

An appeal

- by -

Ty & Cody Holdings Ltd. Operating as Subway  
(“Subway”)

- 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:** James Wolfgang

**FILE No.:** 2001/201

**DATE OF HEARING:** July 9, 2001

**DATE OF DECISION:** September 24, 2001

## DECISION

### APPEARANCES:

Shelley Mackie	representing Subway
Mathew MacDonald	representing himself
Mike Vaast	representing himself
Nadine Bazett	representing herself
Elizabeth Lyle	representing the Director of Employment Standards

### OVERVIEW

This is an appeal by Ty and Cody Holdings Ltd. Operating as Subway (“Subway” or the “Employer”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) on December 20, 2001. The Determination found Subway owed Michael Vaast (“Vaast”), Tamara Gariepy (“Gariepy”), Mathew MacDonald (“MacDonald”) and Nadine Bazett (“Bazett”) \$2,004.09 for minimum wages, overtime, statutory holidays, vacation pay and compensation for length of service. The Determination assessed a penalty of \$0.00 for violation of Section 18(1), 35, 40(1) & (2), 45, 58(3) or any other section within Parts 3,4,5,7 & 8 of the *Act*.

There was a Demand for Employer Records issued by the delegate of the Director on October 04, 2000 for all four former employees. The records were to be delivered to the Employment Standards Branch by 1:30 pm October 12, 2000. The delegate claims the records have not been delivered as of the date of the hearing therefore the employee’s records were used for the calculation of monies owed. Subway claims they dropped the records off at the Branch on or about November 02, 2000. Those records have never been found and a new copy was never supplied by Subway.

The appeal by Subway was filed with the Tribunal after the deadline for appeal. The matter was the subject of a written decision. The adjudicator in that case found the Determination had been filed with the registered and records office of Ty & Cody Holdings on December 27, 2000 and was within the appeal period. Subway did not appeal until after the expiry of the appeal date of December 28, 2000 however the adjudicator extended the appeal period to December 29, 2000 making the appeal timely.

At the hearing it was noted an error appeared to have been made in the calculation of the amount of compensation for length of service owed Bazett. As a result of the investigation by the delegate a “revised Determination” was issued carrying the original date of December 20, 2000.

The covering letter was dated July 09, 2001. The Determination now finds Subway owes Bazett \$1,005.06, Gariepy is owed \$565.79, MacDonald is owed \$199.14 and Vaast is owed \$454.89 for a total of \$2,224.88.

The appeal was heard by way of an oral hearing on July 9, 2001. The witnesses who testified were:

- Wendy Murphy, former employee of the Employer
- Michelle Burgess, former employee of the Employer
- Jason Fraser

Evidence was taken under oath from all parties.

An attempt to mediate the dispute was rejected by the parties.

## **ISSUES**

Does Subway owe Bazett overtime, statutory holidays, vacation pay and compensation for length of service?

Does Subway owe Gariepy for wages and vacation pay?

Does Subway owe MacDonald for wages and vacation pay?

Does Subway owe Vaast for wages, vacation pay and compensation for length of service?

## **ARGUMENT**

Subway operates a sandwich shop in Duncan. It is one of three franchises operated by Ty and Cody Holdings Ltd.

### **Nadine Bazett**

Nadine Bazett was employed by Subway as a Sandwich Artist at the rate of \$7.15 per hour from March 1998 until August 23, 2000.

Bazett was terminated for refusing to report for work while the air conditioning system was broken. According to Subway, no other employees complained about the heat during the time the air conditioning unit was broken.

Subway indicated the employees had contacted the WCB. The WCB conducted an investigation and, according to Subway, determined they were doing all they could with the problem. Subway

claim they contacted the air-conditioning company as soon as the system broke down. The company came and investigated the problem and left to order the necessary parts. They claim the a/c system was repaired as soon as the service company received the parts.

According to Bazett, when she returned from vacation and reported for work the air conditioning system had been broken for several days. The exact number is in dispute however it was between 4 and 8 days. The temperature in the kitchen area was between 33 and 37 degrees. Bazett claims she went home each night with heat stroke symptoms.

The WCB responded to the request to check the work environment. Bazett was on shift when the WCB Inspector arrived and showed him around the shop. She signed the inspection sheet but claims she did not telephone the WCB. The WCB found there was a violation of the Occupational Health and Safety Regulation 4.80.

Bazett claims Subway did nothing to relieve the problem in the kitchen area. She states the employees left the front door open but were not allowed to leave the back door open for security reasons. Subway did not provide for additional breaks to be taken to relieve the problem. One employee brought a fan from home and one of the customers brought another fan for their use.

Finally, after working two eight hour shifts with no one half hour breaks, she refused to return until the system was repaired. She was first advised by the supervisor and later by the owner that if she did not report for work they would consider she had quit.

The delegate filed a copy of the WCB Inspection Report dated August 24, 2000 that states:

The employer has failed to ensure that temperature levels within the indoor work environment are maintained within acceptable comfort ranges. Observed temperatures at 16:40 pm today indicate 36 degrees centigrade.

This is in contravention of the Occupational Health and Safety Regulations Section 4.80

The employer must ensure that temperature and humidity levels within the indoor work environment are maintained within acceptable comfort ranges, as far as is practicable. Acceptable levels during summer would normally be from 23.3C. to 27.2C ensure (sic)that air conditioning systems are repaired and maintained to reduce this excess temperature or provide other effective means.

### **Tamara Gariepy**

Tamara Gariepy was employed by Subway as a Sandwich Artist at the rate of \$7.15 per hour from December 31, 1999 until March 27, 2000. According to Subway, Gariepy was caught stealing from the shop and was terminated. She was also barred from the mall where the shop is

located. They claim they gave her final cheque to her on her last day of work and were waiting for the accounting firm to provide a copy of the cancelled cheque.

Subway, in a later submission to the Tribunal, admit they had not requested a copy of the cancelled cheque as the accounting firm charges \$30.00 for a copy. Gariepy was charged and, according to Subway, the RCMP have a warrant out for her arrest.

Gariepy did not attend the hearing however, the delegate had been in touch with Gariepy and Gariepy claims, as of March 22, 2001 she had not received any payment for wages from Subway. The Employer has never supplied copies of the employment records for Gariepy or a copy of the cancelled cheque. The delegate had indicated in writing if Subway could produce the cancelled cheque the award to Gariepy would be withdrawn.

### **Matthew MacDonald**

Matthew MacDonald was employed by Subway as a Counter Server at the rate of \$7.15 per hour from July 12, 2000 until July 21, 2000. Subway claim he came to them under false pretences. They claim he went to the supervisor with a “work experience form” from the local school. He was put to work on a 30 hour Work Experience Program. This was a local school program that allowed students to receive 30 hours of work experience for which they would receive credits. After working 26 hours MacDonald found he was not going to receive any credits, as he had not been properly enrolled. He then sought to get paid for the time worked. Subway claim they went to the Head of the Work Experience Program and he gave MacDonald his credits, therefore they should not be required to pay him for the time worked. Subway also claim MacDonald did not return his uniform worth \$45.00.

MacDonald said a friend of his had worked under the work experience program and was quite satisfied. As a result, MacDonald picked up the forms from the school and presented them to Subway. He later found this was not the proper procedure and he would not be credited with the time worked. He claims he has never received credit for the time worked at Subway and that he returned the uniform to the shop when Subway refused to pay him.

### **Michael Vaast**

Michael Vaast was employed by Subway as a Sandwich Artist at the rate of \$7.15 per hour from December 27, 1999 until May 01, 2000. He was terminated May 01, 2000 for allegedly taking money from Subway. It is the policy of Subway to take money from the till and deposit it into the on-site safe approximately on an hourly basis.

On the day in question Vaast claims he took approximately \$500.00 from the till to the back of the restaurant to drop in the safe. As he was taking the money to the back of the shop a customer came in and he asked the other employee in the back if they would take care of the customer. The employee went from the back to the front of the store and did not see Vaast put the money in

the safe. He claims he placed the money in the safe but forgot to spin the drum. When he later went back to check the safe he found the money missing. There were three employees on shift at that time however one of them had gone to another outlet for some produce and was away during the period of the theft. The two employees on shift deny taking the money. The RCMP have investigated and closed their file without any charges being laid. When Subway became aware of the missing money they terminated Vaast. Subway does not believe they should be liable for paying Vaast any compensation for length of service because of the missing money.

Subway admit they owe Vaast wages in the amount of \$261.69 but withheld paying him pending the return of his uniform. Vaast claims he dropped his uniform off at the sandwich shop.

At the hearing it was pointed out that withholding wages without authorization is a violation of Section 21 (1) of the *Act*. It is my understanding Subway were prepared to pay Vaast the \$261.69 following the hearing however they were still disputing the payment for length of service.

## **THE FACTS AND ANALYSIS**

### **Nadine Bazett**

Contrary to the position of Subway, the WCB Report is undisputable evidence indicating a violation of the Occupational Health and Safety Regulations Section 4.80. There did not appear to be any real effort by Subway to relieve the conditions in the shop. I can understand there can be a delay when a service company needs to order parts before repairing the system however other measures could have been taken by Subway to make the work environment more acceptable. On the contrary, the employees and the customers attempted to improve the work environment. Bazett had the right to refuse to work under the condition present at the time. She is therefore entitled to compensation for length of service. Subway did not present any acceptable evidence to counter the Determination in the area of overtime, statutory holiday pay or vacation pay.

As there is no claim for regular wages for Bazett; the claim for overtime, statutory holiday pay, vacation pay and compensation for length of service and interest in amount of \$1005.06 as established in the revised Determination is confirmed.

### **Tamara Gariepy**

There was no evidence from Subway indicating Gariepy had been paid her final wages. Subway claim they had requested a copy of the cancelled cheque from their accounting firm. Subway later admitted they had not requested a copy of the cheque as the accounting firm charged \$30.00 for a copy. The amount owed Gariepy in the Determination is \$565.79. It would seem to be good business practise to invest \$30.00 to save \$565.79. It is not a matter before the Tribunal if there is a warrant for her arrest as that is a criminal matter and Gariepy is entitled to wages for time worked. Gariepy is entitled to be paid wages for the time she was employed by Subway.

**Matthew MacDonald**

Subway indicated at the hearing they had given several students employment under the Work Experience Program without any incidents. If they were experienced in the program they should have been aware of the requirements to have the forms completed and signed before the student started work. Subway presented no evidence to indicate MacDonald had received credit for the time worked and therefore, on the basis of probabilities, I accept no credits were given to MacDonald and he is entitled to be paid for the time worked.

**Michael Vaast**

Vaast was employed for over four months without any apparent problem. Section 21 (1) of the *Act* prevents an employer from withholding money from the wages of an employee for any reason. The question of whether Vaast took the money is not a matter the Tribunal can deal with if there is no evidence to prove the case. It also is a criminal matter and it had been referred to the RCMP for investigation. They apparently completed their investigation without any charges being laid.

As there is no proof Vaast took any money he was discharged without proper notice therefore is entitled to be paid compensation for length of service. If Subway has not paid the \$261.69 to Vaast he is entitled to the payment of wages, vacation pay and interest in addition to compensation for length of service.

There is an obligation on the appellant to prove the Determination is wrong, either in fact or in law. Subway has failed to meet that obligation and the Determination is confirmed as revised.

**ORDER**

In accordance with Section 115 of the *Act* I confirm the “revised” Determination by the Director dated December 20, 2000 less any money which may have been paid Vaast. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

---

**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**