

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 -

Jose Duarte
Operating as Juniper Family Restaurant
("Duarte")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Cindy J. Lombard

FILE NO.: 1999/80

DATE OF HEARING: May 26, 1999

DATE OF DECISION: June 9, 1999

DECISION

APPEARANCES

The Appellant appeared together with his representative, an accountant, Simms, and his wife, Maria Duarte.

The Respondent did not appear.

The Director was represented by Kevin Hillman and an observer from his office, Robert Turner.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Jose Duarte operating as Juniper Family Restaurant ("Duarte") from a Determination issued by a delegate of the Director of Employee Standards (the "Director") on January 19, 1999.

The Determination was issued following a complaint by a former employee of Duarte, Don Miller ("Miller"). He was not paid wages for all the time that he worked for Duarte.

Duarte asserted that he had paid Miller what was due.

After investigating the complaint, the Director issued a Determination that Duarte owed Miller \$2,606.55 plus accruing interest.

ISSUES TO BE DECIDED

Duarte's appeal is based on the following grounds:

1. The oral contract of employment between Duarte and Miller provided for a salary of \$750.00 per week plus meals and not including commuting expenses. On that basis, Duarte says that Miller should not have paid for gas, motel and meal expenses (outside of the Juniper Family Restaurant) from company funds and seeks reimbursement in the total amount of those charges of \$2,567.20.
2. The Appellant says that Miller purchased a Polaroid camera with company funds and did not return it when his employment ceased.

FACTS AND ANALYSIS

Duarte and Miller's employment relationship commenced when Duarte, who resides in Oliver, B.C. and owned premises in Vernon in which a restaurant had been operating, approached Miller about reopening and operating the restaurant for him.

The parties agree that Miller stated that he would ask no remuneration for time spent in reopening the restaurant which took the month of January, 1997, and thereafter he would be paid \$750.00 per week. In addition, Mr. Miller would be entitled to meals. Duarte meant meals at the restaurant whereas Miller appears to have believed it was simply meals whether it was at the restaurant or somewhere else along his commute to and from Vernon. In addition, the parties appear to be in agreement that Miller would not charge for his commuting expenses.

Miller operated the restaurant for Duarte from the time it opened on February 1, 1997, to the date that Duarte, without notice to Miller, closed the business on April 22, 1997.

The Director determined that Duarte owed Miller for outstanding wages of the sum of \$2,365.20 calculated as follows:

Wage	
11 weeks @ \$750.00/week	\$8,250.00
Holiday pay	<u>330.00</u>
Total:	\$8,580.00
Less advances, charges, etc.	\$3,909.80
(These were the funds which Miller said that he took by way of advances from the restaurant.)	
Less final cash receipts	<u>\$2,305.00</u>
(This was cash that Miller had in his possession that the restaurant was closed.)	
BALANCE OWING before interest:	\$2,365.20

The onus is on the employer, Duarte, to show that the Determination is incorrect.

Unfortunately, records kept by the parties is lacking here. Duarte kept no records. Miller did keep both a cash and cheque ledger. Duarte's accountant, Mr. Simms, has gone through the cash ledger and determined that the sum of \$2,567.20 was spent by Mr. Miller on gas, meals and motels in the months of January, February, March and April, 1997. Duarte asserts that since the oral contract between the parties stated that commuting expenses were to be to the account of Miller, that there should be a set-off against wages owing for these expenses.

Miller says as follows: "The gas expenses were incurred as expenses of the business. During the month of January I did commute to Vernon and also did a lot of restaurant

business while in Oliver that required driving. I used my own vehicle for all restaurant business – banking, picking up supplies as well as hauling my personal equipment to Vernon to use in the restaurant to save Mr. Duarte money. My wife had gas expenses for restaurant business to travel to Vernon to do books and payroll. She did not expect to be out of pocket for these expenses when she did the bookwork and took time off her work and lost wages to help with the restaurant. The motel expenses listed on the Reasons for Appeal document have already been deducted from my claim.”

Unfortunately, the advances and charges which Miller says totaled \$3,909.80 which was deducted from the Determination in which he now says include motel expenses, there is no accounting at how that figure were arrived at.

Camera

Duarte says that Miller purchased a Polaroid camera with the company’s cash and took that camera with him when he left i.e. that he stole that property.

Conclusion

With respect to both of these grounds, it is not necessary that I make any determination of the validity of the assertions of fact made by either party. This is because Section 21 (1) is clear that an employer is not entitled to “...deduct or require payment of all or part of an employee’s wages for any purpose”. With respect to these allegations, the proper course would be for the employer to file a Small Claims action against the employee. Until the employer has a monetary judgment in its favor against an employee, the employer is not entitled to set off the amount of its claim against wages that are otherwise due and payable.

ANALYSIS

For the foregoing reasons the Appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated January 19, 1999, be confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal