

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-

Alpha Yaya Diallo operating as “Bafing Productions”

(“Diallo” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/361

DATE OF HEARING: September 23rd, 1998

DATE OF DECISION: November 2, 1998

DECISION

APPEARANCES

Alpha Yaya Diallo on his own behalf
Jennifer Camara for Aboubacar Camara
No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Alpha Yaya Diallo operating as Bafing Productions (“Diallo” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 27th, 1998 under file number 084-158 (the “Determination”).

The Director’s delegate determined that Diallo owed his former employee, Aboubacar Camara (“Camara”), the sum of \$3,170.92 on account of unpaid wages and interest. Diallo takes the position that he does not owe any wages to Camara.

FACTS AND ANALYSIS

Diallo testified on his own behalf before me. In addition, Diallo called Kevin Finseth, James Wong and and Sadou Diallo as witnesses. Camara testified on his own behalf and did not call any other witnesses. No one attended the appeal hearing on behalf of the Director.

At the outset, I should note that none of the employer’s witnesses--other than the employer himself--were in a position to give any relevant evidence with respect to Camara’s claim for unpaid wages. Mr. Finseth, Diallo’s record producer (Diallo is an apparently highly regarded musician and band leader), frankly conceded that while he was generally aware of the fact that Camara joined Diallo’s band as a dancer/percussionist in July 1995, and that Camara toured and performed with Diallo’s band in 1995 and 1996, he (Finseth) had no personal knowledge about any financial arrangements that might have been made between Diallo and Camara. Mr. Finseth confirmed that Diallo was and still is the leader of the band and that Diallo alone is responsible for generating work and meeting the band’s expenses. All other band members (2 dancers and 4 musicians) were Diallo’s subordinates.

Mr. Finseth also confirmed that during 1995 and 1996, Mr. Camara--who only arrived in Canada from Guinea, Africa in July 1995--was entirely dependent on Diallo, living in Diallo’s house and sharing all of his meals with Diallo. Finally, Mr. Finseth confirmed that Diallo’s band performs at music festivals, clubs and other benefits across the country. In addition, from time to time, the

band offers “drop-in” workshops for members of the public who are charged an admission fee and are in turn instructed in the nuances of African music and dance.

Similarly, Mr. James Wong, while generally familiar with the relationship between Diallo and Camara, had no personal knowledge whatsoever regarding any agreements between the two with respect to wages or other forms of remuneration. Mr. Wong was generally aware of the workshops which were primarily held at a Vancouver facility known as “Main Dance”. Mr. Wong’s evidence is that there were relatively few such workshops conducted by Diallo’s band and that these workshops were poorly attended and not profitable.

Diallo’s final witness, his brother Sadou Diallo, had only arrived in Canada the week prior to the appeal hearing and had no personal knowledge about any of the matters set out in the Determination.

For his part, Diallo’s evidence was a pastiche of disconnected thoughts and observations that often had little, if any, relevance to the issues raised by the Determination. Diallo’s testimony, rambling and often internally inconsistent, is of limited assistance to me. Despite repeated requests by me to focus his comments on the matter of Camara’s wage claim, Diallo was unable or unwilling to do so preferring to testify about how Camara had betrayed his friendship and how his former spouse had caused him financial and personal distress.

As best as I can gather, Diallo’s position is that he does not owe Camara any money, that Camara is an untruthful person and that the Director’s delegate conducted a sloppy investigation. Diallo says that he incurred some \$7,000 in expenses in bringing Camara to Canada, however, even if true, I do not see, nor was Diallo able to explain why, that outlay is relevant to Camara’s claim for wages earned while a band member. Diallo says that Camara verbally agreed to repay this money, but again, even if true, that agreement (which is denied by Camara) would have to be enforced by way of an action in the provincial court--it is not relevant to Camara’s claim for unpaid under the *Act* (see sections 21 and 22).

Diallo also says that he should be credited for some \$7,000 in room and board expenses which he underwrote during the time that Camara was living in Diallo’s home. Again, without commenting on the merits of this claim, Diallo is not entitled to simply withhold wages otherwise owed on the basis of an alleged right to be reimbursed for room and board costs. Diallo maintains that he paid Camara some \$4,000 in cash but was unable to produce any receipts evidencing such payments; Camara denies having received such cash payments and thus Diallo’s position must be rejected for lack of evidence.

Camara’s testimony, which I find to be credible, was that he arrived in Canada in early July 1995 having been recruited to join Diallo’s band. He immediately commenced work as a dancer with the band playing local engagements as well as touring the country. He left the Diallo’s band in the latter part of December 1996. During this period he often participated with Diallo and other band members in public “workshops” held at “Main Dance” in Vancouver and the Bonsor Recreation centre in Burnaby; these workshops were intended to provide a supplementary source of income when the band was in town and on hiatus from touring--the touring season is primarily the spring and summer months.

While I accept that Camara is entitled to advance a claim under the *Act* with respect to the wages earned while performing as a band member--wages that he is owed under his original written agreement with Diallo--I cannot accept that he is entitled to claim under the *Act* for "teaching" at various workshops. In total, the delegate awarded Camara \$2,328 (plus an additional 4% adjustment for vacation pay) on this aspect of his unpaid wage claim. My note of Camara's evidence with respect to the workshops is that the profits earned through such endeavours were to equally divided among the workshop instructors; my note of his evidence is as follows:

"We did over 100 workshops. We [*i.e.*, Diallo and Camara and typically two other individuals] would divide up the profits. We had to pay for the cost of the room, for flyers and posters. We did the posters ourselves; I posted them with others' help. We charged a \$20 or \$15 admission fee. We would share the profits."

Camara maintains, and the Director's delegate accepted, that Diallo failed to pay Camara his share of the earnings from the workshops. The Director's delegate did not make any finding as to whether or not these workshops were, in fact, profitable; indeed, the rather unsatisfactory evidence before me on this point leads me to conclude that these workshops were not profitable. The delegate proceeded on the assumption that Camara's instructional activities at these workshops were undertaken as an employee of Diallo and thus Camara was entitled to be paid for his time based on the minimum wage and the minimum hours of work provisions contained in the *Act* and *Regulation*.

However, in my view, Camara's own evidence clearly shows that the relationship between the parties, at least insofar as the "workshops" were concerned, was not an employment relationship but rather a partnership relationship (see section 2 of the *Partnership Act*). A claim for a share of partnership profits is not one that can be advanced as an unpaid wage claim under the *Act* (see *Caba Mexican Restaurants Ltd.*, EST Decision No. 370/96), rather it must be advanced under section 27(a) of the *Partnership Act* by way of an ordinary civil action.

Accordingly, in my view, the Determination must be varied by cancelling the award of wages and concomitant vacation pay relating to the "workshops", an amount I calculate to be \$2,421.12 (\$2,328 x 1.04).

ORDER

Pursuant to section 115 of the *Act*, I order that Determination be varied to reflect an amount owing by Diallo to Camara on account of unpaid wages of **\$531.32** together with interest to be calculated, as and from December 21st, 1996, by the Director in accordance with section 88 of the *Act*.

By way of the Determination, a \$0 penalty was also assessed for Diallo's failure to comply with the payment of wages provisions contained in the *Act*. Inasmuch as I have confirmed a contravention by Diallo of these provisions of the *Act*, the \$0 penalty is confirmed.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal