

An appeal

- by -

Beta Enterprises Ltd. operating as BlackSheep Pub

- and by -

Marlena Lummis

- 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.: 2002/15 and 2002/49

DATE OF DECISION: April 19, 2002

DECISION

OVERVIEW

This decision concerns appeals, pursuant to Section 112 of the Employment Standards Act (the "Act"), by Beta Enterprises Ltd. operating as BlackSheep Pub ("Beta") and by Marlena Lummis ("Lummis") against a Determination issued by a delegate of the Director of Employment Standards on December 21, 2001. The delegate found that Beta owed Lummis wages in the amount of \$1,284.89. Beta and Lummis appealed the Determination on the basis that the delegate's calculations are incorrect.

ISSUE TO BE DECIDED

Does Beta owe Lummis wages in the amount of \$1284.89?

FACTS AND ANALYSIS

Lummis worked as a cook for Beta from April 3, 2000 to October 14, 2000.

Lummis filed a complaint at the Employment Standards Branch claiming that Beta owed her regular wages for work performed on April 7, 2000 and April 8, 2000 and overtime wages.

The delegate found that Lummis was not owed wages for work performed on April 7 & 8 as she was paid for this work in the following pay period, but she was entitled to overtime wages in the amount of \$1,284.89, including interest and vacation pay. The delegate stated that the payroll records supplied by Beta confirmed that Lummis was paid straight time for all hours worked. The payroll records showed only the total hours worked in a biweekly pay period; days worked and hours per day were not provided and daily overtime could not be calculated. The delegate determined that all hours worked in excess of 80 in a biweekly pay period should have been paid at time and one-half rather than at straight time. He found that Lummis was owed 281.5 hours at half the straight time rate as she had already received straight time wages.

Beta appealed the Determination on the basis that the delegate's calculations did not account for statutory holiday hours which were included in some of the pay periods and these hours should be deducted from the overtime owed; Lummis was accidentally overpaid on certain occasions and these hours should also be deducted; and the delegate made some errors calculating the hours worked by Lummis. With its appeal, Beta included various time cards for Lummis, a payroll summary sheet and payroll earnings sheets.

Lummis appealed the Determination on the basis that the delegate failed to account for double time in his calculations. She enclosed copies of her pay stubs and calendar. Lummis states she would like the records checked, including a review of her pay stubs and calendar and the original

time cards, to see if she was properly paid for statutory holidays and to determine her entitlement to double time.

It appears that the delegate who issued the Determination is no longer with the Employment Standards Branch and as a result a different delegate replied to the appeals. She said the daily timecards provided by Beta were not provided to the previous delegate and normally this would cause her to argue that the employer should not be allowed to submit new evidence on appeal. However, given the previous delegate did not require the production of the daily hours records in the form of a Demand for Employer Records, she submits the matter should be referred back for a re-calculation of Lummis' actual entitlement since it appears there are calculation errors. For example, the previous delegate ignored double time in his calculations. She said if the Tribunal referred the matter back, Beta would be required to provide all time cards, including a breakdown of the exact total hours worked each day so she could properly calculate what wages were owed to Lummis. She also stated that if the Tribunal decided not to refer the matter back, then it should increase the Determination to reflect that double time is owed after 48 hours of work per week.

From the information on file, I am not satisfied I can establish with any accuracy the amount of wages owed to Lummis. I agree with the delegate that in these circumstances it is appropriate to refer this matter back to her to establish the exact wages owed to Lummis. It is not for the Tribunal as an appellate body to investigate the complaint. That is the responsibility of the delegate. The previous delegate has made errors in his calculations. The additional information provided by the employer on the appeal, as well as the information provided by Lummis, may assist in establishing what wages are owed to Lummis. The current delegate may also find it necessary to request further information from the parties in order to make a finding on this matter.

ORDER

I order pursuant to Section 115 of the Act that the Determination be referred back to the delegate for further investigation regarding Lummis' entitlement to wages.

Norma Edelman
Adjudicator
Employment Standards Tribunal