

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 -

T. B. Bazille operating as Baz's Grill
("Bazille")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/666

DATE OF HEARING: November 3, 1997

DATE OF DECISION: December 9, 1997

DECISION

OVERVIEW

The appeal is by T. B. Bazille operating as Baz’s Grill (“Bazille”) under section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) dated August 7, 1997. The Determination is that Bazille owes Denis Gore wages and other moneys for work performed.

APPEARANCES

Torger Brian Bazille	On His Own Behalf
Deane Jane Mann	Witness
Lois Marie Hundey	Witness
Daniel Gessner	Witness
Deborah Ann Elliot	Witness
Rebecca Moncur	Witness

ISSUE TO BE DECIDED

At issue is the Determination that Denis Gore was an employee of T. B. Bazille.

FACTS

T. B. Bazille decided to open a restaurant, Baz’s Grill, in the Chieftain Hotel. Rosie Gore agreed to act as manager of the restaurant. She contributed a deep fryer to the operation. And she was to receive 20 percent of the restaurant’s profits. The restaurant opened for business on or about the 20th of April, 1997.

Denis Gore is married to Rosie. The Director’s delegate has found that he performed 103 hours of work for Bazille in the period April 10, 1997 to April 26, 1997 and is owed wages, overtime pay, vacation pay and interest as a result.

The Tribunal has heard nothing from Denis Gore on the appeal. There are no records which allow me to determine the extent and nature of work performed by him. All that is before me are the facts as they are presented by Bazille, and the Determination. According to Bazille, Denis Gore was not hired to work at Baz’s Grill and did not actually work at the restaurant. The witnesses are all consistent on the latter point.

The Director's delegate concluded that Denis Gore was an employee as defined by the *Act* for two stated reasons. One, Bazille admitted that Gore performed work for him. Two, letters from Campbell Saunders Ltd. acting in its capacity as receiver and trustee in bankruptcy of the Chieftain Hotel seemed to confirm Gore as employee. In one letter the trustee wrote, "We are advised that Rosie Gore and Gus Bazille entered into an oral agreement whereby Ms. Gore (together with her husband) would run the restaurant in exchange for a wage plus 20 % of the profit". In a second letter the trustee states: "Ms. Gore and her husband were not asked to assume any liabilities. Rather it was a management contract which allowed for a wage plus a percentage of profit".

In the relevant period, Gore was a chef at a restaurant in Whistler. As Bazille and Rosie Gore were getting Baz's Grill ready for its opening, Denis would drop in on occasion. Bazille says that Denis helped him move a deep fryer, work that took a couple of hours. And Gore developed a menu for the restaurant at Bazille's request. According to Bazille, he was to bill the restaurant for the menu.

After the restaurant opened, Denis began to show up at the restaurant and issue instructions to the staff and the restaurant's bookkeeper as if he were manager of the restaurant. He attempted to make scheduling decisions. The evidence is that he prepared job descriptions and work schedules. But according to Bazille, Gore was never asked to do any of that, had no authority to do what he did, and was told to stop once Bazille realised what he was doing. The fact that Denis was told to stop acting like a manager led to hard feelings and an end to the business relationship between Bazille and Rosie Gore.

ANALYSIS

Was Gore employed by Bazille or was he working on the menu as an independent contractor and, in other respects, working as a volunteer who was merely helping out his wife in her new role as manager? Only an employee is entitled to wages or other moneys under the *Act*.

If Gore was an employee it is because of work performed away from the restaurant, for the development of the menu, work schedules and job descriptions; that is how the facts are presented to me. But was he an employee?

There are no documents clearly pointing to Gore as employee. There is statement by the trustee handling the hotel's bankruptcy that "Ms. Gore (together with her husband) would run the restaurant" but the comment is inconclusive. Did the trustee mean to say that both Rosie and Denis were to run the restaurant, or only that Rosie would manage the restaurant with Denis assisting in the background, as a husband might volunteer to help his wife? As matters are presented to me, I must conclude that it is the latter. The fact that the reference to Denis is in brackets suggests that to me. And the uncontradicted testimony of witnesses confirms it.

This case is a matter of determining what is credible and nothing has been heard from complainant, Gore. Bazille on the other hand has presented me with what is an entirely

reasonable explanation of matters which is not contradicted by any of the evidence before me. There is nothing clearly pointing to Denis Gore as employee, quite the contrary. The evidence is that he was seldom at the restaurant and that when he began to act as manager he was told to stop because he was not the manager. I conclude that if Denis Gore is owed money, it is as an independent contractor for development of the menu. Other work performed him was also not as an employee but as a volunteer who was merely helping out his wife, the manager. It follows that he is owed neither wages, nor other moneys under the *Act*.

In the absence of hard evidence showing that Gore was an employee, I have concluded that he was not. If important evidence has been missed which is to the contrary, Gore has only himself to blame. He chose not respond to the appeal. The fact that he did not, in a case which turns completely on the credibility of witnesses, has forced a conclusion which is fatal to the Determination.

In summary, I find no evidence showing that the complainant was actually an employee of T. B. Bazille.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated August 7, 1997 be cancelled.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc