



An appeal

- by -

Sunny Trails Club carrying on business as The Campground  
(“STC”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C.113* (as amended)

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2008A/127

**DATE OF DECISION:** January 30, 2009

## DECISION

### SUBMISSIONS

John S. Piamonte	on behalf of Sunny Trails Club
Gagan Chaliwal	on behalf of the Director of Employment Standards
Shellan Rigg	on his own behalf
Lucienne Winder	on her own behalf

### OVERVIEW

1. This decision arises out of an appeal by Sunny Trails Club c.o.b.a. The Campground, (“STC”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued January 4, 2008.
2. In that decision, the delegate determined that two complainants, Shellan Rigg and Lucienne Winder, were employees of the Campground and that they were entitled to wages in the amount of \$11, 472.80. On April 14, 2008, I issued a decision affirming the delegate’s conclusion that Mr. Rigg and Ms. Winder were employees. I found the delegate had failed to observe the principles of natural justice in determining their wage entitlement by not disclosing to STC the names of the witnesses for the complainants on which he appeared to rely. I referred the issue of the wage entitlement back to the delegate for reconsideration. (BC EST #D038/08)
3. In the referral back, a second delegate sought submissions from the parties on their hours worked, including any witness statements. She visited the campsite and spoke with its current host and groundskeeper. Following the investigation, the delegate determined that Mr. Rigg was entitled to wages and interest of \$2,187.95 and Ms. Winder to wages and interest of \$1,548.21.
4. Both parties dispute the delegate’s conclusions.
5. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This referral back is adjudicated on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

### ISSUE

6. Did the delegate err in her determination of the employees’ wage entitlement?

## THE FACTS AND ARGUMENT

7. The facts are set out in my earlier decision. Briefly, Mr. Rigg worked for STC from April 1, 2003 until September 1, 2006. On June 16, 2006, Mr. Rigg and STC entered into a contract for the period June 1, 2006 until December 31, 2006. Under the terms of that contract Mr. Rigg was to be on duty Wednesday through Sunday inclusive. His duties included answering the telephone, registration, orientation and placement of guests and the collection of fees, monitoring guests' behaviour, cleaning the men's campground washroom and office, weed cutting and hand mowing some areas of grass. His remuneration was \$1300 per month for the months of June, July and August, \$500 for September and \$400 for October, November and December. STC also provided him with an RV site each month of the contract period.
8. On June 17, 2006, Ms. Winder entered into an agreement with STC to work at the campground from June 15, 2006 until September 15, 2006 at a rate of \$1,000 per month. Her duties included orientation, registration and placement of guests, the collection of fees, answering the telephone, cleaning the women's washroom and laundry/utility room, cleaning fire pits and monitoring guests' behaviour. She was required to be on duty Thursday through Monday, inclusive.
9. In the referral back, the delegate noted that neither party kept records of their hours of work. She reviewed the evidence of both parties, noting their objection to the evidence of each of their witnesses. She took into account their disagreement with facts including such things as campsite size and the amount of time it would have taken to perform certain tasks.
10. The delegate acknowledged that assessing the complainants' wage entitlement was a challenge in light of the fact that no accurate records were kept and the complainants did not work on a set schedule. She also noted that there was no way to assess how many campers were at the campground at any given time as the receipts did not accurately reflect those numbers. She further noted that, in any event, many receipts were missing.
11. The delegate visited the campground, noting that it took her less than five minutes to walk around the entire site. She found that the witness statements did not help to accurately assess the complainants' hours of work as most were only at the campsite on weekends and the only information they could provide was anecdotal. She used witness statements only to confirm the complainants' testimony as to the types of tasks they performed.
12. In determining the complainants' wage entitlement, the delegate said as follows:

I determined the duties the complainants performed in accordance with their contract and in accordance with witness statements. I then assigned time to the tasks. In order to do this I factored in the receipts issued, the day of the week, whether or not it was a long weekend, the number of times Mr. Rigg cleaned the bathrooms and the number of times he patrolled according to his calendar. I also used the employers' estimates of the time required for bathroom cleanings and receipts issued (monthly, monthly admissions and transient). All of these factors indicated the number of people that could possibly be at the site at any given time and the length of time it would take to complete each task. I also provided extra units of time in half hour increments depending on the day of the week to account for miscellaneous request made by guest. Please see the attached spreadsheet. The formula and an explanation of it is included.

13. The delegate attached a spreadsheet in which she determined, for each complainant, time worked for each of the days for each task and provided an explanation as to how she arrived at the time estimates.
14. STC takes issue with the delegates' determination of the time worked by each complainant and the tasks she has credited them with performing. It says there are a number of "discrepancies" in the documents apparently relied upon by the delegate. STC's appeal sets out a number of disputes it has with the delegate's Determination. For example, it says that it did not ask Mr. Rigg or Ms. Winder to patrol or work in the store or concession. It contends that Mr. Rigg acted in the capacity of a volunteer when he attended a trade show. It argues that Mr. Rigg made a number of decisions that were inappropriate for an employee. It contends that Mr. Rigg did not do lawn care prior to June, did not do any sewage clean up in August, did not pick up trash. It contends that Ms. Winder did not pick up trash except when cleaning a campsite, did not clean the fire pits sites after a long weekend.
15. Ms. Winder and Mr. Rigg also dispute the delegate's conclusions. They contend that the delegate "refused and neglected to contact, interview and cross examine our witnesses" and "disregarding witness testimony". They say that she "chose to ignore statements, guest receipts evidence, false and acknowledged changed site plan documents given by STC", failed to review all of the evidence and arrived at an incorrect conclusion.
16. In reply, STC disputed much of Ms. Winder and Mr. Rigg's assertions.
17. The delegate says that she did not refuse to contact the witnesses. She said she had access to all of the notes of the recorded interviews by the first delegate and which she reviewed prior to issuing the Determination. The delegate says that STC has submitted specific information about work performed on a daily basis by the complainants that was not provided during the investigation and that it should not now be considered.
18. The delegate says all of the arguments made by the parties on appeal were considered at the time she issued the Determination and that the appeal should be dismissed.

## ANALYSIS

19. The parties must show clear and convincing reasons why the Tribunal should interfere with the delegate's conclusions. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained. Therefore, the Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
20. I am not persuaded that the delegate erred in her conclusions about the employees' wage entitlements.
21. The delegate acknowledged the difficulty of determining wage entitlements in the absence of any records or set schedules. Although the complainants make much of the fact that it is an employer's responsibility to maintain employment records, its failure to do so does not substantiate their case. The evidence is that the delegate spent considerable time, including a site visit, assessing the competing claims of each of the parties. I find that she considered all relevant factors and that her analysis was balanced and reasonable. While both parties continue to take issue about the allocation of time spent on tasks as well as the tasks themselves, neither provides any evidence that the delegate's findings are perverse or that her conclusions were unsustainable on the evidence before her.

22. I deny the appeals of both parties.

**ORDER**

23. I Order, pursuant to Section 115 of the *Act*, that the Director's October 29, 2008 referral back report be confirmed and the Determination, dated January 4, 2008, be varied to the total amount of \$3,736.16.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**