Employment Standards TRIBUNAL

An appeal

- by -

W E P Holdings Ltd. operating as Robins Donuts
(the"Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Ib S. Petersen

FILE No.: 2001/156

DATE OF HEARING: June 27, 2001

DATE OF DECISION: July 12, 2001

DECISION

APPEARANCES:

Mr. Jian Gu	on behalf of the Employer
Mr. Kevin Taylor	on behalf of himself

OVERVIEW

This matter arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination of the Director issued on January 30, 2001. The Determination concluded that Taylor was owed $1,740.71 by the Employer on account of regular wages, overtime, statutory holiday pay and vacation pay.

The delegate's findings and conclusions, in her lengthy Determination, may be briefly set out as follows.

1. The delegate found that Taylor was employed from January 30, 2000 until May 14, 2000 as a baker with the Employer, a franchise operator with Robins Donuts. At the time of termination, he was paid $75.00 per shift. Where the pay per shift fell below minimum wages, due to hours worked, the pay owing was calculated on the basis of the minimum wage rate.

2. The initial training period, from January 30 to February 14, 2000, constituted employment under the *Act* for which Taylor was entitled to be paid. The Employer disagreed with that based on an agreement with Taylor that he would be paid during training. The delegate awarded minimum wages for this period based on Taylor's records.

3. Taylor submitted records which indicated that he worked in excess of 8 hours in a day or 40 hours in a week. The delegate ultimately preferred these records, and Taylor's explanations of his hours, and based her Determination on those records. From the Determination, it appears that the delegate accepted Taylor's records because the Employer's records was based on information provided to the Employer by front end staff as to the time Taylor completed his shift, *i.e.*, he did not have first hand knowledge of the actual hours of work. The Employer also based its case on its view of the time it would take a baker to complete a bake, *i.e.*, it was not necessary to work in excess of the 8 hour shift. The delegate reviewed statements from various witnesses supplied by both sides and, ultimately, decided to rely on Taylor's records.

4. The Employer claimed that it was entitled to off-set the cost of food and drink. The delegate noted that there ws no written authorization to deduct and did not accept the Employer's assertions and its right to deduct for these items.

5. The delegate accepted that Taylor had worked on a statutory holiday and did not receive 1 1/2 his regular pay for the hours worked.

FACTS AND ANALYSIS

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong.

At the hearing, the Employer indicated that it had two concerns with the Determination: (1) pay for the training time; and (2) the overtime awarded. The Employer did not pursue other grounds of appeal set out in its various and numerous submissions to the Tribunal, including allegations of bias on the part of the delegate. In the result, training time and overtime are the only grounds that I propose to deal with.

At the conclusion of the Employer's case, Taylor elected not to call any evidence. In his view, there was no case to meet.

Considering all of the evidence before me, I agree with Taylor. In my view, the Employer has not discharged the burden to show that the Determination is wrong.

At the hearing, the Employer was assisted by an interpreter. There was nothing at the hearing to indicate to me that Gu did not fully understand the proceedings. Unfortunately, from the Employer's standpoint, and perhaps due to lack of familiarity with the process, which was briefly explained at the outset of the hearing, and which is explained in the appeal material made available by the Tribunal, the Employer's evidence did largely not address in any detail the factual findings set out in the lengthy Determination, nor did the Employer in any effective or substantive manner address and explain the documents in the fairly voluminous file. As I indicated to the parties at the commencement of the hearing, it is not for the Tribunal to conduct an investigation. The Tribunal is an appellate tribunal and conducts hearings, in accordance with fundamental principles of natural justice, and considers the evidence submitted by the parties, be it *viva voce* testimony or documentary evidence. While the Tribunal is responsive to the fact that parties appearing before it are more often not represented by legal counsel, ultimately, the responsibility for the presentation of the case rests with the parties.

I turn first to the claim for training. The *Act* is quite clear in that regard. An "employee" includes "a person being trained by an employer for the employer's business" (Section 1 of the *Act*). There was no dispute that Taylor was being trained as a baker by the Employer--in fact, one of his employees, Daniel Bjornson--for the Employer's business. Taylor was going to become a full-time baker at the completion of his training. The employer says that it had an agreement--in writing--with Taylor that his training period would be unpaid. While this agreement was not placed into evidence--the Employer did not keep the document--it is largely irrelevant to my decision. The Employer says that when it took on Taylor, he had been unemployed for a long time and badly needed a job. The Employer also says that it did not

really need Taylor at the time, but provided him with an opportunity to learn and "wouldn't pay training wages." Even if Taylor agreed not to be paid, such an agreement would be of no effect (Section 4 of the *Act*). In brief, in my view, there is no foundation in law or fact for the Employer's argument that it is not obligated to pay for the training time.

Gu took issue with the number of days and hours Taylor claimed as training time--"he didn't work for us as long in training." He did not testify as to the number of days and hours spent by Taylor in training but deferred to Bjornson. However, the Employer's own witness, Bjornson, candidly admitted that he was not sure of the dates that Taylor worked, nor, indeed, the number of days that constituted the training period. As well, because of his experience as a baker--apparently, bakers are paid by the shift, as opposed to the hours--he did not keep track of the hours worked. Bjornson was an experienced baker. Generally, though, while his evidence seemed to favour the basic 8 hour shift claimed by the Employer, and he overall disagreed with Taylor's hours, he agreed that it did on occasion go until 5:00 a.m., *i.e.*, 9 hours, because there could be clean-up work to be done. In the circumstances, Bjornson's testimony did little to advance the Employer's case that Taylor did not work the hours claimed by him during this period. In fact, his testimony confirmed that the hours worked in a shift could--and did, on occasion--exceed the 8 hours claimed by the Employer.

With respect to overtime wages after the training period, after February 14, 2000, I am also not persuaded on the balance of probabilities that the delegate erred.

Considering all of the evidence before me, I do not accept Gu's testimony that Taylor, in fact, worked only the 8 hour shift claimed by the Employer. His evidence largely boils down to the bald assertion, that, in the circumstances, the work could be completed in the 8 hour shift and that he disagrees with the hours claimed by Taylor. Gu submitted several letters from bakers in other franchise operations which indicated that the work should be completed within the 8 hour shift. Taylor also submitted letters from bakers to contradict this evidence. I do not place much--if any--weight to these letters. First, these individuals were not present at the hearing to testify under oath or affirmation and, therefore, not subject to cross examination. Second, and importantly, the issue at hand was the amount of time, or hours, worked by Taylor in this particular business establishment. As noted by the delegate in her Determination, Taylor was a relatively inexperienced baker and may have taken longer time to do the work.

Moreover, Gu and Muong Saepan, who also testified for the Employer, explained that Taylor made numerous and lengthy telephone calls to friends and others during his working hours which, from the Employer's standpoint, should be taken into account in assessing the hours actually worked by Taylor. While I sympathize with the Employer's concern, in my opinion, the assertion, basically to the effect that Taylor spent "hours" on the telephone during work time and entertaining friends at the workplace is not relevant for the present purposes. If true, such conduct may be cause for discipline and, at the end of the day, termination. The Employer is responsible for the control of the workplace and the supervision of its employees and I am not

prepared to hold the Employer's failings in that regard against the Employee. The delegate did not accept the Employer's assertions, and neither do I.

The delegate also rejected the Employer's contention that Taylor had claimed for hours, in fact, spent by him waiting for the bus at the end of his shift and, from the Determination, it appears that she went as far as to compare bus schedules to Taylor's records. The Employer did not pursue this aspect at the hearing.

Moreover, Gu disagrees with some of the "extra" work claimed to have been done by Taylor, such as cleaning the fryer and ordering supplies. Gu testified that his wife did the ordering for the operation when he was abroad, not Taylor. His wife did not testify at the hearing.

Under the Act, there is an onus on the Employer to keep track of hours worked (see Sections 27 and 28). The Employer did not do that. Schedules submitted by the Employer as part of its appeal were just that, schedules, which may or may not reflect the actual hours worked by an employee. Apart from the evidence set out above, there was nothing to properly explain how, and the extent to which, the schedules reflected the amount of time worked. Because Taylor was generally paid on a shift basis, and not on an hourly basis, in my opinion, the Employer did not concern itself greatly with hours worked, only whether the work was actually done. In the circumstances, I do not accept the schedules as reflecting the hours actually worked. It was clear, even from Bjornson's testimony that hours could exceed the basic 8 hour shift. The fact that employees are paid on a shift basis does not relieve employers from compliance with the hours of work and overtime provisions of the *Act*.

The delegate noted certain errors in Taylor's documentation and took those into account. While I appreciate the Employer's scepticism of Taylor's records, I am not persuaded that the delegate's acceptance of those records, in all of the circumstances, and on the balance of probabilities, was wrong. In reaching that conclusion, I am mindful that Saepan testified that Taylor, when she worked with him, would come in at 8:00 p.m. and that would generally be at odds with Taylor's claimed start times, mostly, it appears around 7:00 p.m. However, there are dates where he claims to have started at 8:00. The delegate accepted Taylor's statement that he never worked with Saepan, who is a relative of another franchise operator with Robins Donuts. It appears from the file that the delegate was unable to contact Saepan in the course of her investigation. Saepan's (very brief) testimony was mostly devoted to allegations that Taylor took food and drink without permission and she did not explain when she, in fact, worked with him. In the circumstances, I am somewhat sceptical of her evidence.

In my view, the Employer's evidence does not substantially contradict the specific evidence relied upon by the delegate, namely that Taylor worked certain hours on certain dates. I would have thought that, if the Employer's intent was to discredit the hours claimed by Taylor, and accepted by the delegate, then the Employer would have pointed me to dates and hours claimed to have been worked but, in fact, not worked. If, as the Employer argued, in its dealings with the delegate, that it was kept abreast of Taylor's hours by "front end" staff, I would have expected

viva voce testimony from those employees. The circumstances of these employees failing to attend to testify was unexplained and I might well draw an adverse inference from that. In short, the Employer's evidence lacks any degree of detail that, in my view, and in the circumstances of this case, is necessary to show that the delegate erred in making her Determination.

For all of the above reasons, I am of the view that the Employer has not discharged the burden on the appeal and the application is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated January 30, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal