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 -

Mondher Ben Arfa

–and–

Salima Ben Arfa

–and–

Boulangerie La Parisienne Ltd.

(collectively referred to as the " appellants ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/089

DATE OF HEARING: June 12, 2000

DATE OF DECISION: June 27, 2000

DECISION

APPEARANCES

Kimberley H. Beck, Barrister & Solicitor	for Mondher Ben Arfa, Salima Ben Arfa and Boulangerie La Parisienne Ltd.
Serena Chandi, Barrister & Solicitor	for Aicha Bnoumarzouk
Graeme Moore, I.R.O.	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Mondher Ben Arfa, Salima Ben Arfa and Boulangerie La Parisienne Ltd. (collectively referred to as the "appellants") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 25th, 2000 under file number ER 094331 (the "Determination").

The Director's delegate determined that the appellants owed Ms. Aicha Bnoumarzouk ("Bnoumarzouk"), who had formerly been employed as Mr. and Mrs. Ben Arfa's live-in "nanny" (or, as noted in the Determination, a "domestic" as defined in section 1 of the *Act*), the sum of $9,310.32, on account of unpaid wages and interest.

This appeal was heard at the Tribunal's offices in Vancouver on June 12th, 2000. Mondher Ben Arfa (who is the president and a director of the corporate appellant) testified, in person, and Mrs. Salima Ben Arfa testified, by teleconference, on behalf of the appellants as did (by way of rebuttal evidence) Ms. Catherine Pilotte (also by teleconference). The respondent employee, Aicha Bnoumarzouk , testified in person–via an arabic interpreter–as the sole witness on her own behalf. Mr. Moore, for the Director, excused himself prior to my hearing any *viva voce* evidence after counsel for the appellants advised that she was withdrawing one of her grounds of appeal, namely, that the investigating officer (not Mr. Moore) was, or appeared to be, biased against the appellants.

ISSUES ON APPEAL

Counsel for the appellants submits that the delegate erred in three respects:

- in awarding 4-hours minimum daily pay (see section 34) for certain bank deposits that Bnoumarzouk was found to have made in January and February 1999 on behalf of the Boulangerie La Parisienne bakery/retail shop and Mr. Ben Arfa;

- in determining that the total amount of wages paid by the appellants to Bnoumarzouk was only $9,900; and

- in determining that the value of a return airline ticket ($2,227.96) was not an "advance" against Bnoumarzouk's future earnings.

I shall deal with each of these issues in turn.

ANALYSIS

The Bank Deposits and Section 34

Section 34 of the *Act* states that if an employee reports for work as directed by his or her employer, that employee is entitled to be paid a minimum of 4 hours pay if work is actually undertaken. There are some exceptions to this statutory rule, none of which is relevant here. The delegate concluded that Bnoumarzouk, during January and February 1999–when Mr. and Mrs. Ben Arfa were out the country–collected certain funds from the corporate appellant and in turn deposited those funds, as directed by Mondher Ben Arfa, to both a personal and a corporate bank account. Accordingly, the delegate concluded that Bnoumarzouk was entitled to be paid 4 hours pay for each day that she collected the monies and made the deposits.

The appellants' position is firstly, that the deposits were not made by Bnoumarzouk. Counsel did not firmly press this point and I unreservedly reject that suggestion. Bnoumarzouk testified that she made the deposits and her evidence is, in large measure, corroborated by copies of deposit advices (many of which include Toronto-Dominion Bank stamps and all of which show the "depositor's initials" to be "AB" or "Aicha B"). I am fully satisfied, quite beyond a balance of probabilities, that Bnoumarzouk made the bank deposits as she alleged.

The appellants' second position is that Bnoumarzouk was not authorized to make the deposits and, at best, may have done so as a "favour" for one or more of the employees of the Boulangerie La Parisienne bakery/retail shop who were supposed to make the deposits. I note that that the appellants did not call any of their employees to corroborate this supposition that Bnoumarzouk made the deposits as a favour to one or more of the pastry shop employees.

In my view, the balance of probabilities clearly points to Bnoumarzouk having made the deposits at the specific direction of Mr. Ben Arfa. It should be noted that Mr. Ben Arfa did not, in fact, unequivocally deny having instructed Bnoumarzouk to collect the monies and make the deposits–my note of his evidence is that he testified only that he did not "remember" and could not "recall" having given Bnoumarzouk such instructions. However, even if (and I do not accept this factual proposition) Bnoumarzouk made the deposits as directed by some person in authority at the pastry shop, Bnoumarzouk would have been acting at the behest of an authorized (or at the very least someone who had ostensible authority) agent and thus the principal (*i.e.,* the appellants) would remain ultimately liable to make payment for the work performed.

Wages actually paid to Bnoumarzouk

The delegate accepted Bnoumarzouk's evidence that the appellants paid her a total amount of $9,900 as wages (comprised of payments by way of both cash and cheque) during her employment by them. The appellants say that, in fact, some $16,200 in wages was paid to Bnoumarzouk. *There is absolutely no corroborative documentary evidence* to support the higher

figure–evidence such as receipts for cash received or cancelled cheques or copies of bank statements.

The appellants did submit some so-called "time sheets" which purport to record certain cash and other payments to Bnoumarzouk but I find these documents to be wholly unreliable and, indeed, they may even be fraudulent. Certainly, *even on Mr. Ben Arfa's own evidence*, the documents are inaccurate and, at least for one pay period (June 1st to 15th, 1998), were not even completed until some 2 1/2 months after the fact. Mr. Ben Arfa–in whose hand the time sheets are recorded–acknowledged that he was often away for extended periods and thus only relied on what his wife told him (presumably, again, after the fact) regarding Bnoumarzouk's working hours. The actual hours recorded on these sheets (which invariably record 8 hours worked) are inconsistent with Bnoumarzouk's evidence as to her working hours (which I have no reason to reject) and I must say that I find it difficult to accept that, given the nature of Bnoumarzouk's duties, she *always* worked an 8-hour day, never more nor less.

The only T-4 statement of wages earned that was issued to Bnoumarzouk (and then only after an inquiry by Revenue Canada) shows an even lower wage figure than the total wages that were accepted by Bnoumarzouk as having been paid to her. The appellants did not keep proper payroll records or issue Bnoumarzouk proper (or indeed, any) wage statements. The appellants never issued Bnoumarzouk a Record of Employment–a document that could have corroborated their position as to the actual wages paid. The appellants never made *any* statutory remittances (from which Bnoumarzouk's actual paid wages might have been calculated) to Revenue Canada on Bnoumarzouk's behalf.

In my view, and given the foregoing dearth of evidence, the appellants have manifestly failed to meet their burden of proving that the Determination is incorrect on this point.

The Airline Ticket

As previously noted, it is the appellants' position that the sum of $2,227.96 which was used to purchase a return airline ticket for Bnoumarzouk (Vancouver to Tunisia) represented an "advance" against Bnoumarzouk's future wages. Bnoumarzouk accompanied Mrs. Ben Arfa and her young daughter to Tunisia in May 1998. Bnoumarzouk travelled on a return ticket purchased by Mr. and Mrs. Ben Arfa through their travel agent in Montreal. Bnoumarzouk says that while in Tunisia she continued to serve as the child's nanny and that there never was any agreement that the cost of the airline ticket was a wage advance; Mrs. Ben Arfa says that Bnoumarzouk was not working as a nanny while in Tunisia.

I accept Bnoumarzouk's evidence on this point. First, if the funds were an "advance" against wages, then I must query why it was *never* documented as such. Second, why did the appellants purchase the airline ticket if the monies were simply an advance–why not give the monies to Bnoumarzouk and let her make her own travel arrangements? Third, why would Bnoumarzouk travel on the very same flights (both to and from Tunisia) as Mrs. Ben Arfa and her daughter if she was not accompanying them in a service capacity? Fourth, if the funds were, in fact, an advance against wages why is it that the appellants made *no effort at all to recover the advance* in any subsequent pay period? The appellants' position on this point appears to have been raised only after Bnoumarzouk filed an unpaid wage complaint with the Employment Standards Branch.

I am of the view that the delegate correctly rejected the appellants' position that the value of the airline ticket constituted a wage advance.

I might add that although the delegate (in the Determination) and counsel for the appellants (in her submissions) referred to section 21 and the concept of "business costs", I do not conceive that section to be applicable in this case. The appellants did not require Bnoumarzouk to pay the cost of her airline ticket to Tunisia (as noted, they provided the ticket for her at their expense) and there never was any deduction of the value of the airline ticket from Bnoumarzouk's wages. In such circumstances, I do not see the relevance of section 21(2) to this case. *If* the employer had required Bnoumarzouk to either pay, or reimburse the appellants for, the cost of the airline ticket, then section 21(2) would apply, but that is not the situation here.

As noted above, the appellants' position is, simply, that the monies used to purchase the airline ticket constituted a wage advance (although, I might add that Mr. Ben Arfa, in his testimony, at one point referred to the value of the airline ticket not as a wage advance but rather as a "loan"). I unhesitatingly reject the notion that the monies used to pay for the airline ticket constituted a wage advance.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$9,310.32** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal