

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of appeals pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

518820 B.C. Ltd. operating as Pelican Rouge Coffee Company
("Pelican Rouge")

and

Nick DiMambro, a Director/O fficer of 518820 B.C. Ltd.
("DiMambro")

and

Gordon J. Scott
("Scott")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 98/194, 98/195, 98/196 and
98/197

DATE OF HEARING: May 20, 1998

DATE OF DECISION: June 11, 1998

DECISION

APPEARANCES

Gordon J. Scott	On his own Behalf
Nick DiMambro	For Pelican Rouge and on his own Behalf

OVERVIEW

Gordon J. Scott, and 518820 B.C. Ltd. operating as Pelican Rouge Coffee Company (the “Pelican Rouge”), pursuant to section 112 of the *Employment Standards Act* (the “Act”), appeal, separately, the CDET Determination by the Director of Employment Standards (the “Director”) dated March 2, 1997. As well, Gordon J. Scott and Nick DiMambro, director/officer of the Pelican Rouge, appeal, separately and pursuant to section 112 of the *Act*, the related DDET Determination of the Director dated March 2, 1997. The CDET Determination awards Scott wages and applicable vacation pay and interest. The DDET Determination is that DiMambro, as director/officer of Pelican Rouge, owes the full amount of the moneys that are owed Scott.

The above Determinations follow an earlier decision of the Tribunal, *Nick DiMambro doing business as Pelican Rouge Coffee Company and Gordon J. Scott*, BC EST No. D290/97. That decision sent matters back to the Director for further investigation.

ISSUES TO BE DECIDED

The appeals by the Pelican Rouge and DiMambro go to the matter of whether Scott is or is not an employee. If it is the former, the amount of earnings is then at issue. According to the Pelican Rouge and DiMambro, Scott simply never was an employee but only a regular customer who volunteered minor help on occasion.

The appeals by Scott go to the quantity of work performed. The CDET Determination awards him pay for 27 hours of work. He claims 84 hours worked, and complains of an inadequate investigation by the Employment Standards Branch, and a conspiracy to cover up errors made during the course of the first investigation of his complaint. He points out that not a single one of his claims has been proven false.

FACTS

A number of coffee shops go by the name “Pelican Rouge”. 518820 B.C. Ltd. operating as Pelican Rouge Coffee Company is not now open for business. Nick DiMambro is

director/officer of the Pelican Rouge. Scott claims that he was manager of the Pelican Rouge from July 18, 1996 to August 11, 1996.

When the Pelican Rouge was in operation, it featured Internet access. That attracted Scott to the business as a customer. For many months he was a regular customer who made frequent use of the restaurant's Internet connection.

According to DiMambro, Scott was never anything but a regular customer who would volunteer help on occasion. Letters from Natalie Delmaestro, a former manager of the Pelican Rouge; Steven Thornton, the owner/manager of the neighbouring pizza outlet; and Tracy Livingstone, an employee of a neighbouring video store; all point to Scott as an employee. The delegate reports that, on interviewing former employees and patrons of the Pelican Rouge, she was able to confirm work by Scott. And I am presented with a Staff Schedule and Payroll Hours record for August, 1996. It lists Scott as an employee and indicates 10 hours of work by him in that month. DiMambro alleges that both the letter from Delmaestro and that from Livingstone misconstrue the facts but he provides nothing in support of that. He alleges, as well, that the August schedule of work was altered to show work by Scott. Scott tells me that Darren, an employee of the Pelican Rouge, took the original August schedule. Scott then came by it. As such I find that he clearly had an opportunity to alter the document. But I conclude that what I am shown is likely the actual schedule of work for August, nothing clearly to the contrary, and the record being so obviously not in Scott's favour. Scott claims not 10 hours of work but 42 for the month of August.

DiMambro asks, If Scott really had performed work, would he not have complained when he was not paid along with other employees? Scott explains that he was not seeking work, but asked to work for Pelican Rouge, and that he agreed to do just that, not for regular pay, indeed, Scott admits that there was no discussion of any rate of pay, but merely the promise of some unspecified computer at some unspecified point in time. Of course, none of this is written down.

The Staff Schedule and Payroll Hours record for July shows no work by Scott. Scott in his written submission alleges that someone tampered with the record, removing all reference to him and his work. There is no evidence of that.

While the July schedule of work shows no work by Scott and the August record seems to indicate a mere 10 hours of work, the CDET Determination awards pay for 4 hours of training in July and 23 hours of work in August, some of that through application of the 4 hour minimum of the *Act* (section 34). The delegate explains that on being interviewed, an employee confirmed training of "at least 4 hours". And, relying on the July and August schedules of work, she compared the shifts worked by those people who are known to be employees, against the hours that the Pelican Rouge was open for business, and found all shifts accounted for in July but gaps in the record of work for August, 5 shifts in all. Entries in the margin of the August record indicate that Scott covered 2 of the 5 shifts. The delegate's decision is that it was likely Scott that covered the 3 remaining shifts.

Scott has a record of work and it shows 84 hours of work by him. It is an electronic record on a Sharp 2Q-1200, a form of pocket organiser. The delegate reports that, on interviewing former employees and patrons, she found some of the view that Scott was largely present as a customer, that she was unable to find evidence of work to the extent claimed by Scott, and found evidence that indicated that Scott did not work days which he claims to have worked. She finds that Scott's record is not a credible record. Scott, on appeal, allows that he is unable to substantiate much of what he claims but complains bitterly of the delegate's failure to find evidence, of a conspiracy to "gloss over the initial investigation", and that "nothing has been proven false". He refers specifically to a Costco card application, the fact he had keys and security codes, and the presence of his handwriting on cheques and other documents. It is that sort of evidence, had it been brought to light he says, that would have clearly shown that he not only worked as a *barista*, someone who makes coffees and serves customers, but was 'manager' of the Pelican Rouge. The manager, he says, works even when other employees are at work as *baristas*. However, as Scott presents matters to me, he fails to provide any support for the allegation that the delegate failed to produce and consider evidence. And, Scott presents no new evidence on the extent of his work, including anything which indicates that his electronic record is an accurate, contemporaneous record of hours worked.

The July and August schedules of work show that there were seldom more than two employees on the job at a time, and commonly only one. The July record shows that Delmaestro worked regular shifts and that her last day was the 27th of July, 1996. There is no evidence of any work by Delmaestro which is over and above that shown on the July record of work.

Scott has two minor complaints with the CDET Determination. One is that while the delegate found that he covered shifts in August, and also that there was commonly an overlapping of shifts at noon, she then concludes that none of his shifts overlapped others. He also complains of being awarded only 4 hours for training when the delegate reports that training was said to be for at least 4 hours.

ANALYSIS

As I read the decision *Nick DiMambro doing business as Pelican Rouge Coffee Company and Gordon J. Scott*, supra, the Adjudicator finds an employment relationship. I concur.

The Adjudicator, in the above decision, writes, "It seems inconceivable to me that an employee's claim for unpaid wages should be dismissed because the *employer* failed to meet its statutory obligation with respect to the keeping of payroll records". And he offers the comment, "the Director, having found that an employment relationship subsisted between the parties, was then obliged to make some finding as to the number of hours worked by Scott". I agree with that but add, of course, not just any finding will do. The Director must decide what in all probability is the number of hours worked and provide reasons for the decision. There is no need to confirm every hour of work; that is unfair to

the employee given that it is the employer who is required to record hours worked [section 28 (d) of the *Act*].

The delegate has considered Scott's record of work. It being the sort of electronic record that one can create at any time, she correctly sought confirmation that at least something like that number of hours was worked. She reports that she was unable to confirm work, that some people thought that he was a customer, and that she found evidence that Scott did not work days which he claims to have worked. I find that reason to decide that Scott's electronic record is not credible. And as matters are presented to me, there is no evidence which indicates some error on the delegate's part.

I realise that Scott claims a failure to uncover evidence and consider evidence. Indeed, he alleges a conspiracy. I see none of that.

The onus is on the appellant to make his case and Scott fails to back up his allegations. What he does do, is seize on the fact that the CDET Determination makes no mention of the Costco card application, his possession of keys and security codes, and the presence of handwriting on cheques or other documents, and then leap to the conclusion that there has been a failure to consider all that. He does not realise that the delegate may have done so. The Director is simply not required to provide a list of every document reviewed during the course of an investigation; not expected to provide an exhaustive review of the evidence before her, or a delegate; nor expected to recite each and every argument which is placed before a delegate by a complainant or employer. It is just inconsistent with the need to provide efficient procedures [section 2 (d) of the *Act*]. Moreover, as I see it, the evidence to which he refers is, at best, only of aid in determining the extent of work. It remains that there is no record of total hours worked.

Scott's difficulty, and he astutely recognises this, is a lack of hard evidence that he was at work at the Pelican Rouge to the extent alleged, managing the business as he says, while others were on the job. Delmaestro was the manager until July 28, yet she appears to have only worked regular shifts. There being so few employees, there clearly is no real need for anyone to supervise or direct employees. Former employees and patrons say they thought he was just another customer, not manager of the business. But the main problem for Scott is that he all too casually entered into the loosest of employment relationships; on the promise of only some sort of computer, without even establishing a rate of pay, and without getting anything in writing despite the unusual nature of his employment; and he then failed to ensure that a record of his work was kept such that there could be no later dispute over his hours of work. For that he has only himself to blame.

With little to go on, the delegate has found that Scott is owed pay for 27 hours of work. That appears reasonable to me with one minor exception, that being her failure to allow for an overlapping of shifts. I see no reason to award more than 4 hours of pay for training in the absence of any evidence showing that training was appreciably longer than 4 hours but the evidence is clear that there was commonly an overlapping of shifts at noon. I find it likely that there was the same overlapping of shifts when Scott was at work as when others were on the job. I have reviewed the July and August schedules and find that there was

likely an overlapping of shifts on both the 3rd and 6th of August. It seems likely to me that Scott worked until 2 p.m. on the 3rd and that he began work at 10:00 a.m. on the 6th. The CDET Determination is accordingly varied. Scott is owed 32.5 hours of pay at the minimum wage, \$227.50, and is entitled to a further 4 percent vacation pay, \$9.10, for a total of \$236.60. Interest must be added to that amount.

The DDET Determination

DiMambro agrees that he is a director/officer of the Pelican Rouge. Section 96 (1) of the *Act* provides that “*a person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee*”. Scott has been found to have worked for the Pelican Rouge. The period of employment is less than two months.

Given the need to vary the CDET Determination, there is a corresponding need to vary the DDET Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the CDET Determination dated March 2, 1997 be varied as I find that Scott is owed \$236.60 together with whatever interest is owed pursuant to Section 88 of the *Act*.

I order, pursuant to section 115 of the *Act*, that the related DDET Determination dated March 2, 1997 be varied in accordance with the above. Nick DiMambro owes the full amount of wages, vacation pay and interest which is owed Scott.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal