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-

Queen Charlotte Lodge Ltd.
(the Employer)

- of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR:	Hugh R. Jamieson
FILE NO.:	1999/235
DATE OF HEARING:	August 11, 1999
DATE OF DECISION:	August 24, 1999

DECISION

APPEARANCES

Mr. Grant Scott, for the Employer

Mr. Michael Barnes, (by teleconference)

OVERVIEW

This appeal dated April 21, 1999, is brought by the Employer against a Determination issued by the Director on March 30, 1999, wherein it was found that the Employer owed the amount of $6,627.53, being wages, overtime wages and statutory holiday pay due to Mr. Michael Barnes (the Employee). The basis for the appeal is the Employer's contention that the Director erred in accepting a record of hours submitted by the Employee, which purported to represent the hours he worked for the Employer.

ISSUES TO BE DECIDED

The only issue is whether the Director erred in accepting all of the hours allegedly worked by the Employee.

FACTS

The relevant facts can be summarized as follows. The Employer operates a fishing resort at Naden Harbour in the Queen Charlotte Islands. In addition to a fishing lodge, the facilities include a vessel named the M.V. Driftwood, which is a converted U.S. Army tugboat. The Driftwood is capable of housing twelve (12) guests and operates with a regular crew of a Captain, Chef and two (2) deckhands.

During the operating season, which runs from about May to September, the Driftwood sails from shore on daily trips to various fishing spots within a range of about five miles of the harbour. It berths close to shore every night. For my purposes, the Driftwood can best be described as the " mother ship" for the fleet of twenty or so smaller boats used by the Employer to take guests on fishing trips. Guests residing in the lodge as well as those residing on the Driftwood use the vessel as the central point for their fishing activities. They lunch there, get their bait and beer there and dock there with their catch at the end of their trips. With services aboard the Driftwood being available from 4.00 a.m. until around midnight, the deck hands working and living aboard the vessel are required to work long hours and split shifts to provide the all day coverage.

Deck hands' duties involve maintaining the cleanliness of the Driftwood, including the guest cabins. They do guest laundry and other such chores. They also assist in the anchoring and mooring of the ship. They load, fuel and otherwise prepare the boats and assist guests for departure on fishing trips. They also assist in unloading the boats on return from the fishing grounds, clean and freeze the catch and prepare the boats for the next trip. In general, they are there to provide service to guests and see to their needs.

The Employee was employed as a deck hand on the Driftwood during the 1997 season from May 21, 1997 to September 8, 1997. He was paid a flat daily rate of $70.00 per day, which according to the Employer, was intended to cover minimum wages for an average working day of ten (10) hours per day, including overtime. For what it is worth, the Employer claims that all employees are also given a tax-free allowance of $10.00 per day. The employees however, do not see this money, it is assessed as payment for their board and room.

At the end of April 1999, after he accepted the job, the Employee called Employment Standards expressing some concerns about the likelihood of having to work long hours. Acting on the advice given, he kept a daily diary of his activities during the months he was employed, as well as a record of all the hours that he purportedly worked. When the job was over on September 22, 1997, he filed a complaint alleging that he had not been paid overtime wages and general holiday pay. He provided the daily dairy as proof of the hours worked. In his complaint, he also claimed that he should have been paid for a week he was aboard the Driftwood travelling from Vancouver to the Queen Charlottes at the beginning of the season. He also sought remuneration for other things like attending a first aid course at his own expense and, attending and preparing for a Coast Guard Inspection.

Following a lengthy investigation, the Director issued the Determination in question here, on March 30, 1999. At page 3 of the Determination, the Director says the following about accepting the Employee's record of hours:

> " The employer failed to produce all records required pursuant to section 28 of the *Employment Standards Act*. Although detailed records were not produced, The employer argues that Barnes was required to work a set 10-hour shift. In the employer's submission is a memorandum from company Dock Manager, Brian Clive which appears to contradict the employer's position that Barnes was on a set 10 hour shift schedule throughout his employment. Barnes has provided a detailed accounting of hours worked and the duties he performed. Based on the balance of probabilities, and the employer's failure to produce records required pursuant to section 28 of the *Act*, I find that Barnes' accounting of hours worked is the best evidence upon which to base a decision. "

THE HEARING

As indicated earlier, the Employer was represented by Mr. Grant Scott at the hearing. The Employee participated by teleconference. Apparently, he has since moved to Ontario and was unable to appear in person.

It should be mentioned that in the Employer's initial response to the complaint, the position was taken that the Employee was employed as a deck hand on a chartered vessel therefore exempt from Part 4 of the Employment Standards Act (the Act). Chartered vessel crews are of course included in the exemptions listed in Section 34 of the Employment Standards Regulations. The Director disallowed this claim ruling that in the circumstances, the Driftwood was not a chartered vessel. The day before the hearing, another issue of exemption from Part 4 of the Act by virtue of Section 34 of the Regulations was raised by the Employer. This time on the grounds that the Driftwood is a tugboat. In this regard, the Employer relied on a decision of the Tax Court of Canada, *CIP Inc., v. The Minister of National Revenue*, (1985), 86 DTC 1373. This question came off the table however, when I ruled that this was a new issue that had not been raised before the Director.

The only issue left was one of credibility going to the Employer's challenge of the number of hours that the Employee claims he worked. The Employer had obviously not seen the Employee's diary before receiving a copy of it along with the Director's submission filed in response to the appeal. Therefore, this was the first opportunity there had been for the Employer to voice its concerns about the validity of the information in the diary that was relied upon by the Director.

In this regard, the Employer had prepared a list of questions which were presented orally to the Employee. The situation was of course less than perfect for assessing credibility with the Employee being on conference call. However, I did all I could in the circumstances to ensure that neither party was disadvantaged. They were given plenty of leeway to fully express their views.

What was gleaned from this exercise was that there could be no question that the Employee had worked long hours. However, the hours he claims that he actually worked were clearly inflated. For example, on June 5, 1997, the Driftwood never left the harbour and there were no guests aboard, yet the Employee claims he worked 14 hours. When questioned about what he had actually done during those hours, he hedged, claiming he did chores all day to make a good impression as he was relatively new on the job. The results were the same when he was asked about other days where he claimed to have worked extremely long hours yet still had time to catch as many as seven fish. He could seldom be pinned down to specifics. Instead, the Employee simply went off on a spiel on generalities about how much he had done for the Employer and how badly he had been treated. Responding to a question about meal breaks, the Employee said that the deck hands rarely sat down for a meal, they mostly ate on the run.

Getting into specific examples of how the hours claimed were inflated, throughout the whole period, there was no allowance anywhere for time taken for meals, coffee breaks or any other type of pause in the work cycle. On July 4, 1997, he claims that he worked 17 hours from 7.00 a.m. to 9.00 p.m. without a break. However, he records in his daily entry in his dairy that he helped the other deck hand with his chores from 6.00 p.m. until 9.00 p.m. so that they could go fishing. When questioned, he admitted that he had done this on his own volition without the Employer's consent or knowledge, yet he claims these hours as overtime. Another example of the many flaws in the Employee's claim is on June 6, 1997, where he claims hours from 6.00 a.m. to 10.30 at night, again without breaks, in his diary, he records that he did not get out of bed until 6.30 a.m.

ANALYSIS

In these situations where employers fail to keep or produce records that they are required to keep under Section 28 of the Act, the Tribunal has said that the Director must decide the number of hours worked and provide reasons for the basis of the decision - see *518820 B.C. Ltd.*, BC EST # D244/98. This is what occurred here. However, enough doubt has been cast on the information that the Director relied upon, that it is apparent that the Determination cannot stand as is.

To be fair to the Employee though, in these situations where people work and live on vessels, it is virtually impossible to sort out actual working time from non-working time. What makes it especially difficult is that while the vessel is at sea, employees do not leave the work site during their stand down time. Nor do they keep to the crew quarters, particularly on smaller ships. Consequently, when they are not sleeping, they are always there, hanging around and inevitably picking up things and doing little chores, even if they are supposed to be off duty.

It was obviously the same scenario here for the Employee. When the Driftwood was away from the harbour, the deckhands were onboard, all day, morning, afternoon and evening. With guests coming back and forth in boats at all hours, it would be difficult indeed for the deckhand who was supposed to be on stand down not to pitch in and help. In fact, I suspect that the Employer would expect an employee to respond to the requests of guests if they happened to be in the vicinity, even if they were not officially on duty.

Be that as it may, the discrepancies revealed at the hearing in the Employee's diary are not in my view, sufficient to discredit it in its entirety. Looking at all of the evidence on file, there can still be no doubt that the Employee worked many hours for which the minimum standards set by the Act require payment at overtime rates. The problem is how does one decide, in all probability, how many hours were worked. Obviously, the record of hours submitted by the Employee cannot be accepted in its totality. There are no payroll records that can be of any assistance. Indeed, there was a candid admission at the hearing on the Employer's part that daily hours were not kept simply because of the afore described difficulty in determining hours actually worked in these situations involving vessels. The Employer explained that several methods of tracking daily hours have been tried in the past, including a time clock, but these were impractical.

Heeding one of the purposes of the Act, i.e., Section 2 (b) " *to promote fair treatment of employees and employers* ", the interests of both parties have to be balanced. However, the only evidence of daily hours available is the Employee's diary so it will have to provide the foundation for the calculation of overtime. Of course, adjustments will have to be made for some of the hours claimed but not worked.

Looking at the overall picture, I see that the Employee worked for some 105 days during the 1997 season. In 74 of those days, the Director assessed overtime rates at double time because of hours worked more than 11 hours in a day. The total hours assessed at double time are in the region of 323 ½. To resolve the issue of meal breaks, 1 hour will be deducted for each of the 105 days the Employee worked. This is kept to a minimum in light of the Employee's contention that they ate on the run. Also, the 3 hours that the Employee claimed as overtime on July 4, 1997, when he was actually helping the other deck hand do his work so that they could go fishing, also has to be deducted. This makes a total of 108 hours that will be deducted from the 323-½ or so hours for which the Director found double overtime rates due. I do not intend to go through the other discrepancies in the diary that were revealed at the hearing. Most of these were an hour here and ½ an hour there. These will offset any claim the Employee had for hour's put in before he went on the payroll on May 21, 1999.

ORDER

Pursuant to Section 115 (1) of the *Act*, this matter is referred back to the Director for the purposes of recalculating the amount due to the Employee in accordance with the foregoing formula. The interest will also be varied accordingly.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal