

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 -

Christian Thibodeau
("Thibodeau")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/488

DATE OF HEARING: October 30, 1998

DATE OF DECISION: November 17, 1998

DECISION

APPEARANCES

Christian Thibodeau (by telephone)	The Appellant
Dan Manarovici	Interpreter for Thibodeau
Steven J. Saba	Counsel for the employer
Immaculata (Mac) Figliuzzi	Office Manager of the employer

OVERVIEW

Christian Thibodeau appeals, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), a Determination by a delegate of the Director of Employment Standards dated July 7, 1998. The delegate was unable to confirm that Thibodeau was owed either wages or car expenses by his former employer, Freden Fine Foods Ltd. (“Freden” or “the employer”).

ISSUES TO BE DECIDED

Thibodeau claims pay for work between January 17, 1997 and January 28, 1997. The delegate was unable to establish that he actually worked in that period, indeed, she refers to evidence which is to the contrary. Thibodeau claims on appeal that he has proof that he worked in the period and that he is owed both “salary and commissions” for the work. Freden says that he was hourly paid employee, not entitled to commissions, and that it has no record of work by him in that period.

Thibodeau claims car expenses for the period January 17, 1997 to January 31, 1997. The delegate found that the car was rented for Anderson’s Restaurant. Thibodeau on appeal claims that Freden paid \$200 towards the car and that he was instructed by his employer to rent the car. The employer says that it did not tell Thibodeau to rent a car, and would not have, as Freden had company vehicles available.

At issue is the matter of whether or not Thibodeau is owed commissions for sales in the period September 15, 1997 to October 29, 1997. The delegate has found that Thibodeau is not entitled to commissions but only hourly wages.

FACTS

The delegate was led to understand that the period of employment was August 18, 1996 to October 31, 1997. But as matters are presented to me it is clear that there are two separate

periods of employment. Thibodeau tells me that he quit working for Freden on or about the end of January, 1997 and I find that is exactly what he did, namely, sever his employment. He was then approached by Mac Figliuzzi, Freden's Office Manager, several weeks later and she suggested that he might return to the company as an employee. Thibodeau did just that. He began work on the 10th of March and worked to the 31st of October, 1997 before quitting once again.

Thibodeau's Complaint was filed on the 24th of November, 1997. On filling out the Complaint, he claimed regular wages for the period January 17, 1997 to January 28, 1997, commissions for only the period September 15, 1997 to October 29, 1997, and car expenses. On appeal, Thibodeau expands his claim. Now he claims commissions, not only in the period September 15 - October 29, 1997, but also January 17 - 28, 1997.

Thibodeau's claim, as amended, is for wages and commissions covering the period January 17 - 28, 1997. That is disputed by Freden. It is, for reasons that I will outline below, not a matter that I need decide for the purposes of this appeal.

There is also a dispute over the rate of pay for the period September 15 to October 29, 1997. Thibodeau claims that Freden agreed to pay him on the same basis as another employee, Bim. He describes that as salary plus commissions. Freden's response is that it simply does not pay commissions on top of salary; that its employees are paid either an hourly wage, or commissions, not both; and that Thibodeau is entitled to nothing beyond his hourly wage. I find, on the balance of probabilities, that Thibodeau was paid by the hour. I am shown payroll records which appear in order. They show that Thibodeau was paid on that basis alone, from the 10th of March right through to the end of October, initially, at a rate of \$8.00 an hour, and later, \$9.00 an hour. The payroll records show, contrary to what Thibodeau appears to believe, that Bim was being paid commissions, and advances against commissions, not an hourly wage plus commissions. It is apparent that Thibodeau was asking for a raise in pay but there is no evidence to indicate that Freden agreed to pay him commissions, a salary and commissions, or an hourly wage plus commissions; or to any increase in pay beyond that which took him to \$9.00 an hour.

Thibodeau makes much of the fact that Freden issued him blue cheques and red cheques. He says that the blue ones were for commissions and the red cheques for wages. Yet he offers no proof of that while Freden admits to having red cheques and blue cheques and is able to offer an entirely reasonable explanation for the two sets of cheques. It says that the red ones are computer generated and that they are used for paying commissions and hourly wages, whichever of the two an employee earns. The blue cheques are said to be used when the system for generating cheques with a computer is down or not convenient. I accept that explanation, nothing clearly to the contrary, as it is consistent with common practice and the payroll records that I am shown.

Thibodeau rented a car from the 17th of January, 1997 to the 31st of January, 1997. Anderson's Restaurant is listed on the rental form as his employer. Thibodeau wants to be reimbursed for renting the car, \$522.98, a figure which includes \$30 for gasoline. Freden

disputes that the car was required for Thibodeau's work for it. This is also a matter which I need not decide for the purposes of this appeal.

ANALYSIS

Thibodeau expands his claim for wages. He originally claimed regular wages in January of 1997 but not commissions in that period. On appeal, Thibodeau claims both wages and commissions in the period and, in doing so, he raises an issue, whether or not commissions are owed in the period, which was not put before the delegate and is therefore not addressed by the Determination. He may not do that. The Tribunal has no jurisdiction over matters which have not been presented to the Director, or are not addressed in a Determination.

As I have found the facts, it is clear to me that the delegate has been misled by Thibodeau, unwittingly I believe, in respect to his employment. Had the delegate known that Thibodeau actually terminated his employment on or about the end of January, 1997, I believe that she would have realized that his claim for wages in January, and that for car expenses, were both out of time. Those two complaints were filed more than 9 months after termination of the employment. The Director does not have jurisdiction to deal with complaints that are filed more than six months after the employment is terminated. It is section 74 of the *Act* which establishes the six-month time limit on complaints.

- 74** (1) *An employee, former employee or other person may complain to the director that a person has contravened*
- (a) *a requirement of Parts 2 to 8 of this Act, or*
 - (b) *a requirement of the regulations specified under section 127 (2)(1).*
- (2) *A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.*
- (3) *A complaint relating to an employee whose employment has terminated **must be delivered** under subsection (2) **within 6 months after the last day of employment.***
- (4) *A complaint that a person has contravened a requirement of section 8, 10 or 11 **must be delivered** under subsection (2) **within 6 months after the date of the contravention.*** (my emphasis)

This case is unusual in that, having quit once, the employee rejoined his former employer. That does not somehow breath life into what, so far as the *Act* is concerned, are dead issues. It may well be that the delegate erred in finding what she did in respect to the January pay issue and in deciding that the car was rented for Anderson's Restaurant, not Freden Foods. But what ultimately matters is that neither the January pay issue, nor that involving car expenses, were properly before the delegate, the time for raising the issues

having long since passed. And as the *Act* is written, neither the Director, nor the Tribunal, may make exceptions [*Grant (K)*, BCEST No. 253/97].

It is only the matter of what Thibodeau is or not entitled to in the way of pay for work in the period September 15, 1997 and October 20, 1997 that is properly before me. I have already found, in setting out the facts in that regard, and given nothing to the contrary, that the pay to which he is entitled is just as the delegate has found, namely, on the basis of hourly wages as the payroll records show.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated July 7, 1998 be varied. Those parts of the Determination which deal with the issue of whether or not he is owed pay for work in January of 1997, and that involving car expenses, are cancelled. That part of the Determination which deals with the matter of whether or not Thibodeau is owed commissions for work in September and October of 1998 is upheld.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunals