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 -

Chilcotin Holidays Ltd.
(" CHL ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No: 2000/007

DATE OF HEARING: March 10, 2000

DATE OF DECISION: March 31, 2000

DECISION

APPEARANCES:

for Chilcotin Holidays Ltd.	Sylvia Waterer Kevan Bracewell
for the individual	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Chilcotin Holidays Ltd. ("CHL") of a Determination that was issued on December 17, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that CHL had contravened Sections 45 of the *Act* and Section 24 of the *Employment Standards Regulations* (the "*Regulations*") in respect of the employment of Lorie McCrossan ("McCrossan"), ordered CHL to cease contravening and to comply with the *Act* and ordered CHL to pay $1636.98. The Determination also dismissed a claim for overtime.

CHL says the Determination is wrong in respect of the statutory holiday pay order and argues that a complete review of the compensation that McCrossan received over the audit period indicates she received more than what she was entitled to. CHL also challenges, in the alternative, the conclusion that McCrossan had "regular hours" upon which to base statutory holiday pay entitlement.

ISSUE

The issue is whether CHL has shown any part of the Determination to be wrong in law or in fact.

FACTS

I accept the following facts that appear in the Determination:

CHL operates a guest ranch and guide service.

McCrossan worked for CHL from April 4, 1994 to November 27, 1997 as a cook and housekeeper. Her rate of pay varied during her term of employment. From April 4, 1994 to April 30, 1996 her rate of pay was $80.00 a day, based on a 10 hour day. That period of time did not figure in the Determination.

From May 1, 1996 to February 18, 1997 her rate of pay was $90.00 a day, based on a 10 hour day, with the first eight hours paid at minimum wage and the other 2 hours paid at time and one-half. This rate of pay was described in an employment contract dated May 1, 1996.

From February 19, 1997 to the end of her employment her rate of pay was $110.00 a day, based on a 12 hour day. The following formula was applied to reach that rate of pay: $7.50/hr for the first 8 hours; 11.25/hr for the 9th to 11th hours; and $15.00/hr for the 12th hour. This rate of pay was set out in an employment contract dated February 19, 1997.

McCrossan was injured in an automobile accident on January 2, 1996 and was off work until April 15, 1996.

Based on Section 80 of the *Act*, the time period for which McCrossan was entitled to claim commenced April 15, 1996 and ended November 24, 1997 (the "audit period").

An examination by the Director of CHL's payroll records for the audit period showed no reference to the payment of statutory holidays.

Based on the evidence I heard, I would add the following facts:

1. During the audit period McCrossan was normally paid $90.00 a day or, later, $110.00 a day.

2. CHL claims there were many days where McCrossan worked less than 10 or 12 hours, but was paid the full daily rate in any event, $90.00 or $110.00, respectively. For example, on May 13, 1997, the payroll summary shows she worked 7.5 hours. She was paid $110.00.

3. CHL also claims that when McCrossan worked less than 10 or 12 hours, respectively, her adjusted daily pay would be roughly based on the normal daily amount. For example, on February 2, 1997, the payroll summary shows McCrossan worked from 8 to 12; for that period the payroll record shows 4 hours work and that she was paid $55.00. Another day in that month, February 23, shows she worked for 1 hour and she was paid $10.00 for that day.

4. McCrossan received a pay statement at the end of each month. None of these statements showed that statutory holiday pay was included in the monthly wages.

ANALYSIS

At the hearing, CHL presented an analysis of their payroll records for the audit period. The purpose of the analysis was to show that when their record of the hours worked by McCrossan in each month was compared to the wages paid to her in that month, she was paid enough in every month to cover her statutory holiday pay entitlement. The Determination notes CHL's position:

> Sylvia Waterer, President, advised the complainant had been paid for all hours worked, and she had been paid for all applicable statutory holidays. She further added, "This is shown if you examine the complainant's total hours worked each month and then compare it to her gross pay. It clearly shows she has been paid all her overtime worked, and her statutory holidays."

The Determination concluded, after examining all of McCrossan's daily time sheets for the audit period and computing regular wages and overtime earnings each month, that McCrossan had

been paid all overtime worked. The Determination found no reference to the payment of statutory holiday pay in the payroll records. The Determination also concluded that while there was evidence showing that McCrossan was paid 1½ times her regular wage when she worked on a statutory holiday, but there nothing showing McCrossan received another day off with pay for those days. The Determination noted that CHL had failed to meet the requirement in Section 28(1)(h) of the *Act* to keep a record of statutory holidays taken and paid.

The purpose of an appeal is not simply to allow an aggrieved party a second chance to argue the same case that was argued unsuccessfully to the Director during the investigation. A party appealing a Determination must show it is wrong, in fact or in law. In the context of an appeal based on an alleged error on the facts or the conclusion to be drawn from the facts, a party saying, in effect: "I don't disagree that these are the facts and that the Director had all these facts, but I disagree with the result", will not be successful. The Tribunal is not a forum for second guessing the work of the Director.

CHL has not shown that the Determination was wrong in respect of its conclusion on statutory holiday pay. The same argument was made to the Director that was made to me on this appeal. Nothing new has been added to the position of CHL. The conclusion that was reached by the Director was not unreasonable or inconsistent with the provisions of the *Act* and the appeal on that point is therefore dismissed.

CHL also argued, as a matter of fact and law, that the basis for the calculation made by the Director of statutory holiday pay entitlement was wrong. The statutory provision states:

> 45. An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:
>
> (a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;
>
> (b) in any other case, an amount calculated in accordance with the regulations.

The alternative to calculating the statutory holiday entitlement on "regular schedule of hours" would be, according to Section 24 of the *Regulations*, to base the calculation on the employee's total wages earned during the applicable period.

CHL says McCrossan had no "regular schedule of hours" and the calculation done by the Director, which was done on the basis of $90.00 or $110.00 a day, was wrong. Their appeal makes the following point:

> Our summary sheets indicate there were no "regular days" (attached example showing February 1997). Hours worked per day varied extremely (ie. 4 hours, 5 hours per day, as did the number of days worked per month. The Complainant worked a Doctor's Requested Schedule well into 1997 as confirmed by the

> records. Our contract with the Complainant reads "based on 12 hours per day where applicable if overtime is worked".

This ground of appeal requires analysis, as CHL suggests that there was no rational basis for the factual conclusion made by the Director. In reply to the appeal on this point, the Director says:

> At no time has the employer supplied pay statements that stipulate the rate of pay, number of hours worked, and overtime wage rates. . . .
>
> . . . If the daily rates of pay are wrong, how were the rates for each month calculated?

It seems to me that both CHL and the Director have missed the point. While Section 24 says that the amount of an employee's statutory holiday pay entitlement must be equivalent to the employee's "regular days" pay, that only applies where it is found that the employee has a "regular schedule of hours". CHL says, in effect, that I should conclude that McCrossan did not have a "regular schedule of hours" because her hours of work "varied extremely". I do not agree with that argument for two reasons: first, as a matter of fact, it is not a correct characterization of the facts in this case to say that McCrossan's hours of work "varied extremely"; and second, as a matter of law, it is an incorrect interpretation of the *Act* to suggest that an employee does not have a "regular schedule of hours" for the purposes of Section 45 because that employee's actual hours of work vary from day to day or week to week.

The employment contract covering the period May 1, 1996 to February 19, 1997 contains a clearly stated intention that McCrossan's "regular schedule of hours" would be 10 hours a day. That is the only effect I can give to the words "$90.00 a day based on a 10 hour day". These words are also given meaning and supported by reference to the payroll summary for this period showing that McCrossan frequently worked a 10 hour day and, consistent with the agreement, was paid $90.00 for that day. As well, in many cases, even where less than 10 hours of time "worked" is shown in the payroll record, McCrossan was nevertheless paid $90.00, indicating she was being paid "based on a 10 hour day". Other elements of the payroll records support the conclusion. On January 20 and 21, 1997, the payroll summary contains the notation: "Normal - 10 hours - as per schedule" (there are several similar entries).

The "Doctor's Requested Schedule", referred to in CHL's appeal in the context of the variance in McCrossan's hour of work, actually seems to support the conclusion I have reached. The proposed schedule showed how a 10 hour work day could be achieved while providing McCrossan with certain periods of rest during her rehabilitation from the automobile accident. In fact, the schedule proposed a 13 hour day during which McCrossan would be working for 10 hours and resting for 3 hours.

While the employment contract for the period from February 19, 1997 to the end of McCrossan's employment is less clear on its stated intention, the evidence showed that McCrossan was given full pay, $110.00, for any days where she worked approximately 10 hours. This suggests that the intention of the parties did not change. Once more this conclusion is supported by reference to the payroll summary for this period that shows McCrossan was typically present at work for 11.5

to 13 hours a day, was given credit by CHL for between 8.5 and 11 hours "worked" and was paid $110.00 a day on each of those days. There is also reference in the payroll record that suggests a normal day continued to be 10 hours. For April 29 and 30, 1997, the payroll summary contains the notation: "Clean and Cook normal schedule - 10 hours each day". Where the payroll record shows a day when something less than a "normal" day was worked, the notation suggests that day was a deviation from the norm. For example, on August 24, 1997, the notation reads: "6:30 - 12:30 - off all afternoon - 6 hours" and on August 30, 1997, the notation reads: "7 - 7 pm - BLS off plus 2 hours - 8.5 hours".

The evidence relating to the duties and responsibilities McCrossan had as the Cook/Housekeeper for CHL showed that McCrossan's normal and regular schedule of duties required her to be at work some time between 6:30 and 7:30 am to cook breakfast and required her to remain at work until 6:30 or 7:00 pm, until supper was completed. Normally this was a period of 12 or 12.5 hours, during which, according to the payroll summary, she would be credited with an amount of time "worked" - usually 10 hours. Frequently, there were differences in the amount of time "worked", even on days where the payroll summary showed she had spent the same amount of time at work. For example, on August 3, 1997, the payroll record notes: "6:30 - 6:30 pm 3 - 4 off BLS off 9.5 hours", while the entry for August 7, 1997 notes: "6:30 - 6:30 2 - 4 off BLS off 8.5 hours". Consistent with these entries, the differences in the time "worked" were most often attributable to time off taken by McCrossan during the day, not to any variation in her regular schedule of hours.

In all the circumstances, I find, for the purposes of Section 45 of the *Act*, that McCrossan had a "regular schedule of hours" which was comprised of 10 hours a day.

The above finding is not affected by evidence of days where McCrossan worked something other than regular scheduled hours or by periods where she did not work at all. The evidence was that fluctuations in the amount of available work were typical of employment for this employer, whose business is cyclical. There were periods of layoff when CHL had no guests or clients. Relating to those slow periods, there were days when she was not required to cook all, or any, of the meals. On other days, she was asked by CHL to vary her routine and perform different tasks, such as typing, stuffing envelopes, shopping, picking up mail and driving. Occasionally, the payroll summary indicates she left work for medical appointments or to attend to personal business. None of those matters change the fact that through most of her employment McCrossan worked a regular and consistent schedule of hours as described above.

There is nothing in Section 45 that suggests an employee must continuously work their "regular schedule of hours" to qualify for statutory holiday pay. The provision anticipates that an employee's "regular schedule of hours" may be affected from time to time by seasonal shutdowns, slowdowns or changes in work demands and says that the employee only needs to have *"worked or earned wages"* in the qualifying period to be entitled to statutory holiday pay equivalent to their normal days' pay.

As a result, I conclude that McCrossan's statutory holiday pay entitlement was correctly calculated. No error has been shown in the Determination and this aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 17, 1999 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal