

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Kyllo Bros. Holdings, Kenneth Peter Kyllo, Peter Kyllo
(" Kyllo ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO: 96/060

DATE OF HEARING: April 23, 1996 and
May 2, 1996

DATE OF DECISION: May 13, 1996

DECISION

OVERVIEW

This is an appeal by Kylo pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination No. CDET 000464 issued by the Director on December 14, 1995. In this appeal Kylo claims that the Peter Kylo is the only employer in this matter and further that the Director’s calculation of wages owing is not correct.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint under this *Act*.

Written submissions were received from Kylo, the complainants Marika and Mariano Mejias, and information was provided by the Director. Subsequently, an oral hearing commenced on April 23, 1996 in Fort St. John, British Columbia ,with a second day of hearings on May 2, 1996 in Mackenzie, British Columbia. Due to the fact that the complainants are now residing near Victoria, their participation in the hearing was via telephone conference call and speaker phone.

Persons in attendance at the hearing were:

For the Appellants

Peter Kylo
Kenneth Peter Kylo
William Scott Kylo
Lovette Janet Kylo
Ivor Andrew Svisdahl
Emma Barbara Svisdahl
Robert James Hauber
Kenneth Isaac
Tracy Chubak
Paul Leonard LeBouthiellier

For the Complainants

Yvonne Marie Mejias (Marika)
Luis Mariano Mejias (Mariano)

For the Director

Robert Joyce, Industrial Relations Officer

FACTS

Marika and Mariano were hired by Scott Kylo in early 1995 to work at Fort Graham Lodge, a fishing and hunting lodge located on Williston Lake near Mackenzie, British Columbia. The wage offer made by Scott Kylo was for \$1500.00 per month with room and board provided. While they were enroute to Mackenzie they contacted Scott Kylo on the telephone and were informed that he would not be going up to Fort Graham Lodge at this time but that work was available at Finlay Bay Cabins, a campsite and fishing camp also located on Williston Lake.

Marika was to work as the cook and Mariano was to help with maintenance and repairs at Finlay Bay Cabins. They commenced working at Finlay Bay Cabins on May 17, 1995 and worked until July 3, 1995.

Marika and Mariano acknowledge receiving a total of \$2,025.00 for their entire period of employment.

Marika and Mariano filed complaints with the Employment Standards Branch (“Branch”) on September 20, 1995 alleging that they were owed regular wages, overtime wages and vacation pay, and as well, that the employer did not make the required statutory deductions.

The employer did not keep any records of the daily hours worked by Marika and Mariano during their period of employment.

The Director’s delegate, Robert Joyce Industrial Relations Officer, investigated the complaints and, subsequently, determination # CDET 000464 was issued.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Who was the employer of Marika and Mariano Mejias while they were working at Finlay Bay Cabins ?
2. What hours were actually worked by Marika and Mariano Mejias ?

EVIDENCE

I received a substantial amount of testimony from former customers and employees of Finlay Bay Cabins. While the testimony provided an interesting insight into the operations of Finlay Bay Cabins, most of it was anecdotal in nature, generally vague and lacked specifics as to times or even dates to be of much assistance to me in this matter. It should be clearly understood that I am not inferring that the witnesses did not

truthfully recount their recollections, merely that those recollections of events which transpired almost 1 year earlier are understandably vague.

I will now turn to the testimony that was relevant to each of the issues of this appeal.

With respect to issue #1, who was the employer, the testimony given was:

Marika and Mariano testified that:

- they were hired by Scott Kyлло and they understood that they were to work for Kyлло Bros. Holdings at Fort Graham Lodge
- when they were instead put to work at Finlay Bay Cabins, they were not told that they were no longer working for Kyлло Bros. Holdings
- they were given instructions and directions by Kenneth Peter Kyлло and his wife Lovette, as well as by Scott Kyлло and his wife Barb and by Peter Kyлло
- they were told by Peter Kyлло that a joint loan he was to obtain with his father would ensure that enough money was available to pay them at the end of the season

Kenneth Peter Kyлло testified that:

- he personally owns the property and facilities at Finlay Bay Cabins and in conjunction with a partner owns the property and facilities at Fort Graham Lodge.
- Kyлло Bros. Holdings is a partnership consisting of himself and his wife Lovette.
- Kyлло Bros. Holdings has nothing to do with either Fort Graham Lodge or Finlay Bay Cabins.
- he had leased out Finlay Bay Cabins to a couple, Andy and Emma Svisdahl, for the 3 previous years and when they advised that they were not interested in leasing the property in 1995, his son Peter indicated that he would like to lease the property.
- there has never been a written lease with the operator of Finlay Bay Cabins, only a verbal lease and that 1995 was no different
- does not recall exchanging material or other supplies between Fort Graham Lodge and Finlay Bay Cabins
- some fuel was taken from Finlay Bay Cabins to Fort Graham Lodge however he also purchased fuel from the bulk dealer and gave it to Finlay Bay Cabins to replace the fuel taken as it was cheaper to barge large quantities

Peter Kyлло testified that

- he and he alone operated Finlay Bay Cabins and was at all times the employer of Marika and Mariano

- he had his own business accounts for supplies and materials set up separate from those of Fort Graham Lodge
- any of the so called instructions or directions given by his father and mother, or his brother and his wife were in the nature of advice only

Scott Kylo testified that:

- he had offered Marika and Mariano employment at Fort Graham Lodge at the wage of \$1,500.00 per month for both plus room and board
- the employment was to last till the end of hunting season
- he was not able to have them go up to Fort Graham Lodge so he let Peter “have them”
- he preferred to have Marika and Mariano at Fort Graham but his father wanted to keep the old cook, Fay

Lovette Kylo testified that:

- she went shopping with Marika and Mariano in Prince George on June 1 and after some time she was tired so she gave her credit card to Marika to finish the shopping and as well pick up some parts for Peter’s truck at a local dealer
- all the grocery orders for Finlay Bay Cabins go through her, if he (Peter) needs something he either calls a company in Dawson Creek or calls me
- she told Marika to get what she needed as she knew what was needed at Finlay Bay Cabins

Emma Barbara Svisdahl testified that

- she ran Finlay Bay Cabins for the 3 years previous to 1995
- she did not have any written lease with Kenneth Peter Kylo, only a verbal lease

With respect to issue #2, how many hours were worked by Marika and Mariano, the testimony given was:

Marika Mejias testified that:

- she did not know whose decision it was to have her and Mariano go to Finlay Bay Cabins instead of Fort Graham Lodge, but it was communicated to her by Scott
- they arrived at Finlay Bay Cabins in the evening and Peter showed them where to stay
- in the morning, Peter asked her to be the cook and for Mariano to help out around the place
- she kept a record of the hours worked on a calendar from the very beginning as this is a habit of hers

- the summary of hours provided to the Branch were transcribed from the calendar
- she wrote the hours on the calendar on a daily basis
- the only discrepancies with the hours on the calendar were for the 2 trips to Prince George, when as they did some shopping for Finlay Bay Cabins, she thought they should be paid for that time
- she was always there (at the restaurant) from first thing in the morning till late at night
- she was always at the restaurant by around 8:00 a.m., sometimes a little earlier or later
- there was not much room in their cabin and the only food was at the restaurant
- the restaurant was opened around 8:00 a.m. and closed around 8:00 or 9:00 p.m. daily except on weekends when it usually was open to either 9:00 or 10:00 p.m.
- she was responsible for cooking for the other employees and any guests which might be there
- she usually cooked 3 big meals each day
- Peter was the supervisor except when Ken was there
- she was told on the July 1 long weekend to not come to work until 10:30 a.m.
- after they returned from the last trip to Prince George, gave Peter 2 weeks notice, he said he would have to confer with his father and went to Hudson Hope to do so and upon his return said O.K. to the notice
- Peter may have cooked breakfast for some friends or customers once or twice, but he was not usually up and about until 9:30 a.m. or 10:00 a.m.
- on the last day Peter gave her a paper which he claimed showed all the money they had received to date and a balance owing of \$940.00
- they signed this paper noting that they felt that this accounting was unjust
- she agrees that they received a total of \$1,085 in advances during their employment at Finlay Bay Cabins and a further \$940.00 in cash when they left.
- she never received the other \$175.00 that Peter put on his note

Mariano Mejias testified that:

- he never kept track of his hours because Marika did so
- Mariko began to keep track of the hours from the very beginning but not sure if it was from the first day or the first week
- when Kenneth Kyлло was at Finlay Bay Cabins, he would usually help him unload supplies and materials
- he helped Ken Kyлло repair the water system as there was many problems with the pumps, one eventually burned up
- Peter sent him into Mackenzie to rent a pump and then after it wasn't doing the job, Peter phoned his father to order a new pump

- when the new pump came in, Kenneth Kyлло decided to use a smaller, cheaper electric pump and the one that was ordered was sent back
- when Kenneth Kyлло brought the small electric pump to Finlay Bay Cabins, he helped put it in
- some of the projects that were done took longer than normal because they needed material or tools and had to wait for them
- his son spent a lot of time around him while he was working as it wasn't safe to let him wander around on his own

Peter Kyлло testified that:

- he was not standing over them (Marika and Mariano) cracking a whip
- he pretty much left them alone in the kitchen to feed the crew and customers
- he didn't know exactly what they were doing at all times
- he did not keep a daily record of the hours worked by either Marika or Mariano
- he was never presented with any list of hours claimed to have been worked
- Mariano was supposed to help out around the campsite but after the first week spent most of his time helping in the kitchen and playing with his children
- Marika very seldom was there to cook breakfast and in fact most times breakfast wasn't served until around 10:00 a.m. to 11:00 a.m.
- the last 2 - 3 weeks that they were there, they wanted to spend more quality time with their children, so it was agreed that they would not start work until 10:00 a.m. or 10:30 a.m.
- the kitchen was usually in a mess with lots of dishes piled up to be washed etc.
- he doesn't believe that the hours marked down were actually worked as the number of customers and staff wouldn't require that much time each day
- on their last day at Finlay Bay Cabins, he presented them with an accounting of the money they had received as advances totaling \$1,260.00 and paid them the balance of \$940.00

Emma Svisdahl testified that:

- she operated Finlay Bay Cabins for the 3 previous years and while the restaurant was open for 12 - 13 hours each day, it only took about 8 hours of actual work each day
- she used to work an average of 8 hours per day when she operated Finlay Bay Cabins but it would probably take them (Marika) a little longer to make the type of meals she did
- during those 8 hours there was no help in the kitchen and also washed walls, painted walls, cleaned cabins, etc

- she and her husband visited Finlay Bay Cabins 2 times in 1995, once on the May long weekend and again on the July 1 long weekend
- during the May long weekend she help Marika to get organized and showed her how to do the various things necessary
- Marika was in and out of the kitchen during that weekend and seemed to spend a lot of time with her children
- don't believe that Marika was at the kitchen much before 10:00 a.m.
- most times after supper, Marika and Mariano took the children up to their cabin to put them to bed
- when they visited Finlay Bay Cabins on the July 1 long weekend, the kitchen was a disaster area, never seen so many dirty pots, dishes, etc
- she and Peter had to wash dishes for 4 hours just to start cleaning up
- the grill in the kitchen was so dirty it took her at least 1 hour just to get it clean enough to use
- Marika did not show up at the kitchen until 10:00 a.m. or 10:30 a.m.
- she wrote some notes about the July long weekend shortly after her and her husband returned home because she had a feeling that they (Marika and Mariano) were going to be a problem
- her evidence about the May long weekend was based on her recollections
- Marika told her that Peter should hire some help for the kitchen as she (Emma) had hired 2 girls the previous year to help out for 5 weeks

ARGUMENTS

Peter Kylo argues that the hours claimed as worked were fabricated after the fact and are not an accurate accounting of the actual hours worked and that this is substantiated by the inconsistencies in the hours recorded for the trips to Prince George and the trip to Mackenzie to do laundry.

Peter Kylo also argues that the evidence provided by his witnesses is very clear and in agreement to the fact that Marika and Mariano seldom began work before 10:00 a.m. or 10:30 a.m. and even then, the amount of work that was done shouldn't have taken them as long as they claim.

Peter Kylo further argues that the agreement made was for \$1,500.00 per month for the couple and that should be all that they are entitled to.

Peter Kylo further argues that he should not be required to pay Marika and Mariano for the time that they spent socializing in the kitchen or out in the campsite.

Peter Kylo further argues that the kitchen should be considered as part of the employee's place of residence

Peter Kylo further argues that the written submissions of Marika and Mariano is contradictory in places and therefore is not credible.

Peter Kylo further argues that he offered a settlement on at least 2 occasions and neither was accepted by Marika and Mariano as they seem to want as much as possible.

Peter Kylo further argues that he was the only employer in this matter and that Kylo Bros. Holdings and Kenneth Peter Kylo had nothing to do with the operations at Finlay Bay Cabins in 1995.

Peter Kylo finally argues that it would be fair and reasonable to state that with the exception of the May long weekend, Marika probably averaged 8 hours per day and Mariano averaged 6.5 hours per day.

Marika Mejias argues that the evidence provided accurately reflects the hours worked at Finlay Bay Cabins.

Marika Mejias also argues that they only want to receive what they are entitled to for the work that they did for Finlay Bay Cabins.

The Director contends that the evidence provided clearly indicates that Kylo Bros. Holdings, Kenneth Peter Kylo and Peter Kylo were involved in the operation of Finlay Bay Cabins through providing direction and control of the complainants and because of the joint financial involvement via the loan obtained.

The Director also contends that there is no documented evidence to prove that the operation of Finlay Bay Cabins was separate and distinct from that of Fort Graham Lodge.

The Director further contends that this was a family operation, not an arms length operation.

The Director further contends that as the employer kept no records of hours worked the records kept by the complainants should be considered as accurate.

The Director further contends that the focus must be on the facts, not vague recollections. The facts are that the restaurant was open for 12 - 13 hours per day, even if there were no customers the staff still had to eat somewhere and if the restaurant is open, someone has to be there. Furthermore, the complainants kept records of hours worked and the employer did not.

The Director further contends that the evidence of the former customers and employees was vague, based on assumptions and contained no reliable information as to the work performed by the complainants. The customers were there to enjoy themselves and the other staff had their own work to do and it is not reasonable to expect them to be aware of what the complainants were doing or even when they were at work.

The Director further contends that the majority of the evidence of the employer's witnesses was based on recollections documented after the Determination was issued, some 5 to 6 months after the events had transpired.

The Director finally contends that the complaint was properly and reasonable investigated and that the Determination was issued based on the facts provided at the time.

ANALYSIS

A central issue in deciding this appeal is the credibility of the evidence provided by all the parties. In assessing credibility, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been seen and heard
- the probability of the event happening in the manner suggested

The *Act* defines "employer" as:

"employer includes a person
(a) who has or had control or direction of an employee, or
(b) who is or was responsible, directly or indirectly, for the employment of an employee"

The evidence provided with respect to who was the real employer, was for the most part, contradictory, however, there was no doubt that all members of the Kyлло family were involved in the operation in one fashion or another. Furthermore, in the absence of any documentation to support the argument that this was an arms length operation, I must conclude that Kyлло Bros. Holdings, Kenneth Peter Kyлло and Peter Kyлло were the employer of the complainants.

The *Act* in Part 3 clearly places the onus on the employer to keep payroll records and to pay minimum wage with respect to each employee. The evidence was clear in that the employer kept no records whatsoever with respect to the employees and that minimum wage was not paid. In the absence of records kept by the employer it is appropriate to consider the records kept by the employees. I do however have some concerns with the records supplied by the complainants as it was agreed that they only recorded the hours in "general" for both of the complainants and furthermore it was agreed that the records contain some inconsistencies, specifically in regards to the trips to Prince George. It is

therefore necessary to reconstruct the actual hours worked based on the evidence provided and the provisions of the *Act*.

In order to determine the hours worked by the complainants, I must first consider what the *Act* defines as work. The *Act* in section 1(1) and 1(2) defines work as:

“work means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee’s residence.”

The evidence was that the restaurant was open for 12 to 13 hours each day. Even if there were no customers to serve, the complainants had to be “on call” in case someone did arrive. The complainants are deemed to be at work while on call at the restaurant as this was the location designated by the employer. I am satisfied that, with some exceptions which will be noted below, that Marika Mejias was “at work” for the hours recorded by her on the calendar. In the absence of specific hours of work being recorded for Mariano Mejias, I am satisfied that Peter Kylo’s estimate of 6.5 hours worked each day, again with some exceptions, is most likely to reflect the actual hours worked.

The specific exceptions for Marika Mejias as mentioned above are for the dates as follows:

Date	Reason for adjustment	Hours deemed to have been worked
May 24	drove to Mackenzie to do laundry, some shopping for Finlay Bay Cabins	6
May 31	drove to Mackenzie before supper	10
June 1	drove to Prince George, Dr.s appointment, did some shopping for Finlay Bay Cabins	4
June 2	did some more shopping for Finlay Bay Cabins	4
June 21	left for Prince George in the afternoon for Dr.s appointment	6
June 23	waiting for money from employer’s relative in Prince George	0
June 24	did some shopping for Finlay Bay Cabins and returned to Finlay Bay Cabins	4

The specific exceptions for Mariano Mejias as mentioned above are for the dates as follows:

Date	Reason for adjustment	Hours deemed to have been worked
May 24	drove to Mackenzie to do laundry, some shopping for Finlay Bay Cabins	4
June 1	drove to Prince George, Dr.s appointment, did some shopping for Finlay Bay Cabins	0
June 2	did some more shopping for Finlay Bay Cabins	0
June 19	drove into Mackenzie to get insurance for van	4
June 21	left for Prince George in the afternoon for Dr.s appointment	4
June 23	waiting for money from employer's relative in Prince George	0
June 24	did some shopping for Finlay Bay Cabins and returned to Finlay Bay Cabins	0

There was no evidence provided to substantiate the employer's assertion that the complainants received advances in the total amount of \$1,260.00. I conclude, based on the evidence provided, that the complainants received advances in the amount of \$1,085.00 during their period of employment and received a further \$940.00 in cash on the day they left Finlay Bay Cabins for a total of \$2,025.00 in wages.

I have recalculated the wages earned by Marika Mejias and Mariano Mejias on the basis of the minimum wage in effect at that time. I have further allocated the advances received and the final pay against Marika's total wages as follows:

Marika Mejias

wages earned	= \$5,102.50
4% vac. pay	= \$ 204.10
total wages	<u>= \$5,306.60</u>
less advances	= \$1,085.00
less final pay	= \$ 940.00
wages owing	<u>= \$3,281.60</u>

Mariano Mejias

wages earned	= \$1,893.11
4 % vac. pay	= \$ 75.72
total wages	<u>= \$1,968.83</u>
wages owing	<u>= \$1,968.83</u>

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000464 be varied to be the amount of \$5250.43

Hans Suhr
Adjudicator
Employment Standards Tribunal

May 13, 1996
Date

:jel