

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

GM Investments Inc.
operating as GM Restaurant
("GM" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No: 1999/725

DATE OF HEARING: January 31, 2000

DATE OF DECISION: February 11, 2000

DECISION

APPEARANCES:

Ms. Swarmjit Shah on behalf of the Employer

Mr. Jasbir Sidhu on behalf of Ms. Paramjit Sidhu (“Sidhu” or the “Employee”)

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on November 22, 1999 which determined that Sidhu had been terminated from her employment with GM and awarded her one week’s pay, on account of compensation for length of service, and an amount on account of regular wages, overtime, statutory holidays and vacation pay, for a total of \$831.01. The Employer appeals the Determination and says that Sidhu quit to take another job elsewhere. The Employer also takes issue with the calculation of the amount awarded and says that Sidhu was, in fact, paid most of the Determination amount.

FACTS AND ANALYSIS

As the appellant, GM has the burden to show that the delegate erred in making the Determination. For the reasons set out below, I am of the opinion that GM has failed to do so.

GM operates a restaurant in on the Lougheed Highway in Maple Ridge, British Columbia. According to the Determination, Sidhu was employed as a cook between February 6, 1999 and July 10, 1999, earning a salary of \$1,150 per month.

According to the Determination, the Employer’s position with respect to the issues raised by the complaint were:

- Sidhu worked an average of 6.5 hours per day, six days a week. The salary paid included vacation pay and statutory holiday pay.
- The Employer did not keep a record of hours worked.
- Sidhu told the Employer that she would not be able to work any longer as she had found other employment which was closer to home and paid better.

Sidhu’s position was stated as follows:

- She was not paid for overtime and statutory holidays. She was not paid vacation pay.
- She kept a record of hours worked.
- Sidhu explained that she was terminated from her employment after asking for a day off.

The delegate found the time records supplied by the Employee reliable and accurate, and concluded that Sidhu was not paid for all hours worked, including overtime, statutory holidays and vacation pay (at the rate of 4%). The delegate also found that the Employer did not provide 32 hours free from work. Taking into account the hours worked, he determined that Sidhu was paid below the minimum wage rate, at the time, \$7.15 per hour. The delegate did not find that there was any evidence to support the Employer's contention that Sidhu quit her employment.

At the hearing the Employer argued that it had paid Sidhu \$497.19 and that this amount should be deducted from the Determination amount. The argument is based on the Employer's evidence that Sidhu worked from 4:00 to 10:00 p.m., six days a week, and that she was paid a salary including overtime, statutory holiday pay and vacation pay. In the circumstances, the inclusion of overtime, statutory holiday pay and vacation pay contravened the *Act*. Moreover, the Employer's argument cannot succeed as the amount it argues should be deducted was, in fact, taken into account by the delegate. What the Employer fails to appreciate is that the delegate based his findings on the Employee's records of hours worked, *i.e.*, did not accept that Sidhu worked only 6.5 hours per day (or six hours per day--as explained at the hearing). There is nothing before me to support an argument that the delegate erred in determining the hours worked. The delegate determined that Sidhu had earned \$6,278.98, including overtime, statutory holidays and vacation pay, and had only been paid \$5,700 according to the Employer's payroll records. The Employer argued that Sidhu had been paid additional amounts on her pay cheques--\$50.00 in March, \$69.07 in May, \$51.87 in June, and \$326.25 in July, for a total of \$497.19. However, based on the pay cheques presented in evidence at the hearing, the amount paid is less than the \$5,700 paid according to the payroll records. In short, I do not accept that the amount awarded should be reduced by \$497.19. This ground of appeal is dismissed.

With respect to the issue of termination, Swarmjit Shah ("Shah") testified that the Employer did not terminate Sidhu. She explained that Sidhu asked for time off because she was "looking for other work" and "wanted to take more time off" on weekends, especially Saturdays. The conversation which resulted in the termination was between Sidhu and Shah's husband who did not testify at the hearing. Shah was not present at the time. Sidhu denied the Employer's version of the events. She said she was fired because she wanted to take a day off. However, even if I accept the Employer's testimony at the hearing, that Sidhu wanted to look for other employment and wanted more time off, that would not constitute a resignation. As such, Sidhu is entitled to compensation for length of service. In short, I agree with the delegate, and dismiss this ground of appeal.

ORDER

The Determination dated November 22, 1999 is confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal