

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 -

Gustelas Holdings Ltd. (operating as Demos' Restaurant)
(“Demos”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Niki Buchan

FILE NO.: 97/571

DATE OF HEARING: October 31, 1997

DATE OF DECISION: January 5, 1998

DECISION

APPEARANCES

| | |
|----------------|---------------------|
| Demos Zmeis | for Himself |
| Karen Doucette | on behalf of Demos' |
| Greg Jordanov | for Himself |
| Jeff Jordonov | Observer |
| Ian MacNeil | for the Director |

OVERVIEW

This appeal brought by Karen Doucette ("Doucette") on behalf of Gustelas Holdings Ltd. operating as Demos' Restaurant ("Demos'"), pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of a delegate of the Director of Employment Standards (the "Director") issued on July 2, 1997. The Determination found that Demos' had contravened Sections 17(2) and 58(3) of the Act. It ordered Demos' to pay \$10,531.31 to Greg Jordanov ("Jordanov") for wages, annual vacation pay and interest.

The Determination was made after a complaint by Greg Jordanov ("Jordanov") who alleged he was hired on February 19, 1997 by Demos Zmeis ("Zmeis") as restaurant operations manager for Demos' Restaurant at a salary of \$3500.00 per month. He terminated his employment on May 15, 1997 because he was not being paid.

Demos' appeals on the grounds that not all the facts were brought out and some things in the Determination are untrue.

Neither of the parties received notice of the Oral Hearing, dated October 3, 1997. They were informed by the delegate for the Director on October 29th and 30th, 1997. Demos' requested an adjournment in a fax sent to the Tribunal on October 30, 1997. The Tribunal had not had the mailed notice returned and advised Demos' to bring the matter before the adjudicator at the hearing. An adjournment was not requested at the Oral Hearing and both Demos' and Jordanov stated they were prepared to proceed.

The Oral Hearing was held in Nanaimo at which time sworn evidence was taken from Doucette, Zmeis, and Jordanov.

ISSUE TO BE DECIDED

Whether the Determination was made on erroneous or untrue facts?

FACTS

The Determination was made on facts provided by Jordanov. His diary indicates that he recorded daily hours related to work at Demos' Restaurant from February 19, 1997 to the middle of-May. Jordanov terminated his employment on May 15, 1997 because he was not being paid.

Jordanov did some work for Demos' prior to April 1, 1997. This work included hiring and paying subcontractors, arranging for suppliers, hiring and training staff for the restaurant.

The restaurant was closed approximately six weeks for renovations. It reopened on April 18, 1997.

Demos' was served with a Demand for Employer Records on May 28, 1997. Demos' failed to produce daily time records but did provide payroll records that indicate Jordanov had earnings dating from April 1, 1997 until he terminated on May 15, 1997. The payroll records indicate that Jordanov received \$3000.00 plus \$120.00 vacation pay over the six week period from which statutory deductions were taken. These records are inaccurate. Jordanov did not receive these funds. Both Doucette and Zmeis admit the cheques were not given to Jordanov.

Jordanov signed 3 receipts for cash withdrawals (Exhibit #1) in the total amount of \$380.00. There was no evidence that the cash shortages reflected in Exhibit #2 could be attributed to Jordanov.

ANALYSIS

Doucette, representing Demos', argues that the Determination is wrong for the following reasons:

1. Jordanov was not hired on February 19, 1997 because she was acting manager until the middle of March.
2. The restaurant was closed for six weeks and did not reopen until April 18, 1997. A manager was not needed as there was no business to run.
3. She was unable to produce time records because Jordanov was on salary and never kept his records at the restaurant.
4. The agreed salary was \$2000.00 not \$3500.00.
5. The \$3000.00 cash advances he was given were taken out of cash without the consent of the owner.

This appeal involves an analysis of the correctness of the Determination in that facts are disputed and the credibility of the information provided to the Director is questioned by the appellant.

I allowed some evidence to be presented because Demos' had not received the Notice of Hearing and had the opportunity to make a last submission within the time allowed in the notice. That evidence is in the form of exhibit documents:

Exhibit # 1 Receipts for cash taken and signed for by Jordanov, probably on May 8, 1997.

Jordanov admitted he withdrew the \$380.00 and signed for the cash at the request of Zmeis who required extra cash to pay employees for extra hours worked.

Exhibit #2 A hand written statement showing a shortage in cash taken in and deposits made from April 18, 1997 and May 12, 1997. The shortages amounted to a total of \$2097.92. There was no evidence that this shortage could be attributed to Jordanov. It is only an assumption by Doucette that the cash had been spent to pay expenses. Jordanov claimed he had incurred in setting up the restaurant. She was not involved at the restaurant after the middle of March 1997.

Exhibit #3 (At page 1) A computer print out of Gus' Pizza & Pasta House, Employee Cheque Detail Report with period end dates from 04/30/97 to 05/31/97. This record is the one provided to The Director during the investigation. It indicates that Jordanov received a salary of \$3000.00 plus \$120.00 as vacation pay over a six week period from which statutory deductions were made. It indicates that two cheques were issued to Jordanov for the net amount owed to him. (At page 2) An Earnings and Deductions Summary report with period end dates from 01/01/97 to 05/31/97. This document reflects that Jordanov earned \$3000.00 salary and \$120.00 vacation pay during the period. These records are misleading. Jordanov did not receive those cheques. Both Doucette and Zmeis admit that the cheques were never given to Jordanov. Zmeis states he withheld the cheques because he wanted to be repaid an \$800.00 loan he had made to Jordanov. The Director was correct in assuming that this money had not been received by Jordanov.

Exhibit #4 A letter, dated October 30, 1997, from the accountant for Gustelas Holdings Ltd. to Zmeis which confirms meetings held with him and discussions about her recommendations for a salary of \$2000.00 per month and profit sharing agreements for the cook and Jordanov. She states she did not see a formal agreement but she assumed the agreement was in place. She states that Jordanov began working for Demos on April 1, 1997 and had received his cheques because he had not complained that they were for the wrong amount. She seems to have based the date of hire as April 1, 1997 because he was paid from April 1, onward. She was obviously not advised that the cheques were never given to Jordanov. This letter is not proof of the salary agreed upon, the date of hire, or whether Jordanov had been paid his wages.. The accountant was not called as a witness. This information was not produced at the time of the investigation and it is not accepted as fact in this appeal..

Exhibit #5 An agreement, dated February 24, 1997, indicating that Joel Girard was appointed the superintendent of the construction taking place on site. This agreement is irrelevant to the date Jordanov was hired.

Exhibit #6 A copy of a canceled cheque, dated March 7, 1997, paid to Jordanov in the amount of \$800.00 by Gus' Pizza & Pasta House indicating that the payment was for landscaping. In fact, Zmies gave evidence that this money was a loan to Jordanov to pay his rent. If he was not repaid, Jordanov was to do landscaping for the \$800.00. He did not expect to be repaid. He claims Jordanov did not do the landscaping and he never was repaid. Jordanov gave evidence that he did some landscaping and did not repay the \$800.00. It was not suggested that this payment was a wage payment under the contract. I do not consider this payment a part of Jordanov's wages because it was either a loan or payment for landscaping. This is new evidence that Demos' attempts to use to justify the reason the cheques were withheld. The information is irrelevant to the issue of whether Jordan was paid his wages and is not accepted.

The dispute over the date of hire remains. The Director had only the records produced by Jordanov that indicate that he commenced his employment on February 19, 1997, well before April 1, 1997. Absent evidence to the contrary the date of hire was calculate from Jordanov's records. Other complainants on the file indicated that Jordanov was working prior to April 1, 1997. At least one other complainant was hired and trained by Jordanov in March. Zmeis gave evidence that he had discussions about hiring Jordanov sometime in April. He could not give a date but states he was "standing around" and did have meetings with staff for before that date. Zmeis now claims that Jordanov was hired on April 1, 1997. Based on the evidence available during the investigation and without credible evidence that April 1, 1997 was the actual date of hire, I find the Director was correct when he determined that Jordonov was hired well before April 11, 1997. There was no evidence or argument presented at this hearing to show that this was an unreasonable finding.

The remaining dispute is whether the agreement on the amount to be paid was \$2000.00 or \$3500.00 per month. Submissions by Demos' state the payroll records show cash advances taken by Jordanov. The records do not show that they were a cash advance. In any event, he did not receive the \$3000.00 as an advance or as a wage payment. There is no definitive answer as to what agreement was reached. Jordanov alleges he was to be paid \$3500.00 per month and that a bonus over that was discussed. Zmeis gave evidence that Jordanov's salary would be more than \$2000.00 per month because there was also to be a percentage. Without a written contract or other substantial evidence it is impossible to determine the exact terms agreed by the parties when they contradict each other. Demos' has not satisfied the onus to prove the agreed salary was to be \$2000.00 per month.

While I allowed exhibits to be produced at the hearing that were not presented during the submission time limits or at the time of the investigation, there is no evidence within them or arising from them to indicate the Determination was based on erroneous facts. The Director issued the Determination based on the only facts available to him.

In an appeal of a Determination the onus is on the Appellant to show that the Determination is wrong. Demos' did not produce evidence to prove the date of hire, the agreed salary or that Jordanov had received any payment for wages or vacation pay. The evidence confirms the Director's assumption that the payroll records were inaccurate and that Jordanov had not been paid wages or vacation pay. Zmies withheld information that he had not given the

cheques to Jordanov as indicated by the payroll records. Even in submissions during this appeal process it was alleged that Jordanov had received \$3000.00 as advances on his wages. Only at the hearing did Zmies admit that there had been no payments made to Jordanov. His credibility with respect to the other contested matters is therefore questionable. Demos' has not met the onus that the Determination was based on erroneous or untrue facts. The Determination will be confirmed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated July 2, 1997 and filed under number 83855 be confirmed in the amount of \$10,531.31 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

**Niki Buchan
Adjudicator
Employment Standards Tribunal**