

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 -

Gustelas Holdings Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: J.E. Wolfgang
FILE NO.: 98/214
DATE OF HEARING: June 2, 1998
DATE OF DECISION: June 23, 1998

DECISION

APPEARANCES

John Anthony
Shelly Miller
Ian MacNeill

On behalf of Gustelas Holdings Ltd
for herself
for the Director of Employment Standards

OVERVIEW

This is an appeal by Gustelas Holdings Ltd. (“Gustelas”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 24, 1998. The Determination found that Gustelas had contravened Sections 18(2), 40, 45, and 58 of the *Employment Standards Act* and ordered Gustelas to pay \$2,030.00 to Shelly Miller (“Miller”) for wages, annual vacation pay and statutory holiday pay.

Gustelas filed an appeal dated April 6, 1998 alleging the calculations of the Director were in error, were based solely on the hours presented by Miller and did not give reasons for rejecting the information provided by the Employer. It seeks to set aside the Determination, establish the proper amount owed and requests time to pay. Gustelas accepts some money is owed to Miller but disagrees on the amount.

A Summons was issued requiring Demos Zmeis to appear, to testify and to produce the following documents:

The bank deposit book for Demos Homemade Fresh Foods and Pasta covering the months of April and May 1997.

The daily time sheets and payroll totals or schedules on which the paychecks for Miller were based for April and May 1997.

The minutes of staff meetings held during March and April 1997.

A hearing was held on June 2, 1998 at which time I took evidence from all parties.

ISSUE TO BE DECIDED

Does the Determination accurately reflect the amount owed to Miller and, if not, what is the correct amount?

FACTS

Miller was employed by Gustelas as a server from April 2, 1996 to May 27, 1997. She had also worked for the previous owner of the restaurant.

Zmeis left the operation of the restaurant to different managers. During the period in question, April and May 1997, there was a kitchen manager and a "front manager." He relied on the "front manager" for financial matters and scheduling of serving staff etc.

Miller claims the manager, Greg Jordanov, wanted her to do cash and daily/weekly reports and for this, she was given additional training beyond that provided the regular staff. She came in early to do the cash, make up bank deposits, and assisted in doing the staff scheduling. There was a two-day period when she was asked to work in the office matching the receipts to the cheques for the bank. She was told she would be paid separately for this work and was instructed to keep her hours separated from those worked as a server. She claims she worked 39 hours in April and 35 hours in May doing this work.

When Gustelas started delivering its products, she set up the schedule, the cash system for the drivers and the order system. The manager had no experience with a delivery system and she had been involved with deliveries while working for the previous owner.

The restaurant was closed for renovations from March 23 until April 18 and the staff were laid off, including Miller.

Miller contends she was not properly laid off in March but was telephoned at home in the morning advising her not to report for work that day. When she asked how long the restaurant would be closed they indicated a few days. This continued on for nearly a month.

During the closure, a new restaurant management system (known as the Squirrel system) was installed. A number of staff training meetings were held with the newly-hired and former staff.

There is some question whether attendance at these meetings were required or if it was voluntary. Miller indicates there were ten meetings and each person was telephoned to attend. Ian McLaughlin, a former employee, indicated that he believed attendance at these meetings was required by the employer.

Zmeis takes the position that these were information meetings and therefore attendance was not required. Employees were not paid for attending and no minutes or record of attendance was kept.

Miller claims the staff were required to report for work on May 17, one day before the official opening of the restaurant, and were given 2 hours of training and then spent 5 hours cleaning the restaurant. No one was paid for that day. During the first four or five days of operation in May, there were no time sheets prepared and she telephoned the staff at home to confirm the hours they had worked.

The staff were required to sign in at the start of their shift and sign out at the end. This time sheet was kept on the wall in the kitchen. The manager normally took these sheets and totalled the

amounts for each employee and forwarded that information to the accountant to make up the payroll. I was advised those sheets were no longer available to confirm the hours Miller worked. I was given some information by the accountant at the hearing regarding the summary sheets from which she prepared the payroll. There is no way to verify the accuracy of that information without the time sheets.

At the hearing, Zmeis claimed he no longer had the bank deposit book or employment records identified in the Summons. Some limited payroll information was provided by the accountant.

The Director's delegate was unable to get proper employment records for Miller from Zmeis and made the Determination based on records supplied by Miller. Miller had kept a diary of her hours of work, a record of the staff meetings and the time she was doing work other than as a server.

ANALYSIS

The question of the accuracy of the Determination was raised by both Zmeis and Miller. Counsel for Gustelas requested that the Determination be set aside and the proper amount owed be determined. Miller sent a submission to the Tribunal on May 21, 1998 seeking to correct the total hours of work in the Determination.

Zmeis generally accepts the records of hours Miller worked as a server although there are some differences. He denies she was authorized to do the extra duties she claims she performed. The major dispute is centred around the additional duties Miller claims to have worked during the months of April and May 1997.

The scheduling of staff meetings were arranged by management and the employees were called at home to advise them of the time and place of the meetings. These meetings were held at the instruction of management and the employees that did attend are entitled to be paid, including Miller.

The letters from Doug Stuart of Island Pacific Training Centre Ltd. indicate Miller received additional training in the Squirrel system to perform the added duties including daily cash and daily/weekly reports. This training took place during April. This is the work for which Miller indicates the manager had requested she keep a separate record of her hours. On the basis of the information available her claim for those hours is allowed.

Gustelas submits that Miller's complaint was untimely. Miller's complaint was filed November 17, 1997. The last day worked by Miller was May 27, 1997. Section 74(3) of the *Act*, states:

A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

I find that Miller's complaint was filed within the 6-month period and, therefore, is timely.

The Determination should be varied for the reasons that follow. Gustelas objected to the application by Miller to have the hours in the Determination recalculated on the ground that she had not filed an appeal. However, Gustelas opened the Determination for review by its appeal "...to have the amounts owed by the employer to the employee determined". Therefore, Miller is entitled to make a submission on that issue and it is appropriate for me to consider her evidence on that point.

Miller submits that the Director's delegate failed to credit her for 22.25 hours she had worked. She supplied a list of the specific days and the hours in question. In checking this information against the diary material filed with the Director, I find her submission to be correct and the Determination should be varied.

Gustelas submits that "...the calculations of the Director rely on hours presented by the employee/claimant, reject those provided by the employer but give no reason for doing so". It was the evidence of the Director that no payroll information was provided in support of the employer's position.

In an appeal of a Determination, the onus is on the Appellant to show that the Determination is wrong. The failure of Gustelas to provide evidence to support its claim leads me to prefer the evidence provided by Miller.

The Determination is varied to add the 22.25 hours at \$7.00 per hour plus vacation pay for a total of \$161.98. This is to be added to the \$2,030.00 calculated in the Determination for a total of \$2,191.98 plus appropriate interest.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 24, 1998 be varied in the amount of \$2,191.98 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal