Employment Standards TRIBUNAL

Appeals

- by -

Martin Hudelist and Christoph Lotter
(“Hudelist” and “Lotter”)

- 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: David B. Stevenson

FILE No.: 2001/769 and 2001/770

DATE OF HEARING: March 26, 2002

DATE OF DECISION: April 9, 2002

DECISION

APPEARANCES:

On behalf of the appellants	Both in person
On behalf of RHS Holdings Ltd.	Hans Schroth Ruth Schroth

OVERVIEW

This decision addresses two appeals that have been brought pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), one by Martin Hudelist ("Hudelist") and the other by Cristoph Lotter ("Lotter"). Both appeals arise from a Determination of a delegate of the Director of Employment Standards (the "Director") dated October 15, 2001.

Hudelist and Lotter had filed complaints with the Director alleging their employer, RHS Holdings Ltd. operating as Woodfire Gasthaus ("RHS") had failed to pay them all wages owed under the *Act*. The Determination concluded that RHS had not contravened of the *Act* and, pursuant to Section 76(2) of the *Act*, ceased investigating and closed the file on the complaint.

Hudelist and Lotter say the Director erred in rejecting their claims for unpaid salary and overtime hours worked.

ISSUE

The issue in this appeal is whether Hudelist and Lotter have shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to cancel or vary the Determination, or to refer it back to the director. More specifically, the principle question arising in this appeal is whether the decision of the Director to cease investigating the appeal and to close the file on their complaints was fair and reasonable.

THE FACTS

Except in respect of the principle issue, the conclusions of fact made in the Determination are not seriously disputed. The Determination set out the following background information:

RHS Holdings Ltd. operating as Woodfire Gasthaus (the employer) was a restaurant which is under the jurisdiction of the *Act*. Hudelist claims he worked November 10, 1999 to November 30, 1999 assisting the employer with the preparation required in setting up the restaurant and from December 1, 1999 to April 30, 2000, as an Executive Chef at the rate of $1500.00 per month plus profit earned by the restaurant as calculated on a monthly basis. Lotter claims he worked from November 10, 1999 to November 30, 1999 assisting the employer in setting up the restaurant and from December 1, 1999 to

April 30, 2000, as Restaurant Chef, at the rate of $1500.00 per month plus profit earned by the restaurant as calculated on a monthly basis.

The complaints were filed on October 16, 2000, which is in the time period allowed under the *Act*.

Woodfire Gasthaus (Woodfire) restaurant was located at the Big White Ski Resort and was in operation for the 1999-2000 ski season, closing April 2000. Woodfire did not open for the 2000-2001 ski season.

Hans and Ruth Schroth are the owners and Directors/Officers of Woodfire. They have and continue to operate other restaurants and businesses in the Kelowna and surrounding area.

The Determination identified four issues: were Hudelist and Lotter paid according to their employment agreement; were they “managers” for the purposes of the *Act*; if excessive hours were established by Hudelist and Lotter, were they entitled to the multiple hourly rates under Section 40 of the *Act* or straight time for the extra hours of work; and were they owed wages and, if so, in what amount.

The Director made the following findings of fact:

1. Hudelist and Lotter came from Germany to work with RHS; they arrived in November, 1999; they lived with the Mr. and Mrs. Schroth and assisted in setting up and organizing the restaurant, which opened in the beginning of December, 1999.

2. Their rate of pay was $1,450.00 per month plus vacation pay and each received a payment of $3000.00 for their profit share on April 29, 2000.

3. Their duties included hiring and managing their co-workers in the kitchen, scheduling staff hours, training staff, planning menus, ordering supplies, taking delivery of the supplies, other paper work and, in general, running the kitchen.

4. No hours of work were recorded for the period November 1, 1999 to November 30,1999, prior to the opening of the restaurant.

5. Hudelist and Lotter did not provide time sheets to the employer but did keep a record of their own on a daily basis from December 1999 to the end of their employment.

6. Hudelist and Lotter were paid twice a month.

7. Hudelist and Lotter were laid off at the end of the 1999-2000 ski season.

It is worth mentioning at this stage that the Determination noted the RHS had failed to comply with the statutory requirement, found in Section 28 of the *Act*, to keep a daily record of the hours worked by Hudelist and Lotter. The only available record of the hours worked by each was the personal record kept by them.

The documents attached to the Determination, which were introduced into evidence at the hearing included a copy of the employment agreement between Lotter and RHS. Hudelist testified the employment agreement he signed was identical in form and content, with the necessary changes to name

him as one of the contracting parties. The agreements were signed by Hudelist and Lotter on or about November 10, 1999. The agreements do not show the date on which the employment was to commence. The Record of Employment issued to each of the complainants identify December 1, 1999 as the first day worked. Neither Hudelist nor Lotter received any wage payment until mid-December 1999.

The employment agreements did not indicate the hours of work upon which the salary of the complainants was based. As indicated above, the employment agreements included a provision that Hudelist and Lotter would receive 15% of the profits of the restaurant, calculated on a monthly basis. There was some evidence from both of the complainants that they were not entirely comfortable with that arrangement. They did, however, accept it and they did accept the $3000.00 paid to each of them under that provision. In his evidence, Hudelist stated that it was understood that both he and Lotter would have to work many hours in order to make the business successful.

While the employment agreements indicate the starting salary for Hudelist and Lotter was to be $1500.00 per month, the Director found that $1450.00 per month plus vacation pay was their established salary, finding in effect that the salary set out in the employment agreements included annual vacation pay, although the agreements do not indicate that:

Clearly, Hudelist and Lotter agreed to a salary of $1500.00 per month during probationary period according to the signed Employment Agreement between themselves and the employer. They allege they were not paid according to the Employment Agreement they signed. Their pay statements reflect the rate of $725.00 plus vacation, paid on a semi-monthly basis; $1450.00 plus vacation pay per month. They should have discussed it with their employer at the time. Lotter claims he did discuss the rate of pay with the employer, but no increase was made and they continued to be paid $1450.00 per month plus vacation pay through the remainder of the employment period.

Following some analysis, the Director also concluded there was insufficient evidence to determine what, if any, wages were owed for the period November 1, 1999 to November 30, 1999.

On the issue of the hours worked, the Determination described the claim as follows:

> The complainants claim to have worked hours in excess of eight per day and forty per week . . . .

The Director considered that claim was decided on the credibility of the evidence provided by Hudelist and Lotter. The Director stated a belief, on a balance of probabilities, that Hudelist and Lotter had worked overtime hours, but did not accept their record of hours as being an accurate reflection of the amount of overtime worked. As a result of the finding concerning the accuracy of the records kept by Hudelist and Lotter, the Director concluded there was insufficient basis for determining whether there had been a violation of the *Act*. The Determination contained the following statement of principle:

If the hours of work claimed are proven to be at least in part incorrect then it raises question about the accuracy of all the hours claimed. If the hours claimed are questionable and cannot be relied on as accurate then there is insufficient evidence to determine whether or not there has been a violation of the *Act*.

It is, in effect, that statement which forms the main challenge to the Determination by Hudelist and Lotter.

ARGUMENT AND ANALYSIS

The burden is on Hudelist and Lotter, as the appellants, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact.

In their appeals, the primary argument made by both Hudelist and Lotter is that the Director was wrong to reject their personal record of hours worked. They continue to assert their records are accurate. They also argue the conclusion of the Director concerning their salary was also wrong and they should have been paid a salary of $1500.00 a month, rather than the $1450.00 a month they were paid.

In reply to the question of the hours of work, the Director re-asserts the conclusion from the Determination, which is that the start times claimed by the complainants were not corroborated by any witness or by the employer and because part of the record provided by Hudelist and Lotter was proven to be incorrect, the accuracy of all hours claimed was questionable. The Director filed no reply on the matter of whether Hudelist and Lotter were paid the correct monthly salary.

RHS filed a reply to the appeals. In that reply, they re-state their objection to the hours which Hudelist and Lotter claim to have worked.

I heard evidence from the complainants, Mr. Horst Hallen, who was the General Manager for RHS at the restaurant and worked with Hudelist and Lotter from November, 1999 to the end of January, 2000, and Mr. and Mrs. Schroth. I have carefully considered the evidence presented at the hearing of this appeal.

I shall first address the validity of the conclusion that the complainants' salary was $1450.00 plus vacation pay. On that point, I agree completely with the complainants that the Determination is wrong. The Tribunal has consistently stated that the *Act* does not allow the inclusion of annual vacation part as part of an employee's wage (see *Foresil Enterprises Ltd*., BC EST #D201/96; *W.M Schulz Trucking Ltd*., BC EST #D127/97; *Kirkham Silviculture Ltd*., BC EST #D263/97; *Pro Fasteners Inc*., BC EST #D556/97 and *Frank Markin*, BC EST #D228/98). The position of the Tribunal on this issue has reflected on and identified a number of factors that have led to the above conclusion. The position adopted by the Tribunal is also consistent with the reasoning of the Court in *Re Atlas Travel Service Ltd - and - Director of Employment Standards*, unreported, Vancouver Registry No. A931266. The employment agreements are clear in stating the complainants' salary as being $1500.00 per month. Annual vacation pay cannot be included in that amount and as a matter of law, the Director was wrong to have done so. The complainants' succeed on that issue and, at a minimum, the Determination must be varied to reflect my decision on this point.

Even from an evidentiary perspective, I cannot understand how the Director could reach the conclusion that the stated salary of $1500.00 could have been comprised of actual salary of $1450.00 plus 4% vacation pay, when 4% of $1450.00 is $58.00, not $50.00. There is no indication of that in the employment agreement and if that was the agreement between Hudelist and Lotter and RHS, the employment agreements should have clearly indicated that. As well, one would anticipate, as a practical matter that even if the salary agreed upon was intended by the parties to include annual vacation pay, the correct amount of 'salary' plus vacation pay amount would have been set out in the agreements. Base don the conclusion reached by the Director, the salary shown in the agreements should have been $1508.00, not $1500.00. Finally, it also appears that the Director failed to consider the annual vacation entitlement on the $3000.00 paid to each of the complainants on April 29, 2000. That amount was not

part of the agreed 'salary', but was a 'profit' payment. That amount was not only intended by the parties to be part of their wage, but also clearly falls within the definition of 'wages' in the *Act*. It is therefore an amount on which annual vacation was required to be paid.

On the primary issue, that of the decision of the Director to cease investigating the complaints of Hudelist and Lotter and close the files, because of the nature of this issue, Hudelist and Lotter must show that those conclusions of fact were either based on wrong information; were unreasonable, manifestly unfair or there was no rational basis upon which the findings of fact could be made (see Mykonos Taverna, operating as the Achillion Restaurant, BC EST #D576/98). In their appeals, Hudelist and Lotter say the Director's decision was, based on the evidence, unreasonable and unfair.

I shall commence the analysis on this issue by addressing the suggestion which arises in the appeal submissions that, absent RHS maintaining a record of hours worked, as they are required to do under the *Act*, the Director was somehow compelled to accept the record of hours provided by Hudelist and Lotter. I refer to the following comments of the Tribunal in *Wendy Michnick*, BC EST #D006/02:

> There is an inference in the argument made by Michnick that, absent any other information, the Director is bound to accept the records provided by her. That is not correct. The records of Michnick must withstand scrutiny on their own terms. There is no presumption of the correctness of her records only because Prentice Hall failed to keep records. As the Tribunal noted in Mykonos Taverna, operating as the Achillion Restaurant, supra, the Director has been accorded considerable latitude in deciding what evidence will be received and relied on when making decisions subject to fair hearing considerations and within the limitations set out in the first sentence of this paragraph.

That statement also applies in this appeal. The Director was not bound to presume the correctness of the records provided by Hudelist and Lotter. What the Director was required to do was make a fair and reasonable decision based on the findings of the investigation.

The Director appears to have accepted that Hudelist and Lotter did work overtime hours. The Director did not accept the records provided by Hudelist and Lotter as being accurate. The Determination contains the following statement:

> According to the hours of work provided by the complainants, they commenced work earlier in the a.m. than the start times that have been corroborated by witnesses and the employer.

It is apparent from the above statement, and from the Determination generally, that the Director did not accept the complainants' claim, as recorded in their personal records, that from early December, 1999 to mid-February, 2000, they almost always started working at 7:00 or 8:00 am. and from mid-February until late April, 2000 almost always started working at 10.00 or 11:00 am. The Determination noted that witnesses who provided information on their start times did not corroborate the claim:

1. Horst Hallen, General Manager at the Woodfire Gasthaus provided a written statement.

> . . . He claims that one of the complainants would come into work at approx. 9:00 a.m. the other around 10:00 to 10:30 a.m. Both would work long hours sometimes until 12:00 to 12:30 a.m.
>
> . . .

3. Ted Lachut, was unable to corroborate Hudelist's and Lotter's claim they were at work before 10:00 a.m. or 11:00 a.m. Lachut worked as a cook and did the cooking and preparation for the breakfast hours and lunch buffet.

At the time the Determination was issued, the Director had attempted to contact another former Woodfire restaurant employee of RHS, Sandra Limpert. The Determination noted that she had not responded as of October 15, 2001. Apparently, she responded just shortly after the Determination was issued. Her statement was submitted with the reply of the Director and filed as an exhibit by RHS at the hearing. According to her statement, Ms. Limpert started working at the restaurant on January 16th, 2000. She was the front end Manager. I am unable, however, to give much effect to her statement. There are three main reasons: first, at the hearing her statement was shown to be wrong in several respects; second, it is extremely general on the facts; and third, the statement appears, in parts, to be coloured by her personal opinion of the complainants.

Mr. Hallen, in his evidence, was also quite vague on specifics, making statements such as: "we all did the hours", "as long as I was there, none of us had a day off" and "I was there every day from 6:30 am to 12 am, and the chefs matched my hours". He also had filed a complaint with the Director about excessive hours of work, which, from his perspective, was not satisfactorily resolved. Some of what he said did not accord with the statement he provided during the investigation. That statement was provided to the Director on or about June 27, 2001. It purports to be a statement for Hudelist and Lotter and for Ted Lachut, who had also filed a complaint with the Director concerning excessive hours of work. It states:

> I worked at the Woodfir [sic] Gasthaus on Big White in Kelowna as General Manager for Mr. Hans Schroth from Nov. 99 - end of Jan. 2000. During this time Mr. Hudelist and Mr. Lotter worked approx. 13 -15 hrs a Day 7 Days a Week.
>
> Our Breakfast Cook, Ted ?? worked the Breakfast and Lunch Shift and also had to help out on a regular basis in the afternoons and in the evenings.
>
> If you need any further Information please phone or fax.

The evidence of Mr. and Mrs. Schroth did not add much to the factual matrix of these appeals. Both continued to maintain the complainants had 'padded' their records with hours not worked. Mr. Schroth also noted in his testimony that the labour costs for operating the restaurant during the approximately 4½ months it was open, were, as a percentage of the total operating cost, high compared to the usual labour costs, as a percentage of total operating costs, in the restaurant business.

Having considered the evidence and arguments, together with the relevant provisions of the *Act*, I conclude these appeals must succeed.

I am struck firstly by the internal inconsistency of the Determination. On the one hand, the Director states, "On the balance of probabilities I believe Hudelist and Lotter did work overtime hours", while on the other hand applying Section 79(2)(d) to dismiss the complaints and finding, "the *Act* has not been contravened". If there is evidence sufficient to establish 'a belief' that Hudelist and Lotter worked overtime hours, then it is patently unreasonable to reach a conclusion that the Act has not been contravened.

Further, on the available material it would, in any event, have been patently unreasonable to have concluded that Hudelist and Lotter did not work overtime hours. It perhaps needs to be restated that the complaints made by Hudelist and Lotter was that they were entitled to overtime wages because they worked hours in excess of eight in a day and forty in a week. In my view, there was ample evidence to prove that complaint. There is certainly nothing to the contrary in the Determination and no reason provided (apart from the statement of principle which I have set out above and with which I fundamentally disagree) for rejecting their assertion that excessive hours were worked. Even based on the uncontested (and undeniable) assertion that both worked 7 days a week, there is a contravention of the hours of work and overtime provisions of the *Act* and at least some basis for issuing a remedy for that contravention. The conclusion of the Director in this case has confused evidence proving the complaint with evidence establishing the scope of the remedy. Those are two distinct matters (see *Athwal Transportation Ltd*., BC EST #D459/99) and nothing in the Determination indicates the latter has been addressed in any real way.

There is an inference in the reply filed by the Director that the decision to cease investigating was an exercise of discretion made under Section 76(2), but it should be noted that the discretion given to the Director under the *Act*, generally, and under Section 76 specifically, must still be exercised in a manner that is within a reasonable interpretation of the evidence and within the margin of manouevre contemplated by the legislature. The *Act* is social remedial legislation having its primary objective and purpose to ensure that employees are provided with the minimum standards and conditions set out in the *Act* and the legislation does not contemplate that probable contraventions of the *Act* should go unattended because the information acquired through the investigation does not support a part of the complainants' claim. I do not disagree with the conclusion of the Director that there is uncertainty in the material about the complainants' start times, but that uncertainty is not a reason for entirely rejecting the claims by Hudelist and Lotter that they worked 7 days a week and consistently worked more than 8 hours a day. I can find nothing in the material on file and nothing arose in any of the evidence I heard, that would compel me to conclude such a decision was either fair or reasonable. Difficulty in determining the scope of the contravention of the *Act* does not justify a decision to cease investigating a complaint. The Tribunal has stated in several decisions that mathematical exactitude is not required by the *Act*.

My comments also extend to the claims by Hudelist and Lotter that they worked for a period of time in November, 1999 without receiving any wages. The evidence before me in the hearing clearly established that to be the case. The response of RHS to this aspect of the complaints seems to be that during this period the complainants, and Mr. Hallen, were provided room and board by Mr. and Mrs. Schroth.

More work needs to be done by the Director on the complainants' claims, both in respect of their claims for hours worked in excess of 8 in a day or 40 in a week and in respect of their claims for wages during November, 1999.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination dated October 15, 2001 be varied to show the complainants' salary as $1500.00 a month exclusive of annual vacation pay and order the balance of the Determination referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal