

An appeal

- by -

Epicurean Steakhouse Ltd.  
("Epicurean")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

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

**ADJUDICATOR:** Sheila McDonald

**FILE No.:** 2001/63

**DATE OF HEARING:** April 25, 2001

**DATE OF DECISION:** May 30, 2001

## DECISION

### APPEARANCES:

Ms. Kathy Liotsakis	a Director, Epicurean Steakhouse Ltd.
Ms. Catherine Campbell	Employee
Mr. David Oldfield	Employee

### OVERVIEW

This is an appeal under Section 112 of the *Employment Standards Act* (the “Act”) by Epicurean Steakhouse with respect to the Determination by Mr. Bill Woolsey, a delegate of the Employment Standards Branch (the “Director”), which found that Epicurean had contravened Parts 3, 4, 5 and 7 Sections 18(2), 40(1) and (2), 45, 46(1) and 58(3) of the *Act*. The Director found that two employees of Epicurean were owed outstanding regular wages, overtime wages, statutory holiday pay and annual vacation pay. He determined that Ms. Catherine Campbell was owed \$10,783.94 in wages and \$752.51 in interest and Mr. David Oldfield was owed \$9,232.12 in wages and \$655.29 in interest.

### THE DETERMINATION

Ms. Campbell and Mr. Oldfield filed a complaint with the Employment Standards Branch alleging that Epicurean owed them outstanding regular and overtime wages, statutory holiday and annual vacation pay.

Mr. Oldfield stated that he had worked for Epicurean from February 1999 to December 24, 1999 and Ms. Campbell stated that she had worked from March 1999 to December 24, 1999. They were both food servers at the rate of \$7.50 per hour. Both employees were given cash advances to pay their rent and they both ate meals at the restaurant. Campbell received \$2,980.00 in cash and meals valued at \$4,199.00. Oldfield received \$2,500.00 in cash and meals valued at \$2,829.00. Both stated that they received no other wages in kind or in money.

Mr. Andrew Liotsakis, one of the owners was interviewed in June 2000 regarding the complaint. He stated that the Canada Customs and Revenue Agency was investigating the business and had frozen all of its business accounts. He said he would speak to his accountants, Scott Vohara & Company and make the records relating to Campbell’s and Oldfield’s scheduled work available by June 27, 2000. He did not produce the records by that date and he never provided any records at any date after that. On October 5, 2000 Jill Milne from Scott Vohara & Company did produce partial employee records for the complainants at the request of the investigating officer. She said the Epicurean had not provided any other employer records for the complainants, however, she was not able to comment on whether they had been paid any wages.

## **ISSUE**

The issue to be decided is whether Epicurean owes outstanding regular and overtime wages, statutory holiday pay and annual vacation pay to Ms. Campbell and Mr. Oldfield.

## **EMPLOYERS EVIDENCE**

Ms. Kathy Liotsakis, one of the Directors of Epicurean stated that the two employees, Campbell and Oldfield had been laid off because of the slow down in business. She said that according to her calculations Campbell had worked 1,166.5 hours and at a rate of \$8.00 per hour should have been paid \$ 9332.00. She further stated that according to her records Oldfield had worked 962 hours and at a rate of \$7.50 should have been paid \$7,215.00. She said she was unsure how much money had been advanced to them.

She stated that at the time of their employment Canada Customs and Revenue Agency (CCRA) had frozen the accounts of Epicurean so they had been paying the employees in cash. She said that her calculations of what should have been paid to the employees were the gross wages and that deductions would have to be taken into account. She said that Epicurean had paid the employer's portion of the deductions required by CCRA.

Ms. Liotsakis brought hand written schedules to the hearing, which she said outlined the hours, worked by Campbell and Oldfield. She left photocopies of these schedules.

## **EMPLOYEE'S EVIDENCE**

Mr. David Oldfield stated that he had asked the Epicurean for the records of the schedules he worked in 1999 and he also told them that he needed his T4 slip and separation papers. He said he did not receive any of the items requested, therefore, he made up a schedule of the hours he worked for every month. He said that he had received a cash advance of \$2,500.00 and he had meal charges of \$2,829.00. He said that all advances were written on the sheets. He said that he never received any cheques, only cash.

He stated that if the Epicurean was holding back Income Tax, Employment Insurance and Canada Pension Plan deductions it was the first he had heard of it. He said that the calculations that he put together of what he worked were as accurate as he could make them in the absence of any written schedules from the Epicurean. He stated that he resents the suggestion that he may be lying as stated in the March 5, 2001 letter from the accountants Scott, Vohora & Company.

He stated that he has unpaid bills and notices from collection agencies. Since he has no Record of Employment he said he can not apply for employment insurance. He said when he asked Gus Liotsakis for the money he was owed he told him to apply for welfare.

Ms. Cathy Campbell stated that she and Mr. Oldfield went back to the Epicurean several times to look for the written schedules. She said that the schedule book and the papers had been removed

from the restaurant when Kathy Liotsakis came back to town and so they had prepared their hours to the best of their knowledge for the Director. She said that most of the employees left because they were not being paid. She said that any money advanced was written on the schedule. She said that she and Mr. Oldfield were not paid cash at the same time. She said they were promised money on an ongoing basis.

She stated that the schedules that Ms. Liotsakis brought to the hearing should have been provided when requested. She stated that she has never received a T4, which is necessary for her to file her income tax. She said that she has, therefore, not been receiving her family bonus and GST cheques. She has also not been able to apply for employment insurance because she has no Record of Employment. She said that she has received an eviction notice from her apartment.

## **THE FACTS AND ANALYSIS**

The Employment Standards Branch did investigate the complaints of Ms. Campbell and Mr. Oldfield. The complainants provided the Branch with information showing the hours they worked between February 1999 and December 1999. The employer provided no records pertaining to the employment of the complainants. Epicurean was notified of the complainants' allegations by letters, telephone calls and a formal "Demand for Employment Records". The only records received from the employer regarding the complainants' allegations were partial records from the employers' accountant.

In the absence of records from the employer, the Director examined the complainants' submissions and found them to be credible. These submissions recorded the hours each complainant alleged they worked. The Director found that the hours recorded appeared to be within the bounds one would expect a food server to have worked in a restaurant.

The Director accepted the submissions of the complainants and he further noted that on the partial records received from Vohara that Campbell's rate of pay was recorded as \$8.00 an hour so he accepted this as her rate of pay. The Director did a wage calculation and determined that Ms. Campbell was owed wages and interest in the amount of \$11,536.45 and Mr. Oldfield was owed wages and interest in the amount of \$9,887.41.

The Director further found that in accordance with the *Act* the meals received by the complainants from the employer were not wages for the purposes of the *Act*.

The appeal of the Determination made by the Epicurean states that the schedule sheets provided to Canada Customs and Revenue Agency clearly indicate that there was no overtime ever worked by the two complainants and a March 5, 2001 letter from the Epicurean's accountants attached the schedule sheets.

In a letter faxed to the Tribunal by Ms. Campbell on April 17, 2001 she claims that the schedule sheets were not from Canada Customs and Revenue Agency but were false papers made up by her

at the request of Ms. Kathy Liotsakis to show Maurice Lapierre from CCRA. She claims the papers were prepared following the instructions of Kathy and Gus Liotsakis.

In the Director's submission to the Tribunal he made two points. First, that the work schedules contained in the appellant's submission were not available to the Director at the time of the investigation into the matter. Secondly, he points out that Epicurean and their accountant did not provide records in spite of the fact that they were both served with Demands for Employers Records.

The employer did not produce the records to the Employment Standards Branch during the investigation even though it was requested repeatedly. The records, which were provided with the appeal and at the hearing stage in fact, are different and there is no evidence to assume they are accurate. In fact the letter to the Tribunal from Ms. Campbell claims that the records filed with the appeal from the accountants are false.

A previous decision of the Tribunal, Tri-West Tractor (EST D268/96) deals with the issue of the employer not producing documented evidence as requested by the Director. In that decision the adjudicator, David Stevenson states:

This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate ...and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether the decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

The evidence suggests that Epicurean decided not to provide the records requested to the Director, therefore, the submissions made by the complainants with respect to the hours they had worked were the only records he had to make his determinations. It appears that Epicurean decided to "sit in the weeds" and then produce records at the appeal and hearing stage in order to have a re-examination of the complaint, which as stated in Tri-West Tractor is not the purpose of an appeal under Section 112 of the *Act*.

Based on the facts and the evidence I find that the complainants are owed wages as determined by the Director.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination ER#051971, dated December 21, 2000 be confirmed.

---

**Sheila McDonald**  
**Adjudicator**  
**Employment Standards Tribunal**