

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 -

Marjorie Roubelakis operating as
Eagle Ridge Pizza
(the “Company”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Richard S. Longpre

FILE NO.: 98/298

DATE OF HEARING: July 17, 1998

DATE OF DECISION: August 14, 1998

DECISION

APPEARANCES

Marjorie Roubelakis	for the Company
Steve Roubelakis	for the Company
Katherine Mitchell	for the Company
Emanoil Georgescu	for himself

OVERVIEW

Pursuant to Section 112 of the *Employment Standards Act* (the “Act”), the Company filed an appeal of a Determination by a delegate of the Director. The Determination, dated April 30, 1998 (File No. ER069165), concluded that Emanoil Georgescu, a former employee of the Company, was owed wages for extra hours and overtime hours worked, statutory holiday pay, compensation for length of service upon his termination, vacation pay and interest. The Determination found that the Company owed Georgescu a total amount of \$5418.15.

The Company agreed to pay Georgescu the statutory holiday pay found in the Determination. The Company argued that Georgescu did not work extra nor overtime hours. It argued that Georgescu was paid \$8.00 throughout his employment. It also argued that Georgescu quit his employment.

The Director’s delegate did not attend the hearing.

ISSUES TO BE DECIDED

Georgescu was normally scheduled to work a five-hour shift. The issues are whether Georgescu worked extra hours (e.g., more than his five hour shift) and overtime hours and therefore, is owed \$4373.00, and whether he is owed \$486.00 for one week’s compensation for length of service.

FACTS

Georgescu commenced his employment with the Company in October 1996. Events in early July 1997 resulted in him leaving the Company on July 10, 1997.

Marjorie Roubelakis and Steve Roubelakis operate the restaurant and the take out pizza service. The restaurant is open from 11 a.m. to 11 p.m. on Monday to Thursday; 11 a.m. to midnight on Friday; 4 p.m. to midnight on Saturday and 4 p.m. to 10 p.m. on Sunday. Georgescu worked primarily cleaning the restaurant; however, he also did other work including work in the kitchen and taking orders over the telephone.

Georgescu has considerable experience in the restaurant business. I understand he operated a similar restaurant in the past. He said that he felt being paid properly was a problem in the industry and so he kept a record of the time he worked for the Company on a calendar. He kept the calendar at home. When he filed his complaint with Employment Standards, he gave the delegate a photocopy of the calendar.

Georgescu worked from 4:30 p.m. until 9:30 p.m. Georgescu explained that he often arrived early for his shift. He said that it was necessary to start work immediately in the kitchen or in the dining room preparing for the evening's business. Georgescu also explained that at the end of his shift he often waited for the cook, Socrates Vlachos, for a ride home. Vlachos worked from 3:00 p.m. to 11:00 p.m. Georgescu said that he would purchase one or two bottles of beer from the restaurant while he waited. Georgescu also said that while he waited, he might answer the telephone and take an order if the waitress was too busy. He might also help if the restaurant got too busy for the staff to handle. In order to leave close to 11 p.m. he might help Vlachos clean the kitchen. The performance of work in these circumstances was the basis of his claim for extra and overtime wages.

Marjorie Roubelakis works weekdays from 9:00 a.m. to 5:00 p.m. She prepares the food for lunch service, which begins at 11 a.m. and for pizza take out, which begins at 4:30 p.m. Marjorie Roubelakis said that there was no work for Georgescu to perform prior to 4:30 p.m. She would have the entire day, but for a couple of hours over lunch, to prepare food for the evening.

The Company called Katherine Mitchell to give evidence. She also said that there was no work for Georgescu to perform prior to 4:30 p.m. Mitchell started working at 11:00 a.m. as the waitress in the restaurant. Mitchell explained that well before 4:00 p.m. the lunch service was over. She then assisted Marjorie Roubelakis in preparing for the evening's business.

The Determination made the following conclusion with respect to wages owed:

I find that on the Emanoil Georgescu was, indeed, employed by [the Company] as a cook during the period of the claim. On the balance of probabilities, it appears more likely that you had to employ more than one cook to cover such an operating schedule. Furthermore, your own employee reluctantly stated that Emanoil Georgescu was a cook there. Since you have no further evidence with respect to hours worked by Emanoil Georgescu and, since his appear to be credible record, I find that his record was a record kept "in the moment" and can be used to establish his wage entitlement.

Georgescu started working for the Company in October 1996 for \$8.00 per hour. Like all employees, he was paid in cash for hours worked at the end of the shift. Georgescu explained that at the end of March 1997, he and Steve Roubelakis went out one evening, after the restaurant closed, to another restaurant. After leaving the other restaurant, Steve Roubelakis agreed to give Georgescu a \$1.00 per hour raise. Georgescu said that he was to be paid the increase starting in April 1997. Georgescu acknowledged that he was never paid at the increased wage rate.

Steve Roubelakis disagreed with Georgescu. He said that in July 1997, Georgescu was upset with a waitress, Carol Kellar. Georgescu discussed the problem with him. In the discussion, Georgescu requested a \$1.00 increase in his hourly wage. Steve Roubelakis refused and Georgescu quit. Steve Roubelakis said that Georgescu was not terminated.

In reply, Georgescu said that in early July, Steve Roubelakis offered him the job of the cook, Socrates Vlachos. Georgescu did not want to create a poor atmosphere in the restaurant and he refused the offer. However, Georgescu told Vlachos that Steve Roubelakis had offered him his job. Vlachos confronted Steve Roubelakis with this information. Steve Roubelakis was then upset with Georgescu for telling Vlachos of his offer to him. The discussion led to Steve Roubelakis firing Georgescu. Georgescu ceased working for the Company on July 10, 1997.

With respect to severance pay, the Determination reads:

...[Georgescu] claims that [the Company] dismissed him because you stated you could no longer afford to pay him. Since he was employed for more than 3 months, he is entitled to one week's Compensation For Length of Service.

After the hearing I asked that I be given the original copy of the calendar Georgescu used to keep his extra and overtime hours worked. I received the calendar on July 27, 1998.

ANALYSIS

To summarize, the Company argued that the calendar was a complete exaggeration of extra hours and overtime hours worked. Simply stated, both Marjorie Roubelakis and Mitchell said that there was no work for Georgescu to perform before the beginning of his regular shift at 4:30 p.m. After his shift, Georgescu had up to three glasses of beer waiting for Vlachos. He did not work. The Company also argued that it paid its staff at the end of most shifts. No one had ever made the accusations that Georgescu made in his complaint. Georgescu never made the accusation prior to quitting in July 1997. The Company stated that Georgescu quit his employment when he was refused a wage increase.

The Company filed several letters from present and former employees of the restaurant. Little weight can be put on these letters as only Mitchell was present at the hearing to give evidence and be cross-examined. However, the letters set out in some detail the days and

hours worked by Georgescu and the Company's payment of all outstanding wages to all employees. All of the letters supported the Company's evidence. Most important, all employees said that they had always been paid for hours worked.

Georgescu vehemently disagreed with the Company's evidence. He explained, in some detail, the extra hours and overtime hours he worked. He also explained the angry exchange between Steve Roubelakis and himself that resulted in his termination.

Georgescu had the onus of proof in establishing his original complaint. The Company had to demonstrate that the delegate erred in reaching her Determination.

At the outset, I do not accept Georgescu's claim that he achieved a wage increase in April 1997. He was never paid the higher rate. He was paid each evening after shift. I do not accept that he would have accepted an incorrect payment of wages for 3 1/2 months without raising his claim to the higher amount.

I turn now to the Determination's conclusion that Georgescu provided a credible record of extra and overtime hours worked. It is unfortunate that the delegate was unable to meet directly with either party before issuing her Determination. It is also unfortunate that the delegate did not have the original calendar.

The Company cast great doubt on the Determination's conclusion that extra and overtime wages were owed to Georgescu. Several points call Georgescu's calendar into question. For example, over an eight and a half month period, all notations of extra hours worked on the original version of the calendar were written with either the same pencil, the same crayon, or with one of two pens. Each of these was used in every month to mark the extra hours worked on various days. It would take a very organized person to have the same four writing instruments over ten consecutive months. I also note that in some cases every Wednesday or every Thursday in a month was written with the same writing instrument while other days of the month used other instruments. Also, the month of January 1997 started on a Wednesday. The January calendar starts with three blank spaces - Sunday, Monday and Tuesday - the last three days of December. On the December 1996 calendar, Georgescu marked that he worked 3 extra hours on the final Sunday, 4.5 extra hours on the final Monday and a total of 9 hours on Tuesday. These corresponding spaces on the January 1997 calendar indicate that he worked 2.5 overtime hours on the Sunday and that he did not work on the Monday.

Georgescu's calendar also shows that he worked 28 days in November 1996: he worked extra hours on every one of those days. He worked extra hours on each of the 27 days that he worked during December 1996 and again on the 27 days that he worked in January 1997. From February to July 1997, Georgescu worked Tuesday to Saturday every week. His calendar shows that he worked between 1 to 4.5 extra hours every day that he worked. As the Company argued, even the most successful restaurant would not have to work the same employee extra hours on every day that that one employee worked - for ten consecutive months. As the Company argued, Mitchell and the written submissions from other past and present employees did not suggest that employees worked such hours.

The Determination appeared to find support for Georgescu's extra and overtime hour complaint in the fact that he worked as a cook. Georgescu rarely, if ever, worked as the only cook in the restaurant. Marjorie Roubelakis worked as a cook during the day shift from Monday to Friday. Georgescu worked Tuesday to Saturday until 9:30 p.m. It is not possible that he worked as a cook when Marjorie Roubelakis was not working on Saturday: the restaurant was not open for lunch on Saturday. Similarly, Vlachos worked as a cook from 3:00 p.m. to 11:00 p.m. on Tuesday to Saturday. He started before Georgescu and finished after Georgescu's scheduled shift ended.

Georgescu, Marjorie Roubelakis, Steve Roubelakis, Mitchell testified and all letters submitted by the Company confirmed, that Georgescu was scheduled to work from 4:30 p.m. until 9:30 p.m.: a five hour shift. Georgescu explained that after his shift he purchased a beer, or two, and waited for Vlachos to finish his shift. It was while waiting that he would answer the phone if the waitresses, Vlachos or Steve Roubelakis were too busy. Vlachos, the cook who gave Georgescu a ride to and from work, worked until 11:00 p.m. at straight time. It's possible that on occasion he assisted Vlachos to finish his tasks so as to leave at 11:00 p.m.; however, that was neither regularly done nor was it done with the Company's direction or understanding. It would be difficult to decide if, in these circumstances, the Company was allowing, directly or indirectly (section 35 of the *Act*) Georgescu to work. In any event, it's not possible to conclude that in working in this way Georgescu worked between 40 and 70 extra hours every month.

The delegate's conclusion was based on the balance of probabilities. The evidence before me in the hearing did not support that conclusion. Georgescu likely worked some extra hours during his ten months of employment. However, his record of hours worked was not close to being credible. Accordingly, this aspect of the Company's appeal succeeds.

Section 44 of the *Act* provides that after 30 calendar days of employment, an employee must be given either the statutory holiday off or be paid 1 1/2 times an employee's regular rate for the first 11 hours of work. The Company agreed to pay Georgescu \$138.50. for the five Statutory holidays that he worked.

I turn now to whether Georgescu quit or was terminated by the Company. Steve Roubelakis gave one version of the conversations. Georgescu gave another version. During the hearing, Steve Roubelakis said that Georgescu quit when he refused to give Georgescu a wage increase. Georgescu stated that Steve Roubelakis fired him when he discovered that Georgescu told Vlachos that he had been offered Vlachos' position. To the delegate, Georgescu claimed that the Company dismissed him because it could no longer afford to pay him.

Georgescu explained to me that he did not take Vlachos' position as he did not want to create a "poor atmosphere" in the restaurant. It makes little sense that he then told Vlachos about Steve Roubelakis' offer: that would certainly create a poor atmosphere. However, Steve Roubelakis' description of events on July 10 was vague. The Company did not satisfy me that the Determination's conclusion on severance pay should be overturned. This aspect of the Company's appeal is dismissed.

In light of the above, the Company owes Georgescu \$138.50 for Statutory holiday pay, one week's compensation for length of service at \$8.00 per hour, vacation pay and interest. I refer the matter back to the delegate to determine the correct amount owed to Georgescu.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, the Determination dated April 30, 1998 (File No. ER069165) is referred back to the Director's delegate.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal