

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 -

Margaret J. Kim
of Marja Restaurant Ltd.
(The “Company”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Richard Longpre

FILE NO.: 97/372

DATE OF DECISION: August 11, 1997

DECISION

OVERVIEW

Ms. Margaret Kim, director/officer of the Company filed an appeal, pursuant to Section 112 of the *Employment Standards Act*, of Determination no. DDET 000778. The Delegate of the Director of Employment Standards determined the Kim and the Company owed the Complainant Ms. Susan MacDonald, \$2,103.64 in overtime wages, statutory holiday pay, severance pay and interest.

ISSUE TO BE DECIDED

Kim raised two issues on appeal. First, the Company hired MacDonald on December 16, 1992. She argues that the Determination is incorrect in concluding the Company owed MacDonald eight weeks of severance in March 1996. Second, during her employment MacDonald requested that she be allowed to work extra hours. Kim argues that she could not afford to pay the overtime premium. MacDonald was allowed to work extra hours at the straight time wage. Kim says these hours would have otherwise been worked by the day shift waitress at straight time wages.

ANALYSIS

I will deal first with the severance pay owed to MacDonald when notice of termination was given to her. MacDonald commenced work at the “Dimella Restaurant” in April 1992. In December 1992, Kim purchased the restaurant. The previous owners gave MacDonald notice; however, MacDonald continued to work with Kim until the sale of the restaurant in March 1996.

Kim purchased the restaurant and chose to continue to employ MacDonald. Section 97 of the *Employment Standards Act* reads:

Section 97

If all or part of a business or a substantial part of the entire asset of a business is disposed of, the employment of an employee of the business is deemed, for the purpose of this Act, to be continuous and uninterrupted by the disposition.

Applying Section 97 to MacDonald’s circumstances, her commencement of employment date, April 24, 1988, was not altered by the purchase of the restaurant by Kim in 1992. At the time of her termination of employment in 1996, therefore, MacDonald had been employed for almost eight years.

The sale of the restaurant was effective March 15, 1996. Kim argues that MacDonald became aware of the sale on January 8, 1996. The *Act* requires that notice of termination of employment be in writing. The conversation between MacDonald and Kim in January 1996 did not satisfy the requirements of the *Act*. MacDonald was given notice of termination two weeks prior to the sale of the restaurant and MacDonald's termination.

Under Section 63 of the *Act*, MacDonald was owed eight weeks severance notice or payment. She worked for two weeks of that notice period. The Delegate correctly found that she was owed six weeks' wages equaling \$1038.56.

Kim's second argument addresses overtime hours worked by MacDonald at straight time wages. Kim permitted MacDonald to work extra hours. These hours would have been worked by another employee at straight time. Kim argues that MacDonald should not be permitted to seek overtime premiums for those hours.

There is no dispute that MacDonald worked overtime hours. The issue is whether Kim and MacDonald could agree not to be governed by the *Act* in these circumstances. The Tribunal has dealt with this situation in a number of Decisions. We see no discretion in the legislation that permits parties to opt out of compliance with the *Act*. Where an employee works overtime hours he/she must be paid at the appropriate rate. The Delegate calculated overtime wages owed to be \$943.40.

Finally, the Determination applies the above principles to statutory holiday pay owed to MacDonald. The delegate concluded MacDonald was owed \$213.98 for the last three statutory holidays in 1995.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, Determination No. DDET 000778 is confirmed.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal