Employment Standards TRIBUNAL

An appeal

- by -

Steven Mavrikos and Romeo's Place (Victoria) Ltd.
("Mavrikos")

- 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: David B. Stevenson

FILE No.: 2001/219

DATE OF DECISION: June 14, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Steve Mavrikos and Romeo's Place (Victoria) Ltd. ("Mavrikos") of a Determination that was issued on February 20, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Mavrikos had contravened Part 3, Sections 17, 18, 20 and 21 of the *Act* in respect of the employment of Ginnoula Rounis ("Rounis") and ordered Mavrikos to cease contravening and to comply with the *Act* and to pay an amount of $1,109.50.

Mavrikos has appealed the Determination on several grounds, which can be summarized as follows:

1. Rounis worked for Mavrikos personally, not for Romeo's Place (Victoria) Ltd., and the Determination should not have included the company;

2. Rounis had thirty-two days off during her employment which were not given effect by the Director;

3. The Director was incorrect to suggest Mavrikos did not "warn" Rounis about the amount of time off that was being taken. A verbal warning was given. There were valid reasons for not adjusting Rounis' wage for the time off taken her that the Director did not consider; and

4. There was a verbal agreement that Rounis would work for Mavrikos for approximately one year. The Director should have considered that agreement, among other things, against the expenses incurred by Mavrikos to take Rounis to Greece for six weeks, all expenses paid.

ISSUE

The issue is whether Mavrikos has been able to demonstrate there was any error made in the Determination that justifies the Tribunal cancelling or varying the Determination.

FACTS

The Determination sets out the following findings of fact:

> November 1999, Ms. Rounis began working in Romeo's restaurant as a waitress.
>
> In May of 2000 Ms. Rounis began providing housekeeping and childcare services to Mr. Mavrikos the owner of Romeo's Restaurant. No Record of Employment

was issued by the restaurant and she continued to be paid bi-weekly with cheques through the restaurant. As such I find that she was an employee of both Mr. Mavrikos and his company Romeo's Place (Victoria) Ltd. Her duties included taking care of the children, and cleaning the house. For this work she was paid $692.30 bi-weekly plus 4% vacation pay. It was agreed that there was no set schedule of hours and that the hours were flexible.

July 12, 2000 Mr. Mavrikos took Ms. Rounis and the children to Greece for six weeks. Mavrikos paid for Ms. Rounis' air tickets, accommodations, and food while in Greece. Ms. Rounis also continued to be paid on a regular basis her regular paycheque while in Greece. I find that on a balance of probabilities it would be unlikely that Ms. Rounis was not working while in Greece. Whether or not her duties were reduced or kept the same while in Greece was at the discretion of the employer. The employer did not reduce her pay while in Greece.

At the end of September Ms. Rounis went to Las Vegas taking four days off work (September 27, 28, 29 and October 2).

On October 4, 2000 Ms. Rounis had a motor vehicle accident with the van while completing work related tasks, specifically dropping the children off at school.

It appears that neither party kept specific records of the hours worked by Ms. Rounis. Mr. Mavrikos has provided an accounting of days taken off by Ms. Rounis, but has not provided a detailed account of the days worked by Ms. Rounis. Ms. Rounis has also submitted her account for the final six weeks of employment with Mr. Mavrikos, but again this concentrates on days worked and does not go into specific details about hours worked. As such it is impossible to determine the quantum of overtime worked, however, I find that Ms. Rounis' explanation of the days worked and not worked to be more likely on a balance of abilities. It is likely that Ms. Rounis did make up for any time missed. In part this is because if Ms. Rounis was an awful employee incapable of doing her duties, and eventually taking additional time off, Mr. Mavrikos could have issued written warnings and terminated the position. Mr. Mavrikos did not issue any written warnings, did not ever during period of employment adjust Ms. Rounis' pay for time missed, and Mr. Mavrikos did not terminate Ms. Rounis as she had quit her position.

While Mavrikos has raised some concerns with the findings of fact made in the Determination, for the most part those concerns had little bearing on the conclusion reached. That applies particularly to the comments made in the Determination about the potential for, and the absence

of, any discipline for taking time off. I do not consider those comments to have a great deal of relevance to the complaint, because except for the days off taken during the last three weeks of employment, all periods of absence were paid without any indication that an adjustment for those days off would be made in the future. Mavrikos would not, in any event, be allowed to claw back wages already paid to Rounis without a clear indication from him, acknowledged by her in writing, that such wages were unearned and would be treated as a debt to be paid back from future wages.

The Director concluded Rounis was an employee of both Mavrikos personally and the company. I would not disturb that conclusion. There was sufficient factual foundation for it.

ARGUMENT AND ANALYSIS

The analysis in the Determination is comprehensive. It considers the claim by Mavrikos that Rounis had been overpaid and the argument that the expenses incurred by Mavrikos in taking Rounis to Greece for six weeks should be set-off against any wages payable from the last three weeks of her employment.

In the appeal, Mavrikos says that Rounis agreed to remain in his employ for approximately one year. Except in the outline of the employer's position, there is no reference in the Determination, to such an agreement. Rounis denies Mavrikos' assertion. That assertion was, quite correctly in my view, not addressed in considering the complaint against the provisions of the *Act*. Its relevance was not explained in the appeal and is not generally apparent. Even if there was an agreement by Rounis to remain employed with Mavrikos for a year, as I have indicated above on another matter, such an agreement would only be a factor if the expenses paid by Mavrikos to take Rounis to Greece for six weeks were clearly identified and acknowledged as being a debt payable by Rounis against future earnings if she did not stay for one year. In that case, the matter might have required consideration in the context of Section 22 of the *Act*, but there is no such evidence and Section 20 and 21 of the *Act*, on analysis, were found to be applicable. I can see no error when the analysis on those sections of the *Act* and the conclusion reached is read against the available evidence.

As well, and in the context of Mavrikos' claim that Rounis had been overpaid when the thirty-two days of time off was taken into account, the Director made a finding of fact, based on probabilities, that Rounis made up for any time missed by working additional hours. No evidence has been provided to show that finding of fact was wrong or manifestly unreasonable.

The burden in this appeal is on Mavrikos to demonstrate an error in the Determination sufficient to justify intervention by the Tribunal and he has not met that burden. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 20, 2001 be confirmed in the amount of $1,109.50, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal