

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Continental Restaurant Ltd.
Operating Roadmaster Courier & Delivery Service
("Continental")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

A DJUDICATOR:	John McConchie
F ILE N O. :	96/235
D ATE OF H EARING:	August 12, 1996
D ATE OF D ECISION:	September 3, 1996

DECISION

OVERVIEW

This is an appeal by Continental Restaurant Ltd. operating Roadmaster Courier & Delivery Service pursuant to section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 001474 issued by a delegate of the Director of the Employment Standards Branch (the “Director”) and dated March 7, 1996.

The Determination found the Continental had contravened the *Act* by failing to pay wages and vacation pay to Daniel Smart, the complainant, upon his voluntary termination from the company. The Determination required Continental to pay the sum of \$2,088.30 in order to bring it into compliance with the *Act*.

Continental has appealed the Determination alleging (1) that the Director’s delegate erred in finding that the complainant’s salary was \$1200 per month (plus other benefits) instead of \$1000 per month; and (2) that Continental is entitled to set-off certain monies owing by the complainant to the company for the purchase of an automobile, the purchase of a table, and other described indebtedness.

A hearing was held on August 12, 1996 at which I heard evidence under oath.

FACTS

The company is in the courier business. It began only a short while ago. It hires couriers on a salary and bonus arrangement. The details of the arrangement in Mr. Smart’s case are not material except for the question of his salary effective April 1, 1996. The complainant says it was \$1200. Continental says his salary was \$1000 per month.

The complainant, Daniel Smart, worked with Continental from November 28, 1994 to June 13, 1995. He was hired as *sales manager*, but it is clear from the description of his duties that he was engaged in direct sales. When the company moved to new premises in March, 1995 he asked to be made the office manager. He testified that he met for lunch to discuss the matter with an individual called “Jazz”. Jazz is a relative of Continental’s principal, Satnam Sickham, and, said the complainant, was held out by Continental as its General Manager. Jazz also operated another company which shared space with Continental, but which was not otherwise related to it.

On the complainant’s testimony, Jazz told him at the lunch that he would be made office manager. The complainant asked what the raise in pay would be and suggested that it should be \$400 per month. Jazz replied that it would be “\$200 or \$300, I will let you know.” Smart left the meeting with the belief that he had received a raise of at least \$200. He retained the hope, if not expectation, that it could be more.

Smart testified that he later met with Sickham who told him the raise would be \$200. He was disappointed and felt that he had been *demoted*. Later, he testified, he was told that there would be no raise at all. Sickham explained this to him by saying that Continental “couldn’t afford anything.” He quit shortly after he learned he would not get a raise.

In cross-examination, the complainant testified that the raise he had been promised by Jazz “was partly because I was going to be doing work for Jazz’s company running his office”. However, shortly after, he and Jazz had their differences and nothing materialized.

Satnam Sickham is Continental’s owner and gave testimony on its behalf. He denied promising the complainant a raise or confirming it in discussion with the complainant. It was his testimony that Jazz was not authorized to offer the complainant a raise - he was merely helping the company out. The company was simply not in a position to pay the complainant any more money than it was paying. Much of Sickham’s testimony was taken up with describing the various debts which he alleged were owed to Continental by the complainant. For the reasons which I will provide later, it is not necessary for me to detail that testimony here.

Jazz did not appear as a witness. Neither the complainant nor Continental professed an interest in calling him as a witness in these proceedings.

ISSUES TO BE DECIDED

The issues in this appeal are:

1. Did the complainant receive a \$200 raise effective April 1, 1995;
2. Is the company able to set-off the alleged indebtedness of the complainant ?
3. Is the complainant entitled to vacation pay and, if so, in what amount ?

ANALYSIS

For convenience, I will deal first with the second and third issues above.

I have reviewed the careful calculations of the Director’s delegate and the evidence presented before me. By the admission of Mr. Sickham, Continental’s records are not in very good order. This would be a very difficult situation to deal with were it not for the efforts of the Director’s delegate to determine the appropriate amounts to be included and deducted from the total of wages owing. In addition, during the course of his investigation, the Director’s delegate worked with the complainant and Mr. Sickham to secure the greatest possible agreement on the items which could be deducted from the amount owing to the complainant as being in the nature of advances. The balance of the items which are not agreed are still in dispute, primarily over the precise quantum, and therefore, in view of Section 21 of the *Act*, I have no jurisdiction to order that they be addressed in these proceedings. The courteous conduct of the complainant and

Mr. Sickham towards one another at the hearing leaves me with confidence that they will be able to work matters out without the need for litigation in the courts. Having said that, there is nothing before me which persuades me to vary or cancel the calculations of the Director's Delegate in this matter, with the exception of (1) vacation pay, and (2) salary effective April 1, 1995.

As to vacation pay, it is clear that Continental must pay vacation pay to the complainant by virtue of the *Act*. The parties and the delegate agreed that the delegate’s calculations had inadvertently excluded December 1994 vacation pay. It was agreed that, for sake of convenience, the amount owing in respect of December 1994 vacation pay would be 4% of \$500, being \$20.

The remaining issue is whether the complainant received a raise to \$1200 per month effective April 1, 1995. On his own evidence, I am satisfied that he did not and that the Director’s delegate,

who was without evidence on this matter, was in error. I accept the complainant's testimony that he met with Jazz to discuss the matter and that the discussion proceeded along the lines of his testimony. I also accept that Continental held out Jazz as being its General Manager and had he entered into an agreement with the complainant, Continental would have been bound by it. However, I am satisfied on the complainant's own testimony that no agreement was reached. Although the complainant left his luncheon meeting satisfied that he had at least a \$200 raise, Jazz had not agreed with him on any particular amount. He had merely indicated what he would likely do and had left it at that. Even had they agreed on a specific amount for a raise, by the complainant's own admission, some part of his new salary was going to be attributable to work which he would be doing for a different company - Jazz' company. The work never materialized.

As to the complainant's discussion with Sickham, I accept Sickham's testimony that he did not agree to any raise for the complainant. The complainant had, in effect, announced the raise to Sickham, who was not a party to the discussion the complainant had with Jazz. Sickham did not confirm that any agreement had been made, but protested that the company did not have money. On the evidence, the company's financial state was not good and the complainant was already being paid more than other salespersons. I prefer the evidence of Sickham on the contents of his discussion with complainant because it accords with the probabilities while the complainant's evidence on the point does not.

In order to find that the parties had entered into a new agreement, there must be some clarity of the terms. Here, there was no such clarity. The complainant had every reason to believe his efforts were going to be recognized by a raise. However, in the end, there was no *consensus ad idem* between the complainant and the company that he was going to receive an additional \$200 per month or any other specific amount. Therefore, I cannot find that the parties varied the complainant's salary by agreement.

As a consequence, it is my finding that the delegate's decision was in error and the amount of the complainant's wages effective April 1, 1995 remained at \$1000 per month. It is unnecessary to discuss the detail of the bonus scheme as no cogent evidence was produced to show that the delegate's calculations were in any way in error on the issue of bonus.

As a consequence, Determination No. CDET 001474 must be varied as it credited the complainant with a salary of \$1200 effective April 1, 1995 through to the termination of the employment contract effective June 13, 1995. This amounts to some \$500, which I fix as the amount to be deducted. Since this would reduce the amount of vacation pay payable by \$20, this offsets the additional \$20 which would be paid on account of the missed December calculation. In the result, the Determination must be reduced by \$500. I did not receive any representations about adding interest to the calculations, and so I will decline to do make an award in this respect.

I encourage the parties to resolve their remaining differences, and I hope that they will be able to do so now that this matter is concluded.

ORDER

Pursuant to Section 115 I order that Determination No. CDET 001474 be varied by reducing the amount owing by Continental to the complainant to \$1588.30.

John McConchie
Adjudicator
Employment Standards Tribunal

JLM:jel