

**EMPLOYMENT STANDARDS TRIBUNAL**

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

-by-

Nick DiMambro doing business as  
Pelican Rouge Coffee Company  
("DiMambro")

and

Gordon J. Scott  
("Scott")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Kenneth Wm. Thornicroft
<b>FILE NO.:</b>	97/135
<b>DATE OF HEARING:</b>	June 26th, 1997
<b>DATE OF DECISION:</b>	July 8th, 1997

**DECISION**

**APPEARANCES**

Nick DiMambro                      on his own behalf  
Gordon J. Scott                    on his own behalf

**OVERVIEW**

I have before me two appeals both brought pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on February 11th, 1997 under file number ER #081-450 (the “Determination”). The Director determined that Gordon J. Scott (“Scott”) was not owed any unpaid wages by Nick DiMambro operating as Pelican Rouge Coffee Company (“DiMambro”).

Both DiMambro and Scott have filed separate appeals from the Determination. These two appeals were heard together at the Tribunal’s offices in Vancouver, B.C. on June 26th, 1997 at which time I heard evidence and submissions from both appellants. The Director did not appear at the appeal hearing.

**THE ISSUES ON APPEAL**

DiMambro’s appeal is based on the argument that DiMambro, in his personal capacity, was not Scott’s employer. DiMambro further says that there never was an employment relationship between Scott and the corporate body that operated the Pelican Rouge Coffee Company (namely, 518820 B.C. Ltd.). Further, DiMambro says that Scott is indebted to this corporation in the amount of \$826 and, therefore, seeks a monetary judgment in that amount.

Scott’s appeal is based on the ground that the Determination is correct to the extent that an employment relationship was found to have existed but incorrect as to the finding that no wages were owing.

**FACTS**

DiMambro was formerly a principal of a company that operated the Pelican Rouge Coffee Company (a small coffee shop located in Surrey, B.C.), 493649 British Columbia Ltd. I understand that this company is now defunct and may or may not have been dissolved. In any event, the Pelican Rouge assets were acquired from a bankruptcy trustee by 518820 B.C. Ltd., a company controlled by DiMambro, sometime during the Spring of 1995.

Scott's evidence, which is disputed by DiMambro, is that he began frequenting the coffee shop as a customer and was sometime later offered the position of coffee shop manager. Scott's evidence is that he was trained for the position by DiMambro and Natalie Delmaestro and began working at the coffee shop on July 18th, 1996. This particular point, namely, Scott's employment status has been corroborated by letters from a former Pelican Rouge manager, Natalie Delmaestro, the owner/manager of a neighbouring pizza outlet, Steven Thornton, and from an employee of a neighbouring video store, Tracy Livingstone.

The investigating industrial relations officer found that Scott was engaged by the employer as an employee, however, dismissed Scott's claim for unpaid wages because of the absence of reliable "contemporaneous records".

## **ANALYSIS**

In my view, 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 might add that Scott did provide to the Director a record as to the number of hours worked (Scott claims to have worked 84 hours during the period July 18th to August 11th, 1996). The Director has not provided, in my view, a satisfactory (or indeed, any) explanation for rejecting Scott's claim as to the number of hours worked. 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. Of course, DiMambro says that there was no employment relationship but the Director rejected this assertion. I should say, for my part, it seems clear, as determined by the Director, that Scott was employed at the Pelican Rouge Coffee Company; the only real issue relates to the identity of the employer.

If, as found by the Director, Scott was an employee during some period of time, he must have had some earnings. In the absence of any agreement as to compensation, Scott was entitled to the statutory minimum wage. If, for some of the hours worked, Scott was employed as a "manager", he is not entitled to overtime pay or to be paid on the basis of the statutory minimum daily hours (see section 34 of the *Act*), but is, nonetheless entitled to be compensated at "straight-time" rates for the hours he actually worked.

As for DiMambro's appeal, I would only say that based on the information before me, it would appear that DiMambro was not Scott's employer; DiMambro's personal liability can only flow from a finding by the Director that section 96 of the *Act* applied--a finding that was not made in this case. As for DiMambro's financial claim against Scott, this is not a claim that can be advanced under the provisions of the *Act*--if DiMambro wishes to pursue this matter, the appropriate forum is the provincial Small Claims Court.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter be referred back to the Director for further investigation and the issuance of a varied determination consistent with these reasons.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**