

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 -

Shanrock Investments Ltd.
operating as Lighthouse Neighbourhood Pub and Resturarent
("Shanrock" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/382

DATE OF DECISION: August 18, 1998

DECISION

APPEARANCES

Mr. Hans J. Wasner	on behalf of the Employer
Mr. Glenn W. Kirk	on behalf of himself
Mr. Gerry Omstead	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on May 26, 1998 which determined that Shanrock was liable for unpaid overtime wages, statutory holiday pay and vacation pay to Mr. Glenn W. Kirk (the “Employee”). The Director’s delegate found that Mr. Kirk was owed \$2,348.32.

Briefly, the delegate’s findings and conclusions may be summarised as follows:

- Mr. Kirk was an employee of Shanrock. He was employed as a cook.
- He was employed between May 11 and August 29, 1997.
- He was paid at the rate of \$10.00 per hour.
- The delegate found that Mr. Kirk was not paid overtime wages, though he “worked hours in excess of 8 hours in a day and 40 hours in a week. The daily time cards indicated that over a period of time Mr. Kirk worked 7 days per week.”
- The delegate concluded that a document signed by Mr. Kirk, dated May 25, 1997, which stated “I Glenn Kirk waive my overtime hours in exchange for an hourly salary” (the “Agreement”), was void (Section 4 of the *Act*).

In the result, the delegate found that Shanrock owed Mr. Kirk unpaid overtime wages, statutory holiday pay and vacation pay. The Employer disputes the Determination.

ISSUE TO BE DECIDED

The overall issue to be decided in this appeal is whether the Tribunal should vary, confirm or cancel the Determination.

ARGUMENT

The Employer argues that the Determination is wrong and should be set aside in its entirety. First, the Employer argues, the Agreement signed by Mr. Kirk is not void. The Employer argues that the Agreement was entered into by Mr. Kirk voluntarily. Second, the Employer did not ask or authorise Mr. Kirk to work overtime. Mr. Kirk took unauthorised time off from work (for which he was paid). The Employer notes that only the first timecard was signed by a manager. The Employer also suggests that Mr. Kirk worked the hours of another employee, who had been injured, by agreement with that employee. Moreover, Mr. Kirk received meals, lodging and personal services from the Employer which he did not pay for.

First, the delegate argues that the May 25, 1997 Agreement is void as a matter of law (Section 4). Second, the delegate notes that there is no dispute that Mr. Kirk did work overtime hours and that the Employer paid regular wages for all hours worked. The Employer directly or indirectly allowed the Employee to work the hours and must, therefore, pay overtime wages (Section 35). The Employer may not now deduct for the meals, lodging and services.

The Employee argues the Agreement was a condition of employment.

ANALYSIS AND DECISION

Section 4 of the *Act* provides:

The requirements of this *Act* or the *Regulations* are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

The Agreement referred to by the Employer is, as noted by the delegate, void. Under the Agreement the Employee purports to give up his statutory right to overtime wages. Whether the Employee and the Employer entered into the agreement voluntarily is irrelevant.

Section 35 of the *Act* provides (in part):

An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows an employee to work

(a) over 8 hours a day or 40 hours a week

In this case the Employer does not dispute that Mr. Kirk worked the hours indicated on the time cards and, importantly, the Employer does not dispute that it paid for the hours indicated at the regular hourly rate. The Employer's submission clearly states that it was aware that Mr. Kirk worked hours in excess of 8 in a day and 40 in a week. The Employer

seeks to explain this with reference to the May 25 agreement and an agreement between Mr. Kirk and the injured employee that Mr. Kirk would work his hours. In those circumstances, the Employer allows the employee to work overtime and must pay the overtime rate.

With respect to the deductions now claimed by the Employer for meals, lodging and personal services to offset the amount in the Determination, I note that Section 21 of the *Act* proscribes deductions not required or permitted by the *Act* or other provincial or federal legislation. The Employer's submission expressly states that it agreed to waive those costs for Mr. Kirk in return for working overtime hours. However, as noted in Section 4, above, the Employee cannot waive the statutory minimum requirements. Moreover, Section 20 of the *Act* describes how wages must be paid, and payment of wages in the manner suggested by the Employer is not one of them.

In the result, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated May 26, 1998 be confirmed in the amount of \$2,348.32 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal