

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* S.B.C. 1995, C. 38

- by -

Esmail Karymi Operating As Kabab Sara Lonsdale

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** E. Casey McCabe

**FILE NO.:** 96/610

**DATE OF DECISION:** January 7, 1997

**DECISION**

**OVERVIEW**

This is an appeal by Esmail Karymi Operating as Kabab Sara Lonsdale pursuant to section 112 of the Employment Standards Act, (“The Act”), against Determination Number CDET 004131 of the Director of Employment Standards (“The Director”) issued on September 27, 1996. In this appeal the employer claims that the complainant is not entitled to overtime pay, holiday pay, compensation for length of service and annual vacation pay.

The employer operates a restaurant known as Kabab Sara Lonsdale located in North Vancouver, B.C. The complainant, Khadijeh M. Zamani, was hired on October 1, 1995 to work in the kitchen and perform waitress duties. Her rate of pay was \$7.00 per hour. She worked three days per week averaging eleven to twelve hours per day.

The complainant was terminated from her job on or about February 25, 1996. She alleges that she was terminated because she refused to agree to a wage reduction to \$6.00 per hour in cash. The complainant was paid monthly. To support her claim for unpaid overtime, statutory holiday pay, compensation (termination) pay and annual vacation pay the complainant submitted hand written records of her work history with the employer along with her 1995 tax return.

The employer does not keep detailed payroll records. The employer, in response to the claim, submitted a T4 Statement of Remuneration Paid and copies of cancelled cheques payable to the complainant.

In its appeal the employer argues that the complainant has made a wrongful and unfair claim and misrepresented the circumstances of the working relationship between the parties. The employer states that the complainant’s work schedule was always three days per week (Friday, Saturday and Sunday) and that she worked a split shift beginning at 10:30 a.m. to 3:00 p.m. and returning at 5:00 p.m. to 10:30 p.m. The employer states that the complainant was always paid for eleven hours even though she left the work place between the hours of 2:30 p.m. and 5:00 p.m. The employer argues that at the time of hire the complainant had agreed to these terms and conditions of employment and that the employer adhered to them throughout. The employer further argues that due to unfamiliarity with the legal system the employer did not “apply for a waiver from your department for approval for this alternative work schedule” despite its opinion that the schedule conforms with Appendix I, Schedule Number 5, of the Regulations.

**ISSUE TO BE DECIDED**

Is the complainant entitled to overtime, statutory holiday pay, compensation (termination) pay for length of service and annual vacation pay?

**ANALYSIS**

The Director issued Determination Number CDET 004131 in the amount of \$3,465.96 on September 27, 1996. In that Determination the Director found that the employer had breached the following provisions of the Act:

Section 17(1) by failing to pay the complainant at least semi-monthly;

Section 18(1) by failing to pay all wages owing within 48 hours of termination;

Section 34(2) by failing to pay the minimum 4 hours once work had commenced;

Section 40(1) by failing to pay overtime rates for hours worked in excess of 8 hours per day;

Section 46 by failing to pay 1 1/2 times the employee's regular wage and further failing to pay wages when a statutory holiday fell on a non-working day;

Section 58(3) by failing to pay at least 4% of total wages paid when employment terminated at the time set by Section 18 for paying wages;

Section 63(1) by failing to give written notice of termination and further breaches of Section 63 by failing to pay one weeks' wages in lieu of notice due to the complainant's length of service.

The employer has not kept detailed records of hours worked by the complainant. The complainant, on the other hand, has kept detailed records. I find that the best evidence of the work history is that submitted by the complainant and upon which the Director relied. However that does not end the matter. The employer argues that the complainant agreed to the terms and conditions of employment at the time of hire, and, because the employer steadfastly adhered to the terms the employee should not be able to complain at termination. The employer further argues that those terms and conditions were fair and reasonable in light of the fact that they fit within one of the shift schedules in Appendix I Schedule Number 5 of the Regulations. The Act specifically contemplates the situation where an employer may impose terms and conditions of employment that are below the

standards set by the legislation or that an employer and employee may agree to such sub-standard provisions. Section 4 states:

Requirements of this Act cannot be waived

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61, and 69.

Sections 43, 49, 61, and 69 allow exemptions for employees covered by collective agreements in certain circumstances. The complainant is not covered by a collective agreement. Therefore any agreement between her and the employer that would undermine the standards of the Act is of no effect. The employer's argument fails.

The employer alternatively argues that the work schedules would otherwise conform with the "Flexible Work Schedules and Overtime Wages" found in Appendix I Schedule Number 5 of the Regulations. Section 37(1) reads:

Flexible work schedules for employees not covered by collective agreement

37.(1) An employer may adopt a flexible work schedule for employees not covered by a collective agreement if:

- (a) the schedule is prescribed in the regulations and is for a period of at least 26 weeks,
- (b) the employer has followed the procedure in the regulations,
- (c) at least 65% of all employees who will be affected by the schedule approve of it, and
- (d) within 7 days after the date of approval by the employees, the employer has provided the director with a copy of the schedule.

Section 72 of the Act and Section 30 of the Regulations provide a detailed procedure to apply for a variance from the provisions of this legislation. This procedure was not followed by the employer. The employer did not send a letter to the Director signed by it and a majority of the employees affected outlining: the section of the Act to be varied; the nature of the variance required; the duration of the variance; the reason for requesting the variance; the employer's name, address, and telephone number; and, the name, address and telephone number of each employee who signs the request. Having failed to follow the procedure set out in the Act the employer cannot raise the argument in retrospect that it might otherwise conform with the legislation when an employee files a complaint on termination. For the above reasons this argument also fails.

**ORDER**

I order, pursuant to Section 115 (1) of the *Act*, that Determination Number CDET 004131 be confirmed.

**Casey McCabe**  
**Adjudicator**  
**Employment Standards Tribunal**