

IN THE *LABOUR RELATIONS CODE* OF BRITISH COLUMBIA

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GOOD COOKING GUYS COMPANY LTD.

"THE EMPLOYER / COMPANY"

AND:

UNITE HERE, LOCAL 40

"THE UNION"

ARBITRATOR:

R. K. McDONALD

COUNSEL:

No one appearing
For the Employer/Company

Sonya Sabet-Rasekh and
Daniel Bertrand
For the Union

DATE AND PLACE OF HEARING:

April 22, 2013
Burnaby, B.C.

DATE OF DECISION:

June 5th, 2013

My appointment as a single arbitrator was pursuant to Section 86 of the *Labour Relations Code*, R.S.B.C., 1996, c.244. The Employer, The Good Cooking Guys Company Ltd., [the "Company"] and its principals, Peter Marvin Dembicki and Patrick Murray Boreen, were given notice of the arbitration hearing scheduled for April 22, 2013 at Burnaby, BC. but failed to attend at the proceedings. Viva voce evidence was given by Jim Pearson, President/Administrator for the Union, with documentary evidence in support of the Union's claims. Submissions were made by Counsel for the Union.

The Company operated a restaurant situated in the Howard Johnson Harbourside Hotel in Nanaimo, British Columbia. It executed a lease of those premises on or about June 25, 2011 with Peter Marvin Dembicki and Patrick Murray Boreen as signatories both as principals of the Company and as personal guarantors. On the Company letterhead, Patrick Boreen is described as Marketing Manager and Peter Dembicki as Executive Red Seal Chef. A search with the Registrar of Companies in Victoria, B.C., indicates Peter Marvin Dembicki to be a Director and Officer of the Company.

On the evidence as a whole, it is clear that from the middle of 2011 the Company as the Employer became bound by the Collective Agreement between Hospitality Industrial Relations and UNITE HERE Local 40 of duration from June 1, 2009 to May 31, 2012 with a continuation clause. Pursuant to that Collective Agreement the employees of the restaurant became members of the Union, were paid wages and remittances were made regularly on their behalf, including Mr. Dembicki. Mr. Boreen was the one management exclusion allowed. When a dispute subsequently arose under the Collective Agreement, Messrs. Dembicki and Boreen both signed submissions to the Labour Relations Board of B.C., on behalf of the Company. Ultimately, Messrs. Dembicki and Boreen signed a

settlement agreement dated March 21, 2012 at proceedings before the Labour Relations Board, acknowledging the obligations of the Company under the Collective Agreement.

The Company operated the restaurant under the terms of the Collective Agreement until July 24, 2012 when it abruptly closed the business, without notice to the employees or the Union, leaving the outstanding financial obligations which are the subject of these proceedings.

Unpaid gross wages of the Employees for work performed pursuant to Articles 11.03 and 11.06 of the Collective Agreement

Sigrid Bentley – for July 18, 19 and 21, 2012, the sum of \$302.40 due and payable.

Leah Corrins – for July 5, 6, 7, and 8, 2012, the sum of \$403.20 due and payable.

Fe Eurango – for five shifts between July 15 to 24, 2012, the sum of \$652.40 due and payable.

Deborah Palmer – for July 16, 17, 20, 21, 22, 23 and 24, 2012, the sum of \$705.60 due and payable.

Christine Smolcic – for July 18, 19, 20 and 22, 2012 the sum of \$497.70 due and payable. In addition, Ms. Smolcic received two pay cheques that were returned NSF (non-sufficient funds):

- For the pay period June 18 to July 1, 2012 for \$725.29
- For the pay period July 2 to July 15, 2012 for \$720.96

- With an NSF fee charged to her of \$42.50

The total sum due and payable to Christine Smolcic is therefore \$1,986.45.

Kailem Soles – for five shifts in July, 2012 the sum of \$671.20 due and payable.

William Frankling – for five shifts in July, 2012 the sum of \$652.40 due and payable.

Satwinder Khela – for five shifts in July, 2012 the sum of \$617.60 due and payable.

Katherine Evans – for eight shifts in July, 2012 the sum of \$604.80 due and payable.

Unpaid Annual Vacation Pay pursuant to Articles 13.01 and 13.02 of the Collective Agreement

None of the employee claimants were paid their annual vacation pay while they were employed by the Company from June 2011 to when the business closed on July 24, 2012.

Sigrid Bentley – at 12% of gross earnings of \$14,269.35 for the sum of \$1,712.32 due and payable.

Leah Corrins – at 4% of gross earnings of \$20,307.62 for the sum of \$812.30 due and payable.

Fe Eurango – at 4% of gross earnings of \$30,311.43 for the sum of \$1,212.46 due and payable.

Deborah Palmer – at 4% of gross earnings of \$26,918.86 for the sum of \$1,076.75 due and payable.

Christine Smolcic – at 4% of gross earnings of \$20,741.42 for the sum of \$829.66 due and payable

Kailem Soles – at 4% of gross earnings of \$26,332.51 for the sum of \$1,053.30 due and payable.

William Frankling – at 4% of gross earnings of \$25,201.57 for the sum of \$1,008.06 due and payable.

Satwinder Khela – at 4% of gross earnings of \$30,880.00 for the sum of \$1235.20 due and payable.

Katherine Evans – at 4% of gross earnings of \$18,144.00 for the sum of \$725.76 due and payable.

Unpaid Health Care and Pension Plan pursuant to Article 14 of the Collective Agreement

The required contributions for the hours of employment performed by the above-named employees were:

- For the month of June, 2012 the sum of \$2,352.90
- For the month of July, 2012 the sum of \$1,468.84

for a total sum due and payable of \$3,821.74, to be paid to the Plans Administrator, Morreau Shepell in favour of the “Local 40 Hospitality Service”.

What Constitutes Wages

Pursuant to the Employment Standards Act [the "Act"] 1996 R.S.B.C., Chapter 113 in Section 1(1) the definition of wages "includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work, ..."

For these purposes, I conclude and determine that the unpaid wages of the employees encompasses:

1. Pay for work done, and

2. Annual vacation pay – see: *Re Sherman [2004] B.C.L.R.B.C. No. 110/2004*, B.C. Labour Relations Board, at paragraph 34.

I do not accept the submission of Union Counsel that the unpaid Health Care and Pension Plan remittances required under the Collective Agreement constitute wages. Under Section 1(1) of the "Act" the definition of wages "includes...

(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person, ..."

In my view the language is intended to encompass contractually required payments, for example to a savings institution or talent agency, and is not designed to include required remittances to the administrator of the Health Care and Pension Plans under the Collective Agreement. A Collective Agreement is separately defined in the "Act", as distinct from a contract of employment.

Directors or Officers Liability for Unpaid Wages

Pursuant to the *Employment Standards Act*, 1996 R.S.B.C., Chapter 113, Section 96(1), “a person who is a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 month’s unpaid wages for each employee.”

The Employer is a company incorporated under the laws of British Columbia as of August 1, 2006. As to director’s liability, I am guided by the analysis in *Re Moore [2011] B.C.E.S.T.D. No. 95*, B.C. Employment Standards Tribunal at paragraph 20:

One of the ways of identifying whether an individual is a director or officer of a corporation is by looking at the corporate records available through the Registrar of Companies or at a corporation’s registered and records office which may show that the individual is recorded as a director or officer (See *Re British Columbia (Director of Employment Standards)*, BC EST # RD047/01). If the corporate records do not show the individual as a director or officer, the Tribunal, when faced with the question of determining whether an individual is a director or officer, will use a functional approach. The functional approach entails an examination of the actual role of the individual in relation to the corporation. Does the individual exercise the typical functions, tasks, or duties that a corporate director or officer would exercise in the normal or usual course of events? While no one function is determinative of an individual’s status as a director or officer under the functional approach, the existence of such, non-exclusive, factors as the following are taken into consideration in the determination: participation in the management of the corporation; signing and cancelling of agreements on the employer’s behalf; reviewing or overseeing financial reports or financial matters of the corporation; handling the corporation’s payroll; dealing with the corporation’s creditors; establishing policies and objectives of the corporation; directing employees of the corporation and approving corporate budgets.

At material times, Peter Marvin Dembicki is recorded as a director and officer of the Company and is thereby liable for payment of the unpaid wages of the employees as has been determined in this Award. With respect to Patrick Murray Boreen and on the evidence placed before me, I have concluded that at material times he was functioning in the capacity of an officer or director of the Company and is thereby liable for payment of the unpaid wages of the employees as has been determined in this Award. For greater certainty, I have determined that the unpaid wages and unpaid vacation pay of the employees as recorded above fall within the "2 month's" specified in Section 96(1) of the "Act". The unpaid wages and annual vacation pay in question and payable arose in June and July, 2012.

Referral to the Director of Employment Standards

The Employment Standards Act [the "Act"] 1996 R.S.B.C., Chapter 113, Section 3 provides:

...

(4) If a collective agreement contains any provision respecting a matter set out in one of the following specified provisions of this Act, that specified provision of this Act does not apply in respect of employees covered by the collective agreement:

Section 17 [*paydays*];

...

(5) If a collective agreement contains no provision respecting a matter set out in a provision specified in subsection (4), the specified provision of this Act is deemed to be incorporated in the collective agreement as part of its terms.

...

(7) If a dispute arises respecting the application, interpretation or operation of

(a) a Part or provision of this Act deemed by subsection (3) or (5) to be incorporated in a collective agreement, or

(b) a provision specified in subsection (6)

the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84(3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute.

(8) Despite subsection (6), if an arbitration board makes a decision on the merits of a matter in dispute referred to in subsection (7) and the decision is in respect of wages, the arbitration board may refer the decision to the director for the purpose of collecting the wages and, for that purpose, the director may collect the wages under sections 87 to 97 and 99 as if the decision of the arbitration board were an order of the tribunal.

(9) In subsection (8), “**arbitration board**” has the same meaning as in Part 8 of the *Labour Relations Code*.

As to paydays the “Act” provides in Section 17 that:

(17) (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

Counsel for the Union proffered an analysis of the “Act” and Collective Agreement in order to justify a referral to the Director of Employment Standards for the purpose of collecting the unpaid wages of the employees. The essence of that submission is:

a) Based on Sections 3(4) and 3(5) of the "Act", as the Collective Agreement has no provision with respect to paydays, then Section 17 of the "Act" is deemed to be incorporated in the Collective Agreement.

b) Based on Section 3(7) of the "Act", as a dispute arose as to unpaid wages, the grievance procedure in the Collective Agreement was invoked leading to this arbitration.

c) In the event that I make a decision on the merits of the matter in dispute, namely the unpaid wages, I may refer that decision to the director under Section 3(8) of the "Act" for the purpose of collecting those unpaid wages.

An examination of the Collective Agreement reveals that there is no provision with respect to paydays, which seems to have become a mere matter of practice. This dispute arose under the Collective Agreement as to the non-payment of wages including annual vacation pay. I have decided the merits of that dispute in favour of the employees. In applying Section 17(1) of the "Act" to the facts, at the very least the unpaid wages including annual vacation pay were due and payable to the employees on July 31, 2012. In these circumstances I am disposed to refer my decision to the director for the purpose of collecting the unpaid wages.

THIS ARBITRATION BOARD MAKES THE FOLLOWING DETERMINATIONS:

1. **I Determine and Declare** that The Good Cooking Guys Company Ltd., violated the provisions of the Collective Agreement in failing,

neglecting or refusing to pay the wages and annual vacation pay of its employees due on or before July 31, 2012 as follows:

Sigrid Bentley	-wages	\$ 302.40
	-annual vacation pay	<u>\$ 1,712.32</u>
	Total:	\$ 2,014.72
Leah Corrins	-wages	\$ 403.20
	-annual vacation pay	<u>\$ 812.30</u>
	Total:	\$ 1,215.50
Fe Eurango	-wages	\$ 652.40
	-annual vacation pay	<u>\$ 1,212.46</u>
	Total:	\$ 1,864.86
Deborah Palmer	-wages	\$ 705.60
	-annual vacation pay	<u>\$ 1,076.75</u>
	Total:	\$ 1,782.35
Christine Smolcic	-wages	\$ 1,986.45
	-annual vacation pay	<u>\$ 829.66</u>
	Total:	\$ 2,816.11
Kailem Sales	-wages	\$ 671.20
	-annual vacation pay	<u>\$ 1,053.30</u>
	Total:	\$ 1,724.50
William Frankling	-wages	\$ 652.40
	-annual vacation pay	<u>\$ 1,008.06</u>
	Total:	\$ 1,660.46
Satwinder Khela	-wages	\$ 617.60
	-annual vacation pay	<u>\$ 1,235.20</u>
	Total:	\$ 1,852.80
Katherine Evans	-wages	\$ 604.80
	-annual vacation pay	<u>\$ 725.76</u>
	Total:	\$ 1,330.56
	Grand Total of Unpaid Wages and Annual Vacation Pay	\$16,261.86

2. **I Determine and Declare** that The Good Cooking Guys Company Ltd., violated the provisions of the Collective Agreement in failing, neglecting or refusing to pay the required contributions for Health Care and Pension Plan due on or before July 31, 2012 as follows:

For June, 2012	\$ 2,352.90
For July 2012	<u>\$ 1,468.84</u>
Total	\$ 3,821.74

3. **I Determine and Declare** that The Good Cooking Guys Company Ltd., Peter Marvin Dembecki and Patrick Murray Boreen are jointly and severally liable for the payment of unpaid wages including annual vacation pay as specified in Paragraph 1 herein for a grand total of \$16,261.86.

4. **I Order and Direct** The Good Cooking Guys Company Ltd. Peter Marvin Dembecki and Patrick Murray Boreen do forthwith pay the said sum of \$16,261.86 to the employees as specified in Paragraph 1 herein.

5. **I Order and Direct** The Good Cooking Guys Company Ltd., do forthwith pay the said sum of \$3,821.74 as specified in Paragraph 2 herein to "Local 40 Hospitality Industry Service" regarding "HW and Plan Good Cook Guys" at the administrator of Plans as follows:

Morneau Shepell
 400 Burrard Street
 Suite 1110
 Vancouver, British Columbia, V6C 3A6

6. **I Order and Direct** my decision as specified in Paragraphs 1, 3 & 4 herein for a grand total of \$16,261.86 to be referred to the Director of Employment Standards for the purpose of collecting the wages of the affected employees.

It is so awarded.

Dated at West Vancouver, British Columbia this 5th Day of June, 2013.

A handwritten signature in black ink, appearing to read 'R. K. McDonald', is written over a horizontal line.

R. K. McDonald
Arbitrator

RKM:sdk

File: RKM S-130605