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 -

Twin Islands Management Ltd., operating
as Blenz Coffee
("Twin Islands")

\- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator:	**Paul E. Love**
File No.:	**98/365**
Date of Decision:	**October 6, 1998**

DECISION

OVERVIEW

This is an appeal by Twin Islands of a Director's Determination, dated May 20, 1998 that held that the employer did not have just cause to terminate the employee. The employer also alleged errors generally with respect to the calculations of the employee's entitlement for overtime pay, and other pay matters.

ISSUES TO BE DECIDED

Did the Director's delegate err in her finding that there was not just cause for the termination of Venus Baeza?

Did the Director's delegate err in her finding of the amounts due and owing for overtime pay and other wage entitlements?

FACTS

The employer carries on the business of operating a Blenz Coffee Shop in Vancouver, located on West Broadway. Venus Baeza was an employee. At the time of termination she was an assistant manager and had received a number of pay increases. At the relevant time Tyler Gardner was the manager and son-in-law of the owner of the Twin Island.

The Director's delegate found that Ms. Baeza was dismissed because she was sexually harassed by Tyler Gardner and Mr. Gardner's wife found out about the harassment so Mr. Gardner dismissed Ms. Baeza. The Director's delegate rejected the defence of just cause advanced by the employer. The employer alleged to the Director's delegate that Ms. Baeza had been late on one occassion in the opening of the store, and caused a customer service complaint. The Determination deals with the findings of fact and analysis on the issue of cause in 3 ½ pages.

I quote the entire submission of the employer in support of its argument of just cause for the termination:

(f) The various incidents leading to the dismissal were discussed with the employee at the time of their occurrence and we had every right to terminate employment. The fact that we did not act sooner should not be construed as condoning the action.

There is no new evidence offered or submission developed by the employer concerning the findings of the Director's delegate. The submission in essence is that the facts justified the termination. I have not been pointed to any error made.

The Director's delegate determined on the basis of a review of the records that Ms. Vaera was entitled to $1,955.80 for overtime wages, plus 4 % vacation pay on $321.75 which equals $12.87. He also found that she was entitled to interest on the wages in the amount of $120.64. The total outstanding amount is $2,411.06.

The employer alleged that a number of calculation errors were made in the Determination. I set out the alleged errors below:

(a) Our work week runs from Thursday to Friday with bi-weekly pay periods. When calculated total weekly Hrs. The results are substantially different from the Calendar week calculations applied.

(b) Hrs. Worked on Stat. Holiday were paid by adding again ½ the Hrs. Worked to the total Hrs. ie 76 Hrs worked, incl. 8 hrs on a Stat Holiday would result in 80 Hrs pay.

(c) Errors were made in calculating time & half, see April 55, 96 for example.

(d) The employee took his ½ Hr. meal break when working 5 Hrs. plus resulting in 7 ½ Hrs worked during an 8 Hr. shift. The fact that the Employee was paid for 8 Hrs does not entitle him to claim for time & half. Letters from Kristy Darychuck and Derek Groucher are attached.

(e) During her employment the Employee never made any claims nor raised the Question of Overtime, until well after termination employment for good and valid reasons. The Employee like everyone else was on an honour system to post their Hrs. each day.

(f) *(relates to reasons for dismissal)*

(g) The calculations by the Employment Standards Representatives err on various parts : 1. The hourly rates claimed by the employees are wrong, 2. The amount paid in total is $12,539.72 not 12,004.09 as stated on the

> determination, the employee claimed for hrs she did not work, (see Oct. 2, 1996) she worked for other employees without the consent of management, bringing her Hrs over the 40 Hr weekly limit.(sic)

Ms. Baeza's response to the employer's submission reads as follows:

> As to the nature of the owner's letter in general, he appears to have written one letter to combat several employee complaints, without specific attention to each employee's individual complaint. There are references to "his", when , in my case, it should definitely be "hers". Other errors include an accusation of overtime calculation (April 55, 96), at this time I was not even employed by Mr. Simon. As such, I can only surmise the owner wished to write a blanket statement of appeal, which would lessen his paperwork load but did not address each claim as unique. ...

The Director's delegate prepared a detailed response to each of the employer's allegations. It is not necessary for me to set out the substance of the responses to dispose of this appeal. It is clear from the evidence before me that a portion of the submission of the employer which related to the overtime calculation did not relate to Ms. Baeza as she was not an employee at the time alleged (April 5, 1996). The Director's delegate stated:

> Had the employer been more specific regarding the rates of pay I could have reviewed them and made any corrections required. The Complainant's evidence was that the wage rates were $7.25 at the date of hire until November 7/96; $7.75 effective November 8th until March 25/97; and $8.25 effective March 26/97. With regard to the amount of wages paid by the Employer, the figure used in the Overtime Calculation report, $12004.09, was taken directly from a payroll provided by the Employer

The Director's delegate made certain findings with regard to the extent to which the parties cooperated in their provision of records:

> The Complainant provided the Delegate with daily records of hours worked. The payroll records were requested of the Employer's store manager, Tyler Gardner, on September 19th. He stated that he was not sure whether he could comply or not, that he would talk to the owner in Kelowna. The Delegate requested that he call back as soon as possible. No call was received by the Delegate until September 22nd. The records were not produced and a Demand for Payroll records was issued September 25/97 for compliance by October 10/97. The Employer was contacted by telephone by the Delegate on October 15th. The records were not provided and a Penalty Determination was issued on October 24, 1997 for failure

> to produce records as required. The records were provided to the Delegate by Mr. Simon, the owner, during a meeting at the Branch on November 17, 1997.
>
> The payroll records provided by the Employer consisted of daily time sheets with the employee's name, date worked and hours worked, as well as a payroll detail sheet with a summary of all wages paid to the employee per pay period.
>
> The Employer's daily records were compared to the Complainant's records. There were no major inconsistencies. Duplicate entries on the payroll detail sheet were excluded and the gross wages amount revised accordingly, and hours for the training period were included in the calculation.
>
> An overtime calculation was prepared using the Employer's own records, with the above-noted revisions.
>
> The calculation shows that there were wages owed for overtime, (see attached). The Delegate attempted on two separate occasions, May 7th and 11th to contact Mr. Simon to review the calculations and the evidence of "just cause" with him. The phone calls were not returned.

ANALYSIS

Issue # 1: Just Cause for Termination

The burden in this case rests with the employer to demonstrate a reason why I should interfere with the Determination. It is clear that the Director has made findings of fact in the issue of termination. He was in a position to assess the credibility of Ms. Baeza and of Tyler Gardner, the store manager. The Director's delegate appears to have rejected the employer's evidence on the basis of credibility of the witnesses. He also made a finding that the employer's story was improbable, as on a date that the employer alleged discipline had been issued against the employee, the employer also promoted the employee to assistant manager. The Director's delegate found that there was one incident which occurred which merited some form of discipline, but did not merit dismissal. In particular the Director's delegate found as follows:

> The Complainant was allegedly told by Mr. Gardner that she was being fired due to 3 complaints that were well documented. According to the Complainant, she was never provided with written notice of the termination, but was told prior to going on vacation that there were complaints against her, and she was being given notice. She stated to the Delegate on more than one occasion that she was not made aware of the specific complaints by Mr. Gardner or anyone else, either verbally or in

> writing prior to being advised that she was being terminated. The Complainant stated that she believed she was fired due to the unwelcome behaviour of Mr. Gardner and the discomfort of his wife with the knowledge of this behaviour. Both the Employer, Karl Simon, and his management representative, Tyler Gardner have denied that there was any sexual harassment by Mr. Gardner, and that Ms. Baeza was terminated for "just cause". I prefer Ms. Baeza's evidence.

I, note further that the employer refused or neglected to discuss with the Director's delegate the facts concerning the dismissal. The time for participation in an investigation is when the matter is before the Director's delegate. I have read and reviewed the facts found and conclusions drawn by the Director's delegate. This case is based almost entirely on credibility. I was not pointed to any errors in the Determination. I therefore confirm the finding of termination without notice in the Determination.

Issue #2 Arithmetic Errors:

In this appeal, it is incumbent on the employer to prove its case to a balance of probabilities standard. This is an appeal not a first instance finding of the facts. In essence the employer's submission amounts to a bare allegation that there was an error in the Determination. It appears to me unclear whether the arithmetic submissions apply to Ms. Baeza's claim or the claim of some other male employee. The Director's delegate responded in detail to the allegations of error.

The employer has not demonstrated any error in the calculations, or the effect of any of its statements on the entitlement of the employee.

It appears from the evidence in this case, that the employees were required to be available for work during their break. Under the s. 32(2) of the *Act* the employees are therefore entitled to be paid for the break.

Section 32 of the *Act* reads as follows:

(1) An employer must ensure

(a) that no employee works more than 5 consecutive hours without a meal break

(b) that each may break lasts at least ½ hour.

(2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

The employer has not demonstrated any error in the Determination on this point.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated May 20, 1998 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal