EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Sharon Threatful, Chris Williamson
("Threatful, Williamson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	97/415
DATE OF HEARING:	July 15, 1997
DATE OF DECISION:	July 29, 1997

DECISION

APPEARANCES

for the appellants:	Al Threatful Sharon Threatful Sandy Threatful
for Skitchine Lodge Ltd.	James Carroll, Esq. Neil Thomson

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act*) by Sharon Threatful ("Threatful") and Chris Williamson ("Williamson") from a two Determinations of a delegate of the Director of Employment Standards (the "Director"), both dated May 1, 1997, which concluded Skitchine Lodge Ltd. ("Skitchine") had contravened the *Act* and that Threatful and Williamson were owed $581.37 and $354.95, respectively, for overtime and statutory holiday pay earned while the two were employed with Skitchine during periods in 1995 and 1996. Threatful and Williamson argue the delegate erred in her calculation of the number of days and hours worked by them. They say that based on the evidence that was available it was obvious the appellants worked more days and hours than accepted by the delegate. Skitchine says the calculations are accurate and the determinations should stand.

ISSUES TO BE DECIDED

There are two issues: first, whether Threatful and Williamson have met the burden on them to persuade me the conclusion of the delegate about the hours worked by each of the appellants was wrong; and, second, if that evidentiary burden can be met, to demonstrate, with some degree of accuracy, what the conclusion of the delegate should have been.

FACTS

Skitchine Lodge Ltd. operates a fishing lodge, including a lodge and five cabins, in the Jamison Creek region north of Kamloops, B.C. The lodge is relatively isolated, having no direct road access and requiring both employees of the lodge and guests to travel approximately one hour, either on foot or on horseback to access and exit the lodge. Work at the lodge is seasonal.

During the season 3 to 4 persons were employed to provide hospitality services at the lodge seven days a week for the guests of the lodge. From time to time the staff were assisted by the daughters of the manager, Mr. Neil Thomson.

Williamson worked at the lodge for periods in 1995 and 1996. He is referred to in the documents on file as the "wrangler/outsideman", which I take to mean he was responsible for the horses and for organizing various activities relating to the use of the lodge facilities and the horses, such as fishing and horseback expeditions; he cut wood and performed other chores relating to the operation of the lodge; he picked up and returned guests to the "trailhead" which refers to the area where any person coming to the lodge by land would transfer from vehicle to horse.

Threatful worked as "lodge steward" for a short period in 1995 and for a period in 1996. Basically, she did everything inside that needed to be done (except the cooking, with which she helped) to keep the lodge running smoothly. This included setting out the tables for breakfast and dinner, serving breakfast and dinner, setting out the table from which the guests prepared their lunches, cleaning for the two meals set up in the lodge, wrapping the lunch table, cleaning the lodge and any of the cabins which had been vacated and assisting in the preparation of dinner. On some of those occasions she left the lodge she was requested to run errands, usualy involving laundry or cleaning.

I heard evidence from Threatful and from her sister, Sandy Threatful, who was occasionally employed at the lodge to fill in for Threatful when she was unable to work at the lodge because of other commitments, about the hours of work required each day during their employment at the lodge.

Threatful described her usual work day as commencing between 5:30 and 6:00 am, breaking at approximately 1:00 to 1:30 pm, a period of 7 to 8 hours, during which she took a meal break, sometimes "on the go". She started working again at 3:30 to 4:00 pm and ended her work day between 9:00 and 9:30 pm, a period of 5 to 6 hours, also during which she took a meal break. She was not challenged on her evidence.

She also gave evidence in support of an argument concerning non-payment of tips, which suggested some portion of the "tip pool" generated by payment of tips on a credit card (as opposed to a direct cash payment left at the table or given directly to the steward) had not been paid over to the staff.

Sandy Threatful had also filed a complaint to the Director. She had kept a record of her hours of work and her complaint was determined from her record. Skitchine did not appeal that determination. She confirmed her record of hours worked under oath in the hearing. She was not challenged in any way on those hours. She gave evidence describing her normal work day

and duties. This evidence also was not challenged. With one exception her evidence confirmed the evidence of Threatful about the hours of work required by the "lodge steward" at the lodge. She testified on some of the days she worked she was also involved in the construction of a new cabin. She estimated the amount of time involved each of those days was "a couple hours".

Williamson did not attend the hearing and there is no direct evidence of his work day or of the number of hours of work he performed during any work day. In support of his complaint Williamson had given an outline of work performed and hours worked during a period September 8, 1996 to September 27, 1996. The delegate accepted this outline when considering his complaint.

Skitchine had no records showing the daily hours of work for employees. The record identified as a Summary of Hours, which were provided to the delegate following a Demand, are shown on the evidence to be unreliable even as an indicator of days worked. Skitchine called no evidence in reply to the case presented on behalf of Threatful and Williamson.

The delegate calculated the hourly rate of pay of Threatful to be $7.50 an hour and Williamson to be $7.00 an hour. These calculations have not been appealed.

ANALYSIS

Tips, or gratuities, are not included in the definition of wages in the *Act*. There is no authority for the suggestion these amounts should be included in the calculation of wages and collected through the enforcement procedures in the *Act*, even if they were capable of calculating with some degree of accuracy.

The burden in this appeal is on Threatful and Williamson to demonstrate on a balance of probabilities the decision of the delegate is incorrect. The procedures of the Tribunal have been fashioned to allow a fair and efficient dispute resolution process. These procedures are consistent with the purposes of the *Act* found in Section 2, particularly subsection 2(d), which states;

> 2. The purposes of this Act are to
>
> . . .
>
> (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act, . . .

For the purpose of deciding appeals based on factual differences, the Tribunal has found it both fair and convenient to allow the parties to present sworn testimony on the issue in the appeal

and to determine the factual issues, and in most cases the appeal, on conclusions relating to credibility, weight and probative value of the evidence presented.

I accept the evidence of Threatful that she worked between 11 and 13 hours a day on average and worked each day between May 20, 1996 and August 31, 1996 except for the days where she worked at London Drugs. I accept it for a number of reasons: it was consistent with and corroborated by the evidence and the actual daily records of Sandy Threatful; it was not challenged in any way by Skitchine; Skitchine called no evidence which cast any doubt on the veracity of the evidence of Threatful; and the evidence makes sense in the circumstances of the employment milieu.

Her appeal is allowed. The matter is referred back to the delegate to calculate the amounts owing based on a conclusion Threatful worked 11 hours a day on each of the days she worked a full day at the lodge. On the evidence, there were 4 days Threatful left the lodge the day previous to a scheduled shift at London Drugs in order to be at work 9:00 am the following morning. She would not have worked more than 8 hours on those days. Those dates are June 14, June 29, August 10 and August 30, 1996. Also, she did not work at the lodge on June 2, June 15 and 16, June 29, July 7, July 14, August 3 and 4, August 10, August 18 and August 31.

The appeal of Williamson must be dismissed. There is no evidence, except uncorroborated hearsay evidence, to indicate how many days and hours work he contributed during his employment. As a rule, hearsay evidence should not be admitted or accepted to establish a crucial and central point in the case. The rationale for this rule relates to an issue of procedural fairness and protection of the integrity of the process. Traditionally, the law has restricted hearsay evidence on the basis that it has an inherently untrustworthy quality from a legal perspective. The main characteristic of hearsay evidence is a statement given to the trier of fact as having been made by a person who is not present at the proceeding, is not under oath when the evidence of the statement is provided and is not subject to cross examination. To quote Arbitrator Nancy Morrison, Aspects of Evidence and Procedure in Arbitration Proceedings, CLE Seminar, Labour Arbitration, June, 1982:

> If there is a rule which excludes certain types of evidence, it is not there by means of some artificial convention. Nor has it been put there long ago for a purpose or reason long forgotten. It is there basically to protect an accused person, in the case of a criminal trial, or a litigant or witness in a civil trial, and the rule usually has a foundation in fairness and common sense.

This result is undoubtedly unfortunate for Williamson, but I am bound by the rules of natural justice to ensure procedural fairness to all parties to the proceeding. That obligation compels

me to the conclusion Williamson has failed to meet the burden placed upon him to demonstrate on balance the conclusion of the delegate about his days and hours of work was incorrect.

ORDER

Pursuant to Section 115 of the *Act*, I order:

1. The Determination dated May 1, 1997 concluding Threatful was owed $581.37 for overtime pay and statutory holiday pay will be varied and it is to be referred back to the delegate for recalculation according to the conclusions contained in this decision; and

2. The Determination dated May 1, 1997 concluding Williamson was owed $354.95 for overtime pay and statutory holiday pay be confirmed.

....

David Stevenson
Adjudicator
Employment Standards Tribunal