

An appeal

- by -

865891 Alberta Ltd. operating as Hansel & Gretel Motel  
("Hansel and Gretel Motel")

- 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:** James Wolfgang

**FILE No.:** 2003A/152

**DATE OF DECISION:** July 23, 2003

## DECISION

### OVERVIEW

This is an appeal by 865891 Alberta Ltd. operating as Hansel & Gretel Motel (the “Employer”) or (“Hansel and Gretel Motel”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by the Delegate of the Director of Employment Standards (the “Director”) dated May 1, 2003. The Determination found Hansel and Gretel Motel contravened Sections 4, 21(1) and 32(2) of the *Act* and owed Sok Eng (Mary) Chia (“Chia”) \$1,887.62 for wages, overtime, statutory holiday pay, annual vacation pay and interest.

A penalty of \$0.00 was also assessed as a disincentive to prevent a repeat contravention.

Chia quit Hansel and Gretel Motel and filed with the Employment Standards Branch (“the Branch”) using the Self Help Kit. When this failed to resolve the dispute she filed a complaint with the Branch on December 16, 2002.

On January 29, 2003, the Delegate submitted a copy of the payroll information received from Chia and the Employment Standards Act Fact Sheets explaining the requirements of the Employment Standards Act to the Employer regarding payment of wages, overtime, statutory holiday pay and annual vacation pay. The Delegate requested if the Employer’s payroll records differed from the records supplied by Chia they were to respond by February 12, 2003.

In an undated fax Hansel and Gretel Motel replied the Manager was away until March 2, 2003 and he was the only one with authority to deal with this complaint.

According to the Delegate’s March 7, 2003 letter, the Employer, during a meeting on February 20, 2003, claimed Chia took personal time away from work. Chia claimed this time was deducted from the time sheets. The Employer also questioned the accuracy of Chia’s record of hours worked. They claimed Mr. Jackie Yu, the former Motel Manager, could provide evidence in this regard. The Delegate stated Chia was paid straight time for all hours worked except for 40 hours between August 16 and August 31, 2002. According to Chia, the Employer did not want these hours to appear on the August payroll and Chia had not been paid for those hours. The Delegate again requested the Employer either verify or dispute the outstanding amount of \$2,075.37 plus interest by March 17, 2003. The Delegate also advised the Employer of Section 32 of the *Act*.

A handwritten undated sheet in the case material indicates meal costs and meal time totals of \$2,137.44, including vacation pay of \$233.45. I expect this was prepared by Hansel and Gretel Motel for the Delegate.

A letter dated March 17, 2003 from the Delegate to the Company indicates Mr. Jackie Yu, the former Motel Manager, accepted the record of hours provided by Chia. According to the letter, he indicated he had reviewed the time sheets and had no new evidence to dispute the hours. The letter then dealt with the question of paid meal breaks, explaining the Employer cannot make deductions from wages without written authorization. The letter again informed the Employer the amount outstanding was \$2,075.37 and a failure to provide either a cheque in that amount or written reason for refusing payment would result in a Determination being issued.

A letter dated April 7, 2003 from the Delegate to the Employer indicates the Employer, through Mr. Yu, agreed to pay Chia \$2,075.37 by March 31, 2003. The payment had not been received and the Employer was given until April 11, 2003 to pay.

A fax dated April 10, 2003 from Hansel and Gretel Motel to the Delegate states Chia had breached a verbal agreement with them. Chia was not to claim overtime and the Employer would provide free meals and paid meal breaks. The Employer also provided a summary of the hours they believed were taken by Chia for lunches and dinners plus the cost of meals totalling \$1,850.96. Their cheque was however the difference from the claimed amount of \$2,075.37. A fax dated April 11, 2003 from Hansel and Gretel Motel to the Delegate indicated the cheque for Chia had been sent and a photocopy of a cheque dated April 10, 2003 in the amount of Two hundred twenty four dollars and forty one cents (\$224.41) for Mary Chia was enclosed.

The delegate issued the Determination on May 1, 2003.

Hansel and Gretel Motel appealed the Determination on the basis the Director failed to observe the principles of natural justice in making the Determination by not giving recognition to evidence supplied to the Delegate.

The Tribunal has decided an oral hearing is not required in this matter and the appeal can be properly addressed through written submissions.

## **ISSUE TO BE DECIDED**

Is Chia entitled to be paid for meal breaks and is the Employer entitled to deduct the cost of meals from Chia's wages?

## **FACTS AND ARGUMENT**

Chia was employed as a front desk receptionist by Hansel and Gretel Motel from July 17, 2002 until November 23, 2002 when she resigned her position. There is a restaurant adjacent to the motel which is operated by the Employer.

Hansel and Gretel Motel do not dispute and have not disputed at any time that they did not pay overtime or statutory holiday pay. They claim they had a verbal agreement with Chia to not pay overtime or statutory holiday pay.

In a letter dated April 10, 2003 to the Director's delegate, Hansel and Gretel Motel state, in part:

In the present letter we are sending you the statement of how much we are going to pay Miss Chia, based on a verbal agreement we had with Miss Mary Chia in the beginning of her job here in Hansel and Gretel Motel. We agreed that we would not charge her the time taken and meals eaten if she would not have over time (sic) in her schedule. Since she wants her over time (sic) be(sic) paid breaking the verbal agreement we had, we are going to deduct the time she took for eating and charge the meals as well.

They submitted a revised calculation to the Delegate charging Chia for meals eaten and the time taken to eat the meals, offering to pay Chia a difference of \$224.41. This was rejected by Chia.

In their appeal to the *Tribunal* they claim the Director failed to look at the documents showing the dates and number of meals Chia ate while employed. They now argue they never indicated the meals were free, that is why they kept a record of the meals. The documents referred to by Hansel and Gretel Motel as records were photocopies of a calendar with only Chia's name listed as "Mary" and the comment "lunch" or "dinner" marked on them.

Hansel and Gretel Motel also claim Chia took every single schedule and document relating to her complaint with her when she left.

In a letter to the *Tribunal* dated June 3, 2003 Chia stated she only worked 4 hours per day, 3 days per week in the beginning however, because of staff changes, she was the only receptionist left and worked every day. Chia claims she was told to carry over her extra hours to the next day or month to avoid showing overtime.

Chia claims she brought boxed lunches from the time she was hired. In early August she was told by the Supervisor of Housekeeping to take her meals at the restaurant for free as the food would be thrown out. She claims she took the food from the restaurant back to the motel office where she ate it as she was still on duty. She also claims other staff ate free meals.

Chia claims there were no records of meals taken until after the investigation as no records were produced for the delegate. Chia states the other employees who ate at the same time as she did are not shown on the calendar.

Chia supplied a letter dated June 7, 2003 from a former employee of Hansel and Gretel Motel who claims she was also told by the same supervisor as Chia to eat meals in the restaurant for free on the days she worked.

Chia denies taking any of the original schedules or documents at the time she terminated her employment.

The Delegate stated all of the matters raised in the appeal had been addressed in the Determination. The Determination states, in part:

The Employer asserted that Ms. Chia agreed to receive her regular rate for all hours worked however, the Employer stated that they understood that pursuant to Section 4 of the Act that such an agreement to waive the overtime requirements of the Act could not be relied upon.

The Determination further states:

The employer acknowledged that Ms. Chia's hours of work were recorded on the timesheets which she had provided to the Employment Standards Branch and that these time sheets had been reviewed by management. The employer also acknowledged that Ms. Chia had received her regular rate of pay for the hours recorded on these timesheets and that meal breaks had not been deducted from her hours of work during the course of her employment. Furthermore, the employer acknowledged that Ms. Chia was required to be available to perform work during her meal breaks because she was usually the only employee scheduled to work at the front desk.

Finally, the Determination states, in part:

..... The employer claims that Ms. Chia ate 111 lunch meals at a cost of \$6.95 per meal plus GST and 37 dinner meals at a cost of \$10.95 per meal plus GST over the course of her

employment. The employer did not provide any detailed records of the dates that these meals were allegedly eaten by Ms. Chia. The employer acknowledged that Ms. Chia was not provided with bills for these meals during the course of her employment and that the employer did not have a written authorization from Ms. Chia to deduct the cost of these meals from her wages.

The Delegate states there was no failure to observe the principles of natural justice in the investigation.

## ANALYSIS

The burden is on Hansel and Gretel Motel to show an error in the Determination. An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation.

There is common agreement Chia was paid straight time for all hours worked. There is also agreement Chia ate some meals from the adjacent restaurant while employed by Hansel and Gretel Motel and that she remained on duty when she had her meals. The Employer acknowledged they cannot rely on a verbal agreement that is in violation of Section 4 of the *Act*.

In a letter dated May 23, 2003 to the *Employment Standards Tribunal* (the “*Tribunal*”) the Employer stated:

The Director did not considerer(sic) the situation and our good intention on that moment. Is (sic) not a matter if the agreement is legal or not, the matter we are trying to let you know is the intention we both parties had when that agreement was made. (emphasis added)

Section 4 of the *Act* states:

- 4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4), has no effect.

Section 32(2) of the *Act* states:

- (2) An employer who requires an employee to work or be available for work during a meal break must count the meal break as time worked by the employee.

I have difficulty with the evidence from the Employer claiming in their appeal to have a calendar showing the dates and type of meals (lunch or dinner) eaten by Chia. The Determination stated the Employer did not provide any detailed records of the meals allegedly eaten by Chia. Clearly if those records were available during the investigation they should have been provided to the Delegate. The Employer submitted a summary of meals to the Delegate going back to July 17, 2002, the first day worked by Chia. Chia claims she began eating in the restaurant in early August after being told to do so by the Supervisor. The first week Chia only worked four hours per day except for one day of four and three quarter hours. She did not start working long hours until the week of August 04. This supports Chia’s argument regarding the meals. Notwithstanding the above, there remains the fact the Employer cannot deduct any money from an employee without written permission, which Hansel and Gretel Motel admit they did not have. Section 21 (1) of the *Act* is specific:

- 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

Hansel and Gretel Motel believe they had a verbal agreement with Chia which was important to them, however the Tribunal cannot give recognition to such agreements, if one existed, when faced with the provisions of the *Act*. Their appeal on fact must fail and the Determination is confirmed.

It should be noted Chia denies any verbal agreement existed between the Employer and herself.

The Director stated that Hansel and Gretel Motel have not shown a failure by the Director to observe the principles of natural justice. I agree with the position of the Director on this point. The information before me clearly shows Hansel and Gretel Motel was afforded every opportunity to respond to the allegations made in the complaint, to provide any relevant evidence and to fully state its position on the allegations made. The decision of the Director to reject the position of Hansel and Gretel Motel does not, in the circumstances, amount to a failure to observe natural justice or procedural fairness.

This appeal is dismissed. Hansel and Gretel Motel have not shown any error in the Determination or that the Director failed to observe the principles of natural justice in making the Determination.

## **ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated May 1, 2003. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**