

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 -

Larry Hartwell and Sharon Hartwell, operating as Riverside Inn & Steakhouse
(the “ Employer ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 2000/109

DATE OF DECISION: July 5, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act*) by Larry Hartwell and Sharon Hartwell, operating as Riverside Inn & Steakhouse (the “Employer”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 1, 2000. The Determination found that the Employer owed Jeremy Paine (“Paine”) \$1,189.23 for statutory holiday pay, vacation pay and interest.

The Employer appealed the Determination on the grounds that it had paid Paine for statutory holidays, and the Director’s delegate had failed to interpret its payroll records correctly.

ISSUE TO BE DECIDED

The issue to be decided in this case was whether the Employer met the burden of demonstrating that it paid Paine for statutory holidays.

FACTS

Paine worked as a cook for the Employer from April 1995 through March 29, 1998. Paine filed a complaint with the Employment Standards Branch on July 13, 1998 alleging that he had not received statutory holiday pay for the entire period of his employment. The delegate found that 18 statutory holidays fell within the last 24 months of Paine’s employment, eight in 1996, nine in 1997 and one in 1998.

The Employer maintained that Paine had received pay for all statutory holidays during his term of employment. In response to the complaint, the Employer stated that it could not provide any copies of payroll records for 1997 due to a failure of the company’s computer. A delegate of the Director sent the Employer a Demand for Employer Records on December 18, 1998. In reply, the Employer stated that in 1998 it used a computer-based payroll system that recorded holiday pay as overtime. The records it submitted for Paine and other employees for 1998 had contained two columns for hours, one headed “Regular Hrs,” and the other, “Overtime Hrs.” The second column contained handwritten notes for at least some months “Stat.” According to the Determination, Paine received 7 hours of overtime pay at \$4.00 per hour in January 1998. The Employer stated that the seven hours reflected only the overtime portion of the statutory holiday pay. The delegate found several months when there was no notation of “Stat” for months in which a statutory holiday occurred.

The Employer did not submit any additional payroll records for Paine in support of its appeal. It stated that no records for 1997 were available because of a computer failure. The Employer did present samples of its records for other employees, consisting of calendar sheets for each month with a note for the number of hours worked each day and a notation at the bottom of the page for “8 stat.” The Employer also produced annual payroll summaries for six other employees for 1998, each containing a handwritten entry “stats” in the row for overtime pay. During 1998, the Employer stated that all employees worked a four-day week, which the monthly records confirmed. The Employer also provided copies of letters from four former or current employees

stating that they had been paid for statutory holidays during the time of their employment, which overlapped with Paine's employment. The appeal contained a number of allegations relating to Paine's performance as an employee. If true, these allegations might have supported a dismissal for cause, but they did not bear on Paine's complaint.

Paine provided the Director's delegates with pay stubs for most of the period in question. The stubs did not indicate that Paine had received statutory holiday pay in the proper amounts, as required by Section 44 of the *Act*.

In response to the Employer's appeal, the Director's delegate examined the payroll records for other employees submitted by the Employer. He found that the records available did not support the Employer's assertion that all employees had received statutory holiday pay.

ANALYSIS

An appellant in these proceedings must persuade the Tribunal that the Determination ought to be varied or cancelled because it contained an error of fact or law. *Re World Project Management Inc. et al.*, BC EST #D134/97.

Section 28 of the *Act* requires to maintain payroll records with a number of items of information. Paragraph (h) of that Article requires the records to include "the dates of the statutory holidays taken by the employee and the amounts paid by the employer."

In this case, the Employer did not dispute that it failed to meet this requirement of the *Act*. The Employer did argue consistently that it had paid Paine for statutory holidays as required by the *Act*, but did not produce records for Paine to support its position, although management stated that it had provided all records available. Information provided to the Tribunal concerned other employees, with the apparent goal of persuading the Tribunal that the pay system worked equally for all employees. The Employer stated that it operated six days per week, with employees apparently scheduled for five days per week. When an employee worked on a statutory holiday, he or she received an extra day's pay or the amount due based on hours worked.

The Employer has not met its burden. Although it provided information in support of its appeal that it did not make available to the Director's delegate, the records presented were insufficient to prove that Paine had received statutory holiday pay or that the Determination was incorrect.

ORDER

For these reasons, the Determination of February 1, 2000 is confirmed. The Employer is obligated to pay Paine \$1,189.23, plus any additional interest due under Section 88 of the *Act* from the date of the Determination.

Mark Thompson
Adjudicator
Employment Standards Tribunal