

**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-

Silenus Foods (1994) Ltd. operating as Pelicano's Cafe and Bakery  
("Pelicanos")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE NO:** 1999/234

**DATE OF DECISION:** June 18, 1999

## DECISION

This is a decision based on written submissions by David Lobay, Barrister and Solicitor for Silenus Foods (1994) Ltd. operating Pelicano's Cafe & Bakery and David Oliver for the Director of Employment Standards. A number of employees also made written submissions in support of the Determination.

### OVERVIEW

This is an appeal by Pelicanos Cafe & Bakery ("Pelicanos"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 29, 1999. The Director's delegate found that Pelicanos had contravened Sections 17(1), 18(1), 58(3) and 63(1)(2) of the *Act* in failing to pay 12 former employees wages, compensation for length of service and vacation pay. Pelicanos was ordered to pay the employees a total amount of \$17,241.22. After the Determination was issued, Pelicanos settled with one employee, bringing the outstanding amount to \$15,629.46.

### ISSUE TO BE DECIDED

Whether the Director erred in finding Pelicanos liable for wages and vacation pay.

### FACTS

On February 23, 1999, Pelicanos closed its doors and issued Records of Employment (ROE) to all employees, stating that the "Landlord closed business for non-payment of rent." Twelve employees (Nikki Archer, Attila Bakos, Bob Barker, Darin Barker, Kimberly Bruce, Catherine Chandler, Tiffany Cowell, Anna Farrant, Elizabeth Fitzzaland, Nike Gardener, Amy Gray, Robert Grieve, Christine Halliday, Paul Hoffmann, Rachel Lake, Therese MacKillop, Diana Neumann, Erin Paziuk, Danika Prelusky, Maggie Shipley, Emma Smith and Devon Zachary) filed complaints with the Employment Standards Branch contending that they had been terminated without payment of wages for the final pay period and other pay periods, and without payment of vacation pay.

Pelicanos did not dispute the allegations during the investigation, or on appeal.

The Director's delegate obtained records from Pelicanos' accountant and other information from its lawyer. Following a review of that information, the delegate found that Pelicanos had failed to pay wages and vacation pay as required by the *Act* and made the Order in the amount noted above.

### ARGUMENT

Pelicanos, through its counsel, sets out the following grounds for the appeal:

- a) The Employer did not have control over the closing of its business which was forced on it by the Landlord.
- b) It is patently unfair to the Employer who, through no actions of itself, was forced out of business causing substantial hardship not only to the employees but also to the Employer.
- c) It is unfair that the *Employment Standards Act* invoke liability on the Employer where the Employer has made best efforts to employ the employees, now making claims against the Employer.

Pelicanos further argues that the Director erred in calculating vacation pay for a number of employees.

The Director's delegate argues that the method of closing the business can have no impact on wages earned and not paid. He further states that Section 63 of the *Act* creates a liability to pay compensation for length of service in respect of employees employed for over three months, which is discharged if notice is given, the employee quits, retires or is dismissed for just cause. The delegate says that none of those circumstances existed in this case and that Pelicanos cannot avail itself of the protection of Section 63.

The Director's delegate further argues that closure of the business due to non payment of rent was foreseeable, and that Pelicano's argument that it made its best effort to employ the employees is not credible since their unemployment arose as a result of its failure to pay rent.

With respect to the vacation pay, the delegate says that the amounts were calculated on the basis of information available, and following consultation with Pelicano's lawyer. The delegate says that " No record of the dates of annual vacation taken and amounts paid were provided, only amounts remaining owing." He argues that no evidence has been provided to support an allegation that the records have been wrongly calculated or interpreted.

## **ANALYSIS**

The burden of establishing that the Determination is incorrect rests with an Appellant. Pelicanos has failed to discharge this burden.

Pelicanos did not dispute any of the facts set out in the determination. The grounds for appeal neither allege nor disclose any error of law on the part of the Director's delegate.

Section 17 provides that an employer must pay to an employee all wages earned by the employee in a pay period at least semimonthly and within 8 days after the end of the pay period. Section 18(1) provides that an employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

Pelicanos failed to comply with both of these sections, and no argument was advanced that the Director's delegate erred in interpreting these provisions.

Section 63(1) provides that an employer must pay an employee an amount equal to one weeks wages as compensation for length of service. This liability is discharged, as noted by the delegate, where appropriate notice is given, where the employee retires, or where the employee is terminated for cause. None of these situations applies to any of the employees. Section 65 sets out exceptions to Section 63, none of which were advanced by counsel for Pelicanos.

The sole issue on appeal appears to be whether it is fair for an Employer to be required to pay wages in this instance.

There is no evidence that Pelicanos was "prevented from operating the business." Pelicanos put itself out of business by failing to pay rent. If Pelicanos was "forced out of business," it was through its own actions, contrary to the arguments advanced by counsel. Pelicanos cannot now rely on its own failure to pay rent to avoid its obligations under the *Act*.

With respect to the grounds of appeal on the issue of vacation pay, the delegate relied on information provided by Pelicanos during the investigation. Pelicanos provided no evidence in support of its argument that the delegate erred in calculating vacation pay. In any event, the Tribunal will not consider new evidence on appeal that was available at the time of the investigation. (see *Tri West Tractor Ltd.* (1996) BC EST #D268/96).

Having no evidence or submissions to controvert the findings of the delegate, I dismiss the appeal.

**ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated March 29, 1999, be confirmed in the amended amount of \$15,629.46, together with whatever interest which has accrued since the date of Determination, pursuant to Section 88.

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Carol Roberts  
Adjudicator  
Employment Standards Tribunal