

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")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/037

DATE OF HEARING: March 28, 2000

DATE OF DECISION: May 9, 2000

DECISION

OVERVIEW

GM Investments Inc. operating as GM Restaurant (“GM”, also, “the employer”), pursuant to section 112 of the *Employment Standards Act* (the “Act”), appeals a Determination by a delegate of the Director of Employment Standards (the “Director”) which is dated January 14, 2000. The Determination orders GM to pay Gurcharam Kaur Gill wages and interest totaling \$3,057.12.

The delegate has determined that Gill had earnings of \$30,731.01 in the last two years of her employment and that GM has yet to pay \$1,672.21 of that amount. GM on appeal claims to have paid more than \$30,731.01 and that Gill has been paid in full for her work.

The Determination awards 4 weeks’ compensation for length of service. It is the delegate’s conclusion that Gill did not quit, that it was the employer that terminated the employment. GM, on appeal, again claims that it did not fire Gill. According to the employer, she got mad and quit on being told that she could not have Mondays off.

APPEARANCES

S. Shah and J. Shah	For GM Restaurant
G. Gill	On her own Behalf
B. Arneja	Interpreter for Gill

ISSUES TO BE DECIDED

There are two separate issues in this case. At issue is the amount of money, if any, which the employer must pay for work performed by the employee. The second issue is the matter of whether the employee did or did not quit. What I must ultimately decide is whether the employer has or has not shown that the Determination ought to be varied, cancelled and/or matters referred back to the Director for reason of an error in fact or law.

FACTS

According to the Determination, Gill, in the period August 7, 1997, to August 7, 1999, earned \$30,731.01 in regular wages, overtime pay, statutory holiday pay and vacation pay and was paid \$29,058.80.

I am shown what both employer and employee tell me are most of Gill’s paycheques for the last two years of the employment. The employer also produces a record of what Gill was paid in the way of regular wages after deductions (what I will call the employer’s “pay stubs”). The pay stubs are fully consistent with what are said to be Gill’s paycheques except for three extra payments. Gill received an extra \$528 on her cheque for August 17, 1998 (#376), an extra \$376

on her cheque for May 20, 1999 (#682) and an extra \$8 on the last of her paycheques (#779). While some of Gill's 1997 paycheques are missing, all of the cheques that I am shown are in a sequence that leads me to conclude, pay stubs and paycheques being consistent with one another, and nothing to the contrary, that Gill received gross wages as set out by the pay stubs plus \$912 ($\$528 + 376 + 8 = \912).

The employer's pay stubs and the evidence of paycheques which is before me are both primary records and I prefer them over what the employer produces in the way of secondary records, an all employee summary of pay and deductions which is by pay period and payroll summaries for the last three years of Gill's employment. The employer's all employee summary contains a significant accounting error. Beginning with the pay period, August, 1998, the employer overstates gross wages by 4 percent and begins to double count vacation pay.

In Table One, attached to this decision, I have set out what Gill was paid after August of 1997. As one can see from that table, by my calculations, Gill was paid at least \$35,905.54 in the period August 7, 1997 to August 7, 1999. I use the term "at least" because it is clear from the pay stubs and information regarding paycheques that it was GM's practice to pay Gill for work which she performed in one month, in the next month, sometimes through a single paycheque but, in most cases, through two cheques, one issued on or about the 5th and, the second, on or about the 20th. Through a cheque dated September 9, Gill was paid for what is said to be her work in the month of August, 1997, (250.5 hours x \$7.50 plus 4% vacation pay for total gross wages of \$1,953.90 and net wages of \$1,502.97). I have not been shown what Gill was paid in August of 1997 but should it be that Gill received a paycheque or paycheques in that month, after the 7th of the month, then the total amount paid to Gill in the period August 7, 1997, to August 7, 1999, is \$35,905.54 plus the amount the paycheque(s).

The employer's pay stubs show that the employer made unspecified extra payments of \$912 and was paying something in the way of vacation pay but that it was not paying Gill either overtime wages or for statutory holidays. The employer's pay stubs have Gill working overtime, as noted above, Gill worked 250.5 hours in August of 1997 alone, but pay is at straight-time wage rates in the case of each and every pay stub.

ANALYSIS

Section 17 of the *Act* is as follows:

17 (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

(2) Subsection (1) does not apply to

(a) overtime wages credited to an employee's time bank,

(b) statutory holiday pay credited to an employee's time bank, or

(c) vacation pay. (my emphasis)

Just so that the employer understands the law, it may not pay employees as it paid Gill as to do so is to contravene section 17 of the *Act*. Gill was not paid at least semi-monthly in 1997. GM did not pay Gill all wages earned in a pay period within 8 days of the end of the pay period. Wages which should have been paid by the 8th of a month were paid on or about the 20th of the month.

The employee also misunderstands the law. She is mistaken in thinking that an employer must pay vacation pay out at least monthly. That is not what the *Act* requires. The *Act* is designed to provide employees like Gill with an actual paid vacation.

I have found that it was not \$29,058.80 but at least \$35,905.54 that GM paid Gill in the period August 7, 1997, to August 7, 1999. That is more than what, according to the Determination, Gill is owed in the way of regular wages, overtime pay, statutory holiday pay and vacation pay for work in that period. But the employee complains that the delegate incorrectly calculates total hours worked and, hence, what she is due in the way of wages. The employer also has a number of complaints with the delegate's calculations. Has GM in fact paid all of what Gill was due in the way of regular wages, overtime pay, statutory holiday pay and vacation pay in the period August 7, 1997, to August 7, 1999?

FACTS

At page four of the Determination, the delegate states that Gill, in the period August 7, 1997, and June 5, 1999, is entitled to regular wages for 2,863.25 hours of work, overtime of 1½ times her regular wage for another 237 hours of work, and double-time pay for 43.5 hours of work. The delegate states that Gill worked another 266.5 hours between June 5, 1999 and August 7, 1999 (240.0 hours at straight-time and 26.5 hours at time and one-half). That is to say that Gill, in total, worked 3,410.25 hours in the period August 7, 1997, to August 7, 1999.

According to the Determination, the employee provided "time sheets for all ... hours worked during the employment" and that only the employee provided a record of hours worked. As matters are presented to me, I find that there is not one record of hours worked but two. I find that the "time sheets" to which the delegate refers are a secondary record compiled from a record of work which the employee kept on a calendar. And I find that there are not time sheets for all hours worked. The "calendar record" covers only the period January 1, 1998, to August 7, 1999.

I find that the employer's pay stubs also provide information on hours worked. The pay stubs show what the employer says is the total number of hours worked in each pay period. I am presented with pay stubs which run from the pay period, August, 1997, right through to the end of the employment.

While the employer disputes the accuracy of the calendar record, I have decided to accept it as the best record of hours worked. It appears to have been contemporaneously kept as work was performed. It, for the most part, tracks the employer's pay stub record. It has the employee working less than do the pay stubs in the case of two months. (See Table Two, also attached to this decision.) Where there is a significant difference between the calendar record and the employer's pay stubs, which is to say, the months of April, May, July and September of 1998 and March, April and May of 1999, it is for reason of what I find to be a difference over lunch breaks and overtime work, and I find that the employee probably did not always receive a lunch break and that there is good reason to believe that she did work overtime as set out on her calendar.

The Shahs tell me that Gill always received a lunch break. And three current employees write to say that they have always been given a lunch break. But Parmjit Aulakh and two other former employees write and say that they did not get lunch breaks. And, most importantly, I find that the employer's own daily record of work for Aulakh and Kamaldeep Dhaliwal shows that those two employees did not receive lunch breaks each and every day. That leads me to believe that Gill very likely did not always receive a proper lunch break as well.

The calendar record has Gill working as much as 9 ½ hours of overtime in a day in 1998 and 1999 and it has her working as much as 250.5 hours in a month. That is not out of line with what the pay stubs show to be true of Gill's work. The pay stubs indicate 250.5 hours worked in the pay period August, 1997, and 201.5 hours of work in August of 1998. And I find that, in disputing the accuracy of the calendar record, the Shahs rely on memory alone and that their recollection of matters appears to have been affected by the passage of time and, quite possibly, self interest. At the investigative stage, they told the delegate that Gill did not work any overtime at all (page 2 of the Determination, second paragraph of "Employer's Position").

Satisfied as to the accuracy of the calendar record as I am, I find that Gill's hours of work between January 1, 1998, and August 7, 1999, are as set out by the calendar record. (Again, see Table Two.) But while the calendar record is preferred over the employer's pay stubs as a record of work, there is no reason from what I can see to discard the latter entirely. It represents all that there is in the way of a record of Gill's work in 1997. I accept, nothing better, that the pay stubs show what were Gill's hours of work in 1997. See Table Three.

The employer's pay stubs for the months August through December, 1997, show 918.75 hours worked. The calendar record shows that between January 1, 1998, and August 7, 1999, Gill worked another 3,503.3 hours. In all, Gill worked 4,422.05 hours between August 7, 1997, and August 7, 1999.

The delegate's calculations are as if there is a pay period ending June 5, 1999. That is likely for reason of the fact that the employee was paid on or about the 5th of the month and the 20th of the month but in fact the end of the pay period is the end of the month or in a few cases, the 15th of the month, the employer switching from monthly pay periods, to semi-monthly, and back again.

According to the Determination, Gill is entitled to be paid for 14 statutory holidays between August 7, 1997 and August 7, 1999.

On the first page of the Determination, the delegate indicates that the rate of pay was \$8.25 per hour in the whole of the last two years of employment. The calculations are on a different basis. The employer's pay stubs show that Gill was paid \$7.50 an hour prior to September of 1997, \$8.00 an hour starting with the pay period September, 1997, and \$8.25 beginning with the pay period June, 1999.

ANALYSIS

As matters are presented to me, it is clear that Gill is not owed regular wages, overtime wages, statutory holiday pay and vacation pay as set out in the Determination.

Gill did not work as is set out in the Determination, which is to say, work 3,410.25 hours in the period August 7, 1997, to August 7, 1999. Her time sheets show that she worked 3,503.3 hours in 1998 and 1999 alone. The employer's pay stubs show that Gill worked another 918.75 hours in the last five months of 1997. That is a total of 4,422.05 hours worked in the period August 7, 1997 and August 7, 1999. And it may be, given the way that GM went about paying Gill, that what Gill is owed for her work in July of 1997 is also an amount due and payable in the last 24 months of the employment.

The amount of wages that an employer may be required to pay by a Determination is governed and limited by section 80 of the *Act*. That section of the *Act* is as follows:

- 80** *The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*
- (a) *in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and*
 - (b) *in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination, plus interest on those wages.*

If GM had not, by the 7th of August, 1997, paid Gill for her work in July of 1997, then that is an amount that became payable in the period August 7, 1997, to August 7, 1999.

There are not 14 statutory holidays between August 7, 1997, and August 7, 1999. As the term "statutory holiday" is defined in section 1 of the *Act*, there are 9 statutory holidays a year, New Year's Day, Good Friday, Victoria Day, Canada Day, British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day.

Section 81 of the *Act* requires that a Determination must include reasons and show how the amount to be paid has been calculated.

- 81** (1) *On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
- (a) *the reasons for the determination;*
 - (b) *if an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or another amount, the amount to be paid and how it was calculated;*

... .
In this case, the employer shows it was not \$29,058.80 that it paid to the employee in the period August 7, 1997, to August 7, 1999, but at least \$35,905.54. And I have found that the Determination contains significant errors with respect to hours worked and Gill's entitlement to statutory holiday pay. Those errors make it impossible to understand how the delegate reached

the conclusion that Gill is owed \$1,672.21 for work performed between August 7, 1997, to August 7, 1999. That part of the Determination is therefore cancelled.

As matters have been presented to me I have been able to reach an number of conclusions in respect to amounts paid, hours worked in 1997 as well as 1998 and 1999, and what is owed in the way of statutory holiday pay. But I am in no position to determine all of what must yet be determined before it is known what Gill is due in the way of regular wages, overtime pay, statutory holiday pay, vacation pay and any other payments to which she may be entitled. I am therefore referring what remains to be determined and calculated back to the Director.

The Matter of Gill's Termination

Employer and employee presented the delegate with two very different versions of how Gill came to be terminated. On appeal, I am again given widely different versions of what led to the termination of Gill's employment.

FACTS

It is not suggested by the employer that Gill went so far as to utter the words "I quit" or words to that effect. What J. Shah tells me on appeal is that Gill, on the 7th of August, asked if she could have Sundays and Mondays off. He suggested that she work Sundays and take Mondays and Tuesdays off instead. Gill said that she was not going to Sundays and that she needed Monday off as she was going to work for another employer on Mondays. On being told that she could not have the day off, Gill is said to have become rude and angry. With that she was told, at least according to Mr. Shah, "you want to go or we call the police" and, on being told that, she walked out.

J. Shah in addition to the above complains that the employee wanted her own way all of the time and that she did not care about her job despite all that GM had done to accommodate her and despite all of the food which had been given to her free of charge.

According to the employee, she did not ask for Monday off but for her statutory holiday and vacation pay. She tells me that J. Shah, at that, became very, very angry and said "if that is what you want I have no job for you" and the told her to "get out" or the police would be called.

The employer made out the employee's final cheque on the 9th of August without making first attempting to contact the employee. The Record of Employment (R.O.E.) is dated that same day. I have not been shown proof that the employee did in fact have another job to go on that Monday.

ANALYSIS

It is the right of each employee to resign his or her employment but that right is personal to the employee. An employer may not deem that an employee has quit. There must be clear, unequivocal facts showing that the employee voluntarily exercised his or her right to quit. There are not in this case.

Quitting is considered to have both a subjective and an objective element. Subjectively, the employee must form the intention to quit. Objectively, he or she must act in a way, or demonstrate conduct, which is quite inconsistent with the continuation of the employment (*Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BC EST #D091/96). The employee did not in this case announce an intention to quit. There is no evidence of conduct which is quite inconsistent with the continuation of her employment at GM.

I am inclined to believe, like the delegate, that the reason that the employer made out Gill's final cheque and R.O.E. on the 9th, without first determining whether the employee was absent merely for reason of illness or an accident, and despite the fact that the employee had not actually said that she was quitting, is that it knew why she had not reported for work: It had fired Gill on the 7th. As GM itself complains, the employee wanted her own way all of the time and did not care about her job despite all that had been done for her and despite all of the free food that she had been given. I am led to believe that it was for that reason that Gill's employment was terminated.

The employer has failed to show that its liability to pay compensation for length of service has been discharged because the employee quit. It follows that Gill is entitled to length of service compensation as set out in the Determination.

ORDER

Pursuant to section 115 of the *Act*, I have decided to cancel that part of the Determination which is dated January 14, 2000 and which orders GM to pay \$1,672.21 in wages for work performed between August 7, 1997, and August 7, 1999. That matter of quantum is referred back to the Director.

I order, pursuant to section 115, that the Determination dated January 14, 2000, be confirmed insofar as it awards compensation for length of service totaling \$1,304.16. To that I add whatever interest may have accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

Table One – Wages Received by the Employee

Gross Wages of	For	Net Wages of	Pay Cheque Nos.*
\$ 330.00	Pay period ending Aug. 7/99	\$ 320.24	779
449.24	Vacation pay	432.26	779
8.00	Extra payment	8.00	779
1,489.13	Pay period ending to Jul. 31/99	1,187.82	779 & 773
1,311.75	Pay period ending to Jun. 30/99	1,063.53	735 & 754
1,224.00	Pay period ending to May 31/99	1,002.04	698 & 717
1,388.00	Pay period ending to Apr. 31/99	1,116.96	660 & 682
376.00	Extra payment	376.00	682
1,436.00	Pay period ending to Mar. 31/99	1,150.59	624 & 639
1,280.00	Pay period ending to Feb. 28/99	1,041.28	592 & 608
1,392.00	Pay period ending to Jan. 31/99	1,119.76	562 & 581
1,380.00	Pay period ending to Dec. 31/98	1,113.40	537 & 548
221.92	Vacation pay	215.93	519
1,332.00	Pay period ending to Nov. 30/98	1,080.28	498 & 517
1,444.00	Pay period ending to Oct. 31/98	1,157.56	467 & 485
692.00	Pay period ending to Sep. 30/98	558.08	443
468.00	Pay period ending to Sep. 15/98	398.93	432
916.00	Pay period ending to Aug. 30/98	710.38	417
696.00	Pay period ending to Aug. 15/98	557.44	397
777.92	Pay period ending to Jul. 31/98	614.38	376
528.00	Extra payment	528.00	376
719.68	Pay period ending to Jul. 15/98	573.89	359
1,439.36	Pay period ending to Jun. 30/98	1,147.79	316 & 345
1,447.68	Pay period ending to May 31/98	1,153.58	273 & 299
1,439.36	Pay period ending to Apr. 30/98	1,147.79	237 & 258
1,439.36	Pay period ending to Mar. 31/98	1,146.21	196 & 215
1,264.64	Pay period ending to Feb. 28/98	1,025.07	169 & 185
1,501.76	Pay period ending to Jan. 31/98	1,189.48	
1,493.44	Pay period ending to Dec. 31/97	1,183.70	
1,389.44	Pay period ending to Nov. 30/97	1,111.59	
1,497.60	Pay period ending to Oct. 31/97	1,186.59	
1,179.36	Pay period ending to Sep. 30/97	965.93	
1,953.90	Pay period ending to Aug. 30/97	1,502.97	57
Total \$35,905.54			

* As the employer went about paying Gill, she was not paid for the work which she performed in one month until the next month. And it was the common practice of the employer to issue two cheques, one on or about the 5th of that month, and a second, on or about the 20th of the month.

Table Two – Hours Worked

Pay Period	Total Hours Worked According to the Employer's Pay Stubs	Total Hours Worked According to the Calendar Record
January, 1998	180.5	183.5
February	152	154.5
March	173	179.75
April	173	185.25*
May	174	192.5*
June	173	177.5
July 15	86.5	
31	93.5 (180 in total)	250.5*
August 15	87	
31	114.5 (201.5 in total)	195.1
September 15	58.5	
30	86.5 (145 in total)	174.1*
October	180.5	180.5
November	166.5	166.75
December, 1998	172.5	175.75
January, 1999	174	173.5
February	160	161.5
March	179.5	189.25*
April	173.5	195.25*
May	153	176.10*
Subtotal	2,911.5	3,111.3
June	159	166.75
July	180.5	182.25
August, 1999	40	43
Grand Total	3,291	3,503.3

* denotes difference greater than 5 percent between the two records.

Table Three – Additional Hours Worked According to the Employer

Pay Period	Total Hours Worked According to the Pay Stubs
August, 1997	250.5
September/ 97	141.75
October/ 97	180
November/ 97	167
December/ 97	179.5
Total	918.75