

An appeal

- by -

Cindee Grant operating as Small-A-Fare Café  
("Grant" or "Employer")

- 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:** Paul E. Love

**FILE No.:** 2002/340

**DATE OF DECISION:** September 25, 2002

## DECISION

### OVERVIEW

This is an appeal by an employer, Cindee Grant operating as Small-A-Fare Café (“Grant” or “Employer”), from a Determination dated May 27, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”).

The Delegate issued a Determination finding Ron Queen, (the “Employee”), was entitled to wages in the amount of \$1,294.00. The Delegate determined the wage entitlement on the basis of information supplied by the Employer. The Employer has not demonstrated any error in the Determination, and therefore I confirmed the Determination.

### ISSUES:

Did the Delegate err in finding that Mr. Queen was entitled to wages in the amount of \$1294.00?

### FACTS

I decided this case after considering the submission of the Employer, Employee and the Delegate. The Delegate issued the Determination on the basis of information communicated primarily by the Employee, as the Employer failed to supply payroll records.

The Delegate made a demand for the business records of Ms. Grant on May 6, 2002. The Delegate notes that at this time the restaurant was out of business. The Employer did not respond to the demand. The Delegate issued the Determination based on information supplied by the Employee, but also credited the Employer for the sum of \$500.00 which was paid in cash by the Employer. It is apparent that the Employer did not keep proper records concerning the hours worked, and wages for Mr. Queen.

The Delegate found that Mr. Queen was hired at an hourly rate of \$15.00 per hour, and worked as a chef at Ms. Grant’s restaurant from March 2, 2000 to March 26, 2000. The Delegate found that Mr. Queen was entitled to the sum of \$1725.00 plus \$69.00 for the hours worked, less \$500.00 in cash paid to Mr. Queen. The Delegate found that the total amount owed to Mr. Queen was \$1,294.00.

### Employer’s Argument:

The Employer submits that the Delegate made in an error in the facts, and that there is a different explanation of the facts. The Employer argues that she had a medical condition which prevented her from responding to the Delegate. The Employer also submits that the Employee lied about his wage, his job description and his hours of employment. The Employer submitted a hand written submission which contained her recollection of the hours of work. The Employer seeks to cancel the Determination, and have the matter sent back for further investigation. Ms. Grant has made further submissions concerning insubordination and other matters, which do not bear on the wage entitlement issue that she raised in this appeal.

**Employee's Argument:**

The Employee submits, in effect, that the wages set out in the Determination were correctly calculated based on the hours that he worked, at a wage rate of \$15.00 per hour. He further submits that except for two days Ms. Grant was not in the business premises.

**Delegate's Argument**

The Delegate submits that the wage entitlement was correctly calculated on the basis of the information supplied by the Employee, in the absence of business records supplied by the Employer.

**ANALYSIS**

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be canceled or varied.

It is apparent in this case, that the Employer breached the record keeping provisions of the *Act*, by not keeping records of the hours worked by the Employee, and other payroll records as required by section 28 of the *Act*. Further it is apparent that the Employer did not respond fully to the investigation of the Delegate. While the Employer submits that this was because of a medical condition, there is no detail supplied by the Employer, from which one could conclude that the Employer's medical state was such that she was not afforded a reasonable opportunity by the Delegate to participate in the investigation.

It appears that the Employer has not provided any new business records which shed any light on the wage entitlement of Mr. Queen. The Delegate has submitted her version of the hours worked by Mr. Queen. As noted in the Delegate's submission, this was a calculation done either "from memory" or as a result of "records" which have not been produced to the Delegate or in the appeal submission of Ms. Grant. The Employer's calculations were not supported by business records produced to the Delegate. In my view, the Employer has not demonstrated any error in the Determination.

Before leaving this matter, I note that the Delegate has submitted an email message from Sandra MacDonald who was apparently hired by Go Wild Enterprises to help get Ms. Grant's business on track. This email is dated July 5, 2002 and was obtained by the Delegate well after the Employer filed her appeal. The email submitted confirms the wage rate advanced by the Employee, which was determined as a fact by the Delegate. This evidence is disputed by Ms. Grant. As this is apparently new evidence, which was not relied upon by the Delegate in making the original Determination, I have not considered this evidence and place no weight on it. This is evidence which should have been gathered by the Delegate during the investigation, rather than gathered by the Delegate and submitted on appeal.

For all the above reasons, I dismiss the Employer's appeal, and confirm the Determination.

**ORDER**

Pursuant to s. 115 of the *Act* I order that the Determination dated May 27, 2002 is confirmed with interest in accordance with s. 88 of the *Act*.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**