

An appeal

- by -

HKS Enterprises Ltd. operating as ABC Family Restaurant
(“HKS”)

- 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: Norma Edelman

FILE No.: 2002/66

DATE OF DECISION: April 19, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by HKS Enterprises Ltd. operating as ABC Family Restaurant ("HKS") of a Determination that was issued on January 22, 2002 by a delegate of the Director of Employment Standards.

The delegate found that HKS owed Natalie Romaniuk ("Romaniuk") \$406.19 on account of vacation pay, statutory holiday pay and a cleaning allowance. HKS agrees it owes wages for the cleaning allowance but says Romaniuk has been paid her vacation pay and statutory holiday pay.

Hardeep Singh Sarai, on behalf of HKS, requested that the appeal be heard by way of an oral hearing. He stated, "I would like to explain our position in person, as I am more comfortable". I have decided an oral hearing is not required to decide this appeal. I am not convinced Mr. Sarai was unable to advance his full case through written submissions. HKS had a full opportunity to make its case and I am satisfied it has received a fair hearing in this matter.

ISSUE TO BE DECIDED

Does HKS owe Romaniuk statutory holiday pay and vacation pay?

FACTS AND ANALYSIS

Romaniuk worked for HKS from June 10, 1997 to September 29, 2001 as a waitress. She quit her employment at the restaurant.

Romaniuk filed a complaint at the Employment Standards Branch alleging she was owed vacation pay, statutory holiday pay and wages for a cleaning allowance.

The delegate found that Romaniuk was owed the following amounts:

| | |
|------------------------------|----------------|
| Statutory holiday pay | \$288.51 |
| Cleaning allowance | \$68.25 |
| 4% vacation pay on the above | \$14.27 |
| Vacation pay owing from 1999 | <u>\$28.81</u> |
| Total including interest | \$406.19 |

The delegate stated that in reaching the above conclusion, she relied on information provided by Romaniuk. HKS did not provide any records and did not cooperate during her investigation. She said she received no reply to a letter she sent to HKS on November 9, 2001; she was advised by HKS on November 28, 2001 it would provide her with information the following week, but it did not; she received no response to a Demand for Employer Records dated December 12, 2001; and HKS's telephone was not answered.

In its appeal, HKS says it agrees it owes Romaniuk \$68.25 for the cleaning allowance, but it says the vacation pay for 1999 has been paid as it was paid every pay period. It further says it owes no statutory holiday pay to Romaniuk. HKS says when Romaniuk worked a statutory holiday, she was paid time and one-half as well as "stat pay". HKS submitted a document (which was produced by Romaniuk and was attached to the Determination) and says, "Refer to the dates that she has submitted, she writes down a stat, and 'ot'. What we did was pay Romaniuk stat pay, and an overtime rate for the work done on that day. There is no error on our part, just misinterpretation on Romaniuk's part". On the document, HKS has made notations that either Romaniuk worked a certain statutory holiday and was paid overtime or she did not work on the statutory holiday and was paid statutory holiday pay.

The delegate and Romaniuk were invited to reply to the appeal. Only the delegate replied and she reiterated that HKS did not take advantage of the opportunity to present evidence during the investigation process. HKS was given an opportunity to make a final reply. It did not do so.

The burden is on the Appellant, HKS, to show that the Determination is wrong. I am not satisfied that HKS has met that burden.

The Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see *Specialty Motor Cars* BCEST #D570/98).

In this case, HKS does not dispute it failed to participate in the investigation process. Further, it provides no reason, let alone a legitimate reason, why it did not respond to the delegate. For that reason alone, the appeal is dismissed. The information provided by HKS on the appeal could have and should have been presented to the delegate in the initial investigation.

However, even if I consider HKS's reasons for the appeal, the appeal is still not successful.

Romaniuk claims she is owed vacation pay for 1999. HKS says it paid vacation pay every pay period. However, it provides no proof, such as pay stubs or other payroll records to show Romaniuk was paid her vacation pay. Accordingly, I accept that HKS owes Romaniuk vacation pay for the year 1999.

Romaniuk further claims she is owed statutory holiday pay. According to the delegate, Romaniuk's document shows she worked 15 statutory holidays, but was only paid time and one-half for 1 of the days. As a result, the delegate found Romaniuk was owed half time for hours worked on 14 days. HKS, referring to Romaniuk's document, says Romaniuk did not work on 7 of the days that she is claiming for and she was paid statutory holiday pay for these days. As for the 8 statutory holidays she did work, she was paid statutory holiday pay and overtime (time and one-half) as shown on Romaniuk's document, and as a result Romaniuk is not owed any further statutory holiday pay.

HKS, however, provides no records concerning Romaniuk's days and hours of work to confirm that she did not work on 7 of the statutory holidays or to show that the pay she received was

based on an average days pay rather than actual hours of work on that day. Consequently, I am not satisfied that HKS has established Romaniuk did not work 7 of the 15 statutory holidays and that she has been properly paid for these days. Furthermore, regarding the 8 statutory holidays that HKS says Romaniuk worked, it provides no payroll records to confirm that Romaniuk was properly paid for these days. Specifically, it provides nothing to substantiate that the entries made by Romaniuk on her document, indicating she received overtime, concerned wages for statutory holiday pay rather than wages for overtime earned sometime in that pay period. Accordingly, I am also not satisfied that HKS has shown that it fully paid Romaniuk for statutory holidays that she worked at the restaurant.

For the above reasons, I conclude that the delegate did not err in finding that Romaniuk is owed wages in the amount of \$406.19

ORDER

I order pursuant to Section 115 of the *Act* that the Determination is confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal