Employment Standards TRIBUNAL

An appeal

- by -

GM Investments Inc. operating as GM Restaurant
("GM")

- 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

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/654

DATE OF DECISION: January 18, 2001

DECISION

OVERVIEW

GM Investments Inc. operating as GM Restaurant (which I will henceforth refer to as "GM" and also "the employer") appealed, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 14, 2000. The Determination ordered the employer to pay Gurcharam Kaur Gill compensation for length of service and other moneys, a total of $3,057.12 including interest.

In *GM Investments Inc. operating as GM Restaurant*, BCEST No. D165/00, I confirmed the order to pay length of service compensation but the matter of pay for work in the period August 7, 1997 to August 7, 1999 was referred back to the Director. According to the Determination, Gill earned $30,731.01 in that period and she was paid $29,058.80. I was shown that the employer paid Gill at least $35,905.54 and that the Determination contained other serious errors.

The Director had the matter of whether Gill is or is not entitled to further pay for work in the period August 7, 1997 to August 7, 1999 ("the matter of quantum") reviewed by the delegate that issued the Determination. The delegate has advised the Tribunal, by letter dated September 20, 2000, that he now calculates that in the period January 1, 1998 to August 7, 1999, Gill earned $1,813.32 more than the amount paid, $28,391.80. The Tribunal is also advised that Gill is entitled to another $550.16 for work in the period August 7, 1997 to December 31, 1997. The latter sum represents statutory holiday pay, overtime pay, and 4 percent vacation pay on the amount of statutory holiday and overtime pay.

The sole focus of this decision is the matter of quantum.

ISSUES TO BE DECIDED

What I must decide is whether the employer has or has not shown that the Director's conclusions in respect to quantum ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

According to the Determination dated January 14, 2000, Gill earned $30,731.01 in the period August 7, 1997 to August 7, 1999. And according to the Determination, she was paid just $29,058.80.

In the decision, *GM Investments* (cited above), I found that, in the relevant period, Gill was not paid $29,058.80 but at least $35,905.54. That is for August 7, 1997 to August 7, 1999, however.

As the Director's delegate now goes about calculating earnings and the amount of wages paid, the employment is divided into two distinct periods, the period for which there is a daily record of work, namely, January 1, 1998 to August 7, 1999, and the period for which there is not a daily record of work, the period August 7, 1997 to December 31, 1997. According to the delegate's new set of calculations (see the last page of the delegate's detailed calculation sheets), Gill earned $30,205.12 in the period January 1, 1998 to August 7, 1999 ($30,151.49 plus $53.63 for the January 1, 1998 statutory holiday) and she was paid $28,391.80. The latter figure is based on the employer's own gross wages figures.

The conclusion that Gill earned $30,205.12 in the period January 1, 1998 to August 7, 1999 reflects two decisions on lunch breaks. In *GM Investments*, I decided that Gill was not always given a proper lunch break (page 5 of the decision). The delegate has gone on to decide that the employee worked through 50 percent of her lunch breaks.

A further $550.16 is awarded for work in the period August 7, 1997 to December 31, 1997, $208 in statutory holiday pay, $321 in overtime pay plus another $21.16 in vacation pay. The employer's own records show that Gill worked overtime and that statutory holiday pay was not being paid. The record for the pay period August, 1997 has Gill working 250.5 hours in a month. By law, a person cannot work that many hours in a month without working overtime.

GM claims that the delegate is still in error. It does not specifically address the delegate's new conclusions and his new set of calculations, however. The employer merely argues that Gill was paid vacation pay, paid cash, paid in full, that she always took a lunch break and that what is found to be overtime work is in fact work which was done on a contract basis. GM also argues that Gill's termination was for just cause.

ANALYSIS

The employer is to some extent seeking to reopen matters which were decided in *GM Investments*. It may not do so, at least at this juncture.

The matter of whether Gill did or did not receive proper lunch breaks is a matter has already been decided. In *GM Investments* I decided that she did not always receive a lunch break. I will not revisit that matter.

The employer again raises the matter of whether it had just cause to terminate Gill. That too is decided in *GM Investments*. Again, I will not revisit the matter. It is, moreover, of no relevance to the matter of what, if anything, Gill is entitled to receive in the way of pay for her work in the period August 7, 1997 to August 7, 1999.

In respect to what is newly decided by the delegate, I find that the employer has nothing important to say.

GM does not show that the decision that Gill worked through 50 percent of lunch breaks is wrong or unfair.

It is said that delegate's calculations fail to account for the vacation pay that Gill was paid but I find that cannot be. The delegate has merely just added up the employer's own gross wages figures. The vacation pay is therefore included in the calculations.

Cash payments are claimed but there is no proof of any cash payments.

It is said that the extra work that Gill performed outside of her normal work hours was done on some sort of contract basis but it is plainly clear to me that all of Gill's work, even the extra work which she performed in August of 1997 and August of 1998, was work for the employer. The employer's own records show that the extra work was considered to be plain ordinary work for the employer and that it was paid as such.

It is not evident that some of Gill's work was done under the employment contract and that other work was done under a separate contract of some sort but, if true, the employment contract would prevail. The other contract would have no force or effect as the work was for the employer and as an employee may not agree to accept less than the minimum standards of the *Act*. An agreement to accept less than the *Act* is null and void.

> **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.

I am now satisfied that GM did not pay Gill as the *Act* requires. And, no clear evidence to the contrary, I am satisfied that it is not $1,672.21 that the employee is owed for work between August 7, 1997 and August 7, 1999 but $2,363.48 ($1,813.32 plus $550.16).

It is not for reason of a failure to count vacation pay, or some other fault on the part of the delegate, that the employer is being ordered to pay another $2,363.48 in wages but its own failure to pay statutory holiday pay, its failure to provide proper lunch breaks on a consistent basis, and its failure to pay overtime wages as the *Act* requires.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated January 14, 2000, be varied with respect to the order to pay for work in the period August 7, 1997 to August 7, 1999. It is not $1,672.21 plus interest that GM Investments owes Gill but $2,363.48 plus interest.

LORNE D. COLLINGWOOD

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal