

An appeal

- by -

Tina Argenti  
(the "Appellant")

- 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:** Kim Polowek

**FILE No.:** 2001/43

**DATE OF DECISION:** June 14, 2001

## DECISION

### OVERVIEW

This is an appeal by Tina Argenti pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination dated March 15, 2000 issued by a delegate of the Director of Employment Standards (the "Director"). Tina Argenti ("Argenti") alleges that the delegate of the Director erred in the Determination by not investigating and addressing in the Determination all of her complaints relating to Employer Coast Deli "O" Inc. ("Coast Deli"). These complaints relate to wage statements, hours of work and shift notices, annual vacation entitlement, and timeliness issues with respect to the record of employment and termination pay. Argenti also alleges that the Determination incorrectly documented her complaints regarding meal breaks and hours free from work each week, as well as reported inaccurate dates of termination, payment for last day of work and vacation pay. Finally, Argenti alleges that the Determination does not comply with the principles of natural justice due to the alleged neglect of the delegate of the Director to apply all the evidence submitted and the unsatisfactory investigation of all of her complaints.

The Determination dated March 15, 2000 concluded that Argenti was not dismissed for just cause and was entitled to compensation for length of service. The Determination also concluded that Argenti was entitled to overtime, vacation pay and regular wages.

### PRELIMINARY MATTERS

The Employment Standards Tribunal convened a hearing relating to this appeal on July 17, 2000. At the outset of this hearing and during the process of explaining the hearing process, it became evident that matters related to both document disclosure and the availability of documents required further investigation. Accordingly, the Adjudicator made the decision to refer the matter back to the delegate for the Director for further investigation of the complaint and document disclosure (payroll records).

Section 115(1) of the Employment Standards Act provides that after considering an appeal, the Employment Standards Tribunal may make an order to refer the matter back to the Director of Employment Standards. A referral back to the Director means there is a need for further investigation.

The results of this further investigation were outlined in the delegate of the Director's report dated January 10, 2001. In this report, the Director advised that Argenti was provided with copies of the payroll records on September 22, 2000 and was invited to provide comments and submissions. Argenti questioned the integrity of the documents alleging that the records had been tampered with. The Director found no reason, however, to doubt the accuracy and authenticity of

these records. The Director stood by his findings that Argenti was given a meal break each shift and that the vacation pay calculated in the original Determination was correct.

The Director also found that Argenti had received a cheque for \$63.00 for her last day of work. This \$63.00 was not reflected in his calculation in the Determination as the payroll records did not include this payment. Accordingly, the Director advised that this amount should be deducted from the wages found owing to her in the determination.

The Director stated that the other issues raised by Argenti in her complaint were not addressed in the Determination as they were of a non-monetary nature and of no consequence to her. Furthermore, the delegate of the Director advised that the Director does not have to address every issue raised in a complaint if it does not affect the complainant or where the Director has no jurisdiction over the matter.

In a letter dated January 12, 2001, the Tribunal's Vice Chair advised the parties that this appeal might be adjudicated based on the parties' written submissions and that an oral hearing would not necessarily be held (see section 107 of the Act). Having reviewed the material before me, I am satisfied that it is appropriate to decide this appeal based solely on the written submissions of the parties.

## **ISSUES ON APPEAL**

There are two specific issues to be addressed in this Appeal:

1) Whether Argenti has shown any parts of the Determination dated March 15, 2000 to be wrong in law or in fact.

The Determination dated March 15, 2000 concluded that Argenti was not dismissed for just cause and was entitled to compensation for length of service. The Determination also concluded that Argenti was entitled to overtime, vacation pay and regular wages. The Determination found that Argenti was provided with a meal break as required under the Act and not owed any wages.

With respect to the matters which were addressed in the original Determination, Argenti alleges that the Determination is wrong as she was required to be available for work and work during her meal breaks and that she is owed wages for not having 32 consecutive hours free from work. Argenti also alleges that the calculation of vacation pay owing and paid to her is incorrect.

2) Are the issues raised in Argenti's complaint but not addressed in the original determination, deserving of investigation by the Director?

Specifically, Tina Argenti ("Argenti") appealed the Determination on several grounds which were not addressed by the Director's delegate and can be summarized as follows:

- The delegate of the Director erred in the Determination by not investigating and addressing in the Determination her complaints relating to wage statements, hours of work and shift notices, annual vacation entitlement, and timeliness issues with respect to the record of employment and termination pay.

### **ANALYSIS:**

Has Argenti shown any parts of the Determination dated March 15, 2000 to be wrong in law or in fact with respect to meal breaks, hours free from work and vacation pay calculation? I will deal with each of these issues below.

#### **Meal breaks**

Argenti alleges she was required to remain in the work area and be available for work during her breaks. Specifically, she states that she was required to remain present during her breaks which were interrupted when customers would order from the kitchen or if busy, or if the other employee was in the stock room. She alleges that she could not and did not leave the premises for walks or for any other reason. She alleges that it was not possible to leave for a break on the night shift as there were only two people on shift. She also alleges that she was often over-worked and could not break at all.

The employer, in her submission dated November 23, 1999, indicates that she never withheld breaks from her employees as she viewed them as crucial to the well being of the staff and to group cohesion. She indicates that she always used 3 or 4 employees for the busy morning shifts and always at least 2 employees in the quieter evening shifts.

Two employees provided statements to the delegate for the Director to support the employer. Both of these employees stated that there were at least two employees working together during the day and night shifts. Both advise that they were always given a meal break, especially so in the evening when it was quieter. One of the employees stated that this break was 1/2 hour in length but the other employee did not specifically state how long the meal break provided was.

One employee describes the manner in which meal breaks were permitted. Specifically, employee Jill Krowchuk advised that employees were required to remain on the work site or were permitted to sit outside the business premises for a cigarette during their breaks.

The Director found that the employers' position that the employees were always given a meal break each shift was supported by the evidence of two other employees. The Director did not believe these employees were influenced or coerced by the employer into making those statements as alleged by Argenti. In the circumstance, the Director found that the complainant was given a meal break each shift and consequently, there were no wages owing to her in this

respect. The Director, however, did not address in the Determination the issue of whether Argenti was required to be available for work during her meal breaks.

The issue, however, is not only whether or not Argenti was given a meal break but whether the employer either directly or indirectly required her to be available for work throughout her meal break.

Section 32 of the Act mandates that an employer must ensure that employee receives at least a 1/2 hour meal break every 5 hours. Further Section 32 requires that an employee be paid for the meal break if the employer requires an employee to be available for work during that time.

There exists persuasive written evidence from another employee which corroborates Argenti's allegation that she could not leave the premises for meal breaks. I am unable to find a plausible explanation for why an employer would require employees to remain either at or close to the work site other than that there was an expectation that they might be required to work if the demands of the business so required it. The fact is that if an employer either directly or indirectly requires an employee to be available for work throughout his or her meal break, that break must be characterized as working time.

Accordingly, on the basis of the evidence I have before me, I have concluded that Argenti was required to be available for work during her meal breaks and is owed wages. This matter is referred back to the Director for calculation of wages owing.

### **Hours free from work**

Argenti alleges that she did not have 32 consecutive hours free from work each week throughout her period of employment. Argenti has not provided me with any documentation to substantiate this claim.

Section 36 of the Act requires that an employer must either ensure that an employee has at least 32 consecutive hours free from work each week, or pay an employee double the regular wage for time worked by the employee during the 32 hour period the employee would otherwise be entitled to have free from work.

The timesheets provided by the Employer to the Director (October 6, 1997 to September 17, 1998) were found to show that Argenti had at least 32 consecutive hours free from work each week. The Director concluded that this documentation demonstrated that Argenti had at least 32 consecutive hours free from work each week throughout the period of her employment.

The Director's delegate had the opportunity to comprehensively review the timesheet documents provided by the employer on two separate occasions. I accept the finding of the Director that this documentation indicated that Argenti had at least 32 consecutive hours free from work each week throughout her period of employment. Argenti has not demonstrated that any error was made by the Director's delegate, and therefore the Director's delegate's findings are confirmed

with respect to the finding that Argenti had at least 32 consecutive hours free from work each week.

### **Vacation Pay**

Argenti alleges that the Determination incorrectly calculated her vacation pay. Specifically, she advises that the Determination indicates she was paid \$571.27 in vacation pay when the actual amount paid to her was \$468.63.

I have found that the Director correctly calculated the vacation pay owing to Argenti. The vacation pay of \$468.63 paid to her represents a net amount after all statutory deductions were taken from a gross of \$571.27. This fact is clearly explained in the report from the delegate of the Director dated January 10, 2001 and I accept this to be an accurate calculation.

### **Wages Owing**

The delegate of the Director has acknowledged in his report of January 10, 2001, as well as in an earlier May 2000 letter to the Tribunal, that the wages found owing to Argenti are incorrect. The Determination concluded that Argenti was not paid for her last day of work on September 17, 1998 and was therefore owed wages and vacation pay. The delegate of the Director subsequently learned that Argenti had received a cheque from the employer for her last day of work in the amount of \$63.00. This error occurred as the payroll records in the possession of the delegate of the Director did not include this payment.

In view of the above, the delegate of the Director has concluded that the amount of \$63.00 be deducted from the wages found owing to Argenti in the Determination. I accept the conclusion of the delegate of the Director in that this \$63.00 should be deducted from the wages found owing in the Determination.

### **ANALYSIS**

Are the issues raised in Argenti's complaint but not addressed in the original determination, deserving of investigation by the Director?

I commence my analysis by observing that Section 74 of the Act gives an employee, former employee or other person the right to complain to the director that a person has contravened

- (a) a requirement of Parts 2 to 8 of this Act, or
- (b) a requirement of the regulations specified under section 127(2)(1).

Furthermore, Section 76 requires that a director must investigate a complaint made under section 74. The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if:

- (a) the complaint is not made within the time limit in section 74(3) or (4),
- (b) this Act does not apply to the complaint
- (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
- (d) there is not enough evidence to prove the complaint,
- (e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator,
- (f) a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint, or
- (g) the dispute that caused the complaint is resolved.

The delegate of the Director's concluded in his report dated January 10, 2001 that the other issues raised by Argenti in her complaint were not addressed in the Determination as they were of a "non-monetary nature and of no consequence to her". Furthermore, the delegate of the Director advised that the Director does not have to address every issue raised in a complaint if it does not effect the complainant or where the Director has no jurisdiction over the matter.

I have concluded that the decision of the delegate of the Director to not investigate Argenti's complaints because they were of a "non-monetary nature" to be an incorrect interpretation and application of the Act. Employees have a right to complain to the Director if a person has contravened a requirement of Parts 2 to 8 of the Act. Several of the complaints raised by Argenti and not investigated by the delegate of the Director fall within these parts of the Act. Parts 2 to 8 of the Act, as well as the accompanying regulations, are of equal importance to both employees and employers and no particular Part of the Act should be dismissed as insignificant or of no consequence to an employee. In this regard, the purposes of the Act are an important reminder.

The purposes of the Employment Standards Act are as follows:

- (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
- (b) to promote the fair treatment of employees and employers;
- (c) to encourage open communication between employers and employees;

- (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
- (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
- (f) to contribute in assisting employees to meet work and family responsibilities.

The matters raised by Argenti in her complaint regarding matters within Parts 2 to 8 of the Act are referred back to the director for further investigation and if appropriate, further determination.

### **ORDER**

Pursuant to section 115 of the Act, I order that the Determination be confirmed in all respects except with respect to the delegate's calculation of wages owing and the delegate's finding that Argenti was not owed wages for meal breaks. These matters are referred back to the Director for calculation of wages owing for meal breaks and for a recalculation of the wages award to reflect the deduction of \$63.00.

Furthermore, the other matters raised by Argenti in her complaint regarding matters within Parts 2 to 8 of the Act are again referred back to the director for further investigation and if appropriate, further determination.

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**Kim Polowek**  
**Adjudicator**  
**Employment Standards Tribunal**