work the afternoon shift until November 18, 1998 when she resigned.
8. Some of the work she performed over the period of her employment was related to establishing the morning shift, but mostly it was work typical of an afternoon shift employee and involved cooking pizzas and meals, waiting on tables, cleaning and occasionally delivering pizza and meals. Mike’s never did open for the morning trade while Fox was employed.
9. Fox was paid three times, early November, mid-November and following her resignation. She received \$240.00 for 22 ½ hours work on her first pay and \$325.00 for 38 ½ hours work on her second pay. On her second pay, Mr. Abdallah said he had withheld \$75.00 to pay for deductions. Fox did not receive a pay statement with either of those payments.

ANALYSIS

The crux of the issue in this appeal is found in the following passage from the Determination:

Based on the balance of probability, I also find that I have two statements, one from a witness, Mr. Wasiewicz, and one from the employer and his wife, which have equal strengths. I therefore find there is no substantial overriding evidence contrary to that which the employer has stated regarding the rate of pay. I also find it reasonable that the employer advised the claimant that her wages would increase upon accepting the increased responsibilities of baking and this did not occur.

The basis for the above statement and conclusion of fact regarding Fox’s rate of pay depended largely on the Director’s acceptance of the assertion made by Mr. and Mrs. Abdallah in their written response to the complaint about the discussion and agreement with Fox on what she would be paid. The response reads, in part:

Our plan was to open the restaurant for the breakfast and lunch trade. Mrs. Fox wanted to work early in the morning to the middle of the afternoon.

We were not in a position to do that at the time we first talked with Mrs. Fox. At our meeting Mike and Sarah Abdallah and Beverly Fox were present only, at the restaurant, in the afternoon around 2.00 pm. Sarah had to leave at 3 pm and left Mike and Bev alone in the restaurant. Ed Wasiewicz was never there at any time.

It was agreed that she be hired to work an 8 hour shift, starting from 4 pm to midnight, at minimum wage (\$7.15).

The agreement between Mrs. Fox and us was that Mrs. Fox would be paid minimum wage (\$7.15) and hour to start and when she began the early morning shift and to bake at the restaurant, she would get \$10.00 an hour.

I do not accept that statement in its entirety. Specifically, I do not accept that Fox was ever told at the time she was hired that she would be paid minimum wage or that she would be hired for the 4 pm to midnight shift. The evidence indicates Fox was hired to be the breakfast and lunch cook. If she was hired to work the afternoon shift, as Mr Abdallah says, there is no explanation why she did not start work until October 5, two weeks after she was hired; why, after working six hours on October 5 doing preliminary work for the breakfast and lunch opening, she was told to go home because the restaurant was not yet set up for morning opening; or why, when Fox did go to work for the afternoon shift on October 23, more than a month after she was allegedly "hired for the afternoon shift", it was because *she* phoned and asked Mr. Abdallah when she could start.

While I do not accept Mr. Abdallah ever told Fox she would be paid minimum wage, I do accept that Fox was told by Mr. Abdallah that she would be paid \$10.00 an hour "when she began the early morning shift". The parties all acknowledge that the discussion on September 20 related only to Fox being hired as the breakfast/lunch cook and in that context it was agreed she would receive \$10.00 an hour when the morning shift started. As Mr. Wasiewicz said in his evidence, Fox would be paid \$10.00 an hour as the breakfast/lunch cook, "and she would start that as soon as it got going, but it never did". I conclude there was no discussion about Fox working the afternoon shift and, it follows, no agreement that she would be paid \$10.00 an hour for working the afternoon shift.

It follows from my conclusions that the Director made an error of fact in concluding that Fox was told, and agreed, that she would be paid minimum wage until she assumed her duties as the breakfast cook. The question is whether that error justifies canceling the Determination. The authority of the Tribunal on an appeal is set out in subsection 115(1) of the *Act*, which states:

115. (1) *After considering the appeal, the tribunal may, by order,*
- (a) *confirm, vary or cancel the determination under appeal,*
or
 - (b) *refer the matter back to the director.*

Notwithstanding my conclusion the Director erred in fact in the conclusions made in the Determination, I am unable to conclude that error would have changed the result. It is still open to the Director to conclude that the failure of the parties to discuss and agree on Fox's wage rate for working the afternoon shift means the statutory default wage rate, which is the minimum wage rate, applies. It seems to me it is also open to the Director to conclude that the failure of Mr. Abdallah to communicate to and clarify for Fox what the

wage rate would be for working the afternoon shift, after she was told she would receive \$10.00 an hour for working the breakfast shift, binds Mike's to that rate.

It may also be that the Director is aware of other facts, not considered or deemed relevant in the context of the facts as they were understood when the Determination was made, that will now have to be considered. I refer particularly to the pay statements which, on the one hand, suggest Mike's paid her the equivalent of \$10.00 in two advances while on the other, state on their face a wage rate of \$7.15 an hour.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 25, 1999 be referred back to the Director.

David Stevenson,
Adjudicator
Employment Standards Tribunal