

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-

Leanore Brown operating as “Ripples Restaurant”

(the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/214

DATE OF DECISION: June 23rd, 1999

DECISION

OVERVIEW

This is an appeal brought by Leanore Brown operating as “Ripples Restaurant” (the “employer”) 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 March 25th, 1999 (the “Determination”).

The Director’s delegate determined that the employer owed its former employee, Patricia J. Dukart (“Dukart”), the sum of \$1,894.20 on account of 6 weeks’ wages as compensation for length of service, unpaid vacation pay and interest.

ISSUES TO BE DECIDED

While the employer’s appeal documents do not clearly set out the issues in dispute, it would appear that three matters need to be addressed, namely:

Dukart’s length of service--the resolution of this issue will determine her entitlement to

- i) compensation for length of service
- ii) unpaid vacation pay; and
- iii) whether or not the employer had just cause for termination.

I will deal with each issue in turn.

FACTS AND ANALYSIS

Length of service

Although the employer disagrees with the delegate’s finding that Dukart was continuously employed as a server with the “Ripples Restaurant” from November 22nd, 1992 until December 23rd, 1998, the evidence before me overwhelmingly shows that to be the case. In particular, the evidence shows that the “Ripples Restaurant”, situated in Kaslo, B.C., has been operated by three successive proprietors. A record of employment issued to Dukart by “Ripples Cafe c/o Steve Pappas” shows that her employment commenced on November 22nd, 1992 and ended on October 29th, 1993 at which time she continued to be employed by the new owners, Elaine Toffan and Roy Brophy, until October 31st, 1995 (see letter from Elaine Toffan dated January 20th, 1999) whereupon the business was sold to the current employer--Dukart continued on with the new employer. The record of employment issued by the employer shows that Dukart’s employment commenced November 1st, 1995 and continued until December 23rd, 1998.

The employer has not provided any information contrary to the above and thus, for purposes of the *Act*, Dukart's employment is deemed continuous as and from November 22nd, 1992 until December 23rd, 1998 by reason of section 97 of the *Act* which provides as follows:

Sale of business or assets

97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

Thus, at the point of termination, Dukart had worked at the Ripples Restaurant for slightly in excess of 6 consecutive years.

Compensation for length of service

By reason of her 6 consecutive years' service, Dukart was entitled to either 6 weeks' wages upon termination or, alternatively, 6 weeks' written notice of termination (see section 63 of the *Act*). The uncontroverted evidence is that Dukart received neither. The employer, in a rather oblique fashion, suggests that Dukart was not entitled to either termination pay, or written notice in lieu thereof, because she had just cause for termination--see section 63(3)(c) of the *Act*. However, even setting aside the point that this particular allegation is inadequately particularized, *the employer's own document*, namely, the record of employment issued by the employer to Dukart on December 23rd, 1998 shows that Dukart's employment ended due to a "shortage of work" (Code "A") rather than because she was dismissed (Code "M"). Quite simply, the employer has manifestly failed to meet its burden of proving just cause and thus the award on account of termination pay must be confirmed.

Vacation pay

Sections 57 and 58 of the *Act* provide as follows:

Entitlement to annual vacation

1. An employer must give an employee an annual vacation of
 - a) at least 2 weeks, after 12 consecutive months of employment, or
 - b) at least 3 weeks, after 5 consecutive years of employment.
2. An employer must ensure an employee takes an annual vacation within 12 months after completing the year of employment entitling the employee to the vacation.
3. An employer must allow an employee who is entitled to an annual vacation to take it in periods of one or more weeks.
4. An annual vacation is exclusive of statutory holidays that an employee is entitled to.

Vacation pay

1. An employer must pay an employee the following amount of vacation pay:
 - a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;
 - b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.
2. Vacation pay must be paid to an employee
 - a) at least 7 days before the beginning of the employee's annual vacation, or
 - b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.
3. Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

The delegate held, at page 6 of the Determination, as follows:

“In [Dukart’s] fifth year of employment, [she] earned \$15,308.01. During this period, the payroll records indicate she received four per cent of total earnings in vacation pay. However, she was entitled to six per cent and is therefore owed a further $2\% \times \$15,308.01 = \306.16 .

In her sixth year of employment, [Dukart] earned \$14,860.42 plus \$306.16 as calculated above for a total of \$15,166.58. During this period, the payroll records indicate she received four per cent of total earnings in vacation pay. However, she was entitled to six per cent and is therefore owed a further $2\% \times \$15,166.58 = \303.33 .”

In my view, the delegate has erred in calculating Dukart’s vacation pay entitlement. Section 58(1)(b) clearly states that an employee’s entitlement to 6% vacation pay does not crystallize until “*after 5 consecutive years of employment*”. Vacation pay is to be paid in the following year based on the current year’s earnings (*i.e.*, Year 1 vacation pay is paid in Year 2 based on Year 1 earnings and so forth). Thus, in Dukart’s fifth year (*i.e.*, after having completed *only 4 years of consecutive employment*) she was only entitled to 4% vacation pay to be calculated based on her earnings the previous year (*i.e.*, her fourth year). Thus, the delegate erred in awarding her an additional 2% during her fifth year of employment (*cf. Re LaPorte*, BC EST #D151/97). The delegate correctly noted that in her sixth year of employment (*i.e.*, after she had completed 5 consecutive years) she was entitled to be paid vacation pay at the rate of 6% based on her fifth year earnings.

I also note that the delegate apparently did not award Dukart any vacation pay on her termination pay, however, since “wages” are defined so as to include termination pay payable under section 63, Dukart is entitled to additional vacation pay in the amount of 6% of her termination pay award.

ORDER

Pursuant to section 115 of the *Act*, I order that this matter be referred back to the Director for purposes of recalculating Dukart’s entitlement to vacation pay in accordance with the directions contained herein; in all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal