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 -

Ann Peterson and Billie Joe Skalicky operating Subby's Submarine Shop and Ann Peterson and Billie Joe Skalicky operating Subby's Subs
("Subby's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	1999/368
DATE OF HEARING:	August 23, 1999
DATE OF DECISION:	September 10, 1999

DECISION

APPEARANCES

for the appellant:	Ann Peterson Billie Joe Skalicky
for the individuals	Rachel Mearns (on her own behalf)

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Ann Peterson and Billie Joe Skalicky operating Subby's Submarine Shop and Ann Peterson and Billie Joe Skalicky operating Subby's Subs ("Subby's") of a Determination which was issued on May 21, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Subby's had contravened Sections 17, 34 and 40 of the *Act* in respect of the employment of three former employees of Subby's, Lark Hicks ("Hicks"), Sandra Laird ("Laird") and Rachel McInnes ("Mearns"[1]) and had contravened Section 63 of the *Act* in respect of Lark Hicks. The Determination ordered Subby's to cease contravening the *Act*, to comply with the requirements of the *Act* and to pay an amount of $1118.42. Except for the issue of length of service compensation for Hicks, the Determination addressed three areas of complaint: overtime, deduction of ½ hour for meal breaks and minimum daily pay. Subby's says the Determination is wrong in several respects: first, the Determination wrongly concluded the employees worked their meal break, incorrectly calculated hours of work, in the case of Mearns, wrongly credited her with statutory holiday pay entitlement for the Victoria Day statutory holiday and, in the case of Hicks, wrongly concluded she was entitled to length of service compensation.

A number of witnesses were presented by Subby's.

ISSUES TO BE DECIDED

The issue in this case is whether Subby's has shown the Determination is wrong in fact, in law or in some combination of the two. The onus to demonstrate an error in the Determination is on Subby's.

FACTS

Subby's operates two shops in Kamloops. The first, Subby's Sub Shop is basically a wholesale business, making and packaging sandwiches and other food items for distribution through various retail convenience outlets. They have some walk-in clients, but do not serve customers on a regular basis. The hours are fairly regular. The other is Millennium's Bistro, which is a small restaurant serving the public generally. Hicks and Mearns worked at both locations, while it appears from the material on file that Laird worked only at Subby's Sub Shop. Mearns' first day of employment was April 18, 1998.

Subby's did not schedule meal breaks, but deducted ½ hour from the hours that each of the individuals was scheduled to work. There was a discussion about these deductions between Ann Peterson ("Peterson"), one

[1]between the date of the complaint and the date of the hearing, Ms. McInnes was married and her married surname is Mearns

of the owners of Subby's, and Laird near the end of June. According to Peterson, Laird asked if she could work the meal break and was told that she had to take a break. It is not clear from the evidence that she did, or that she was able because of the requirements of the business, to take a meal break.

Each of the individuals maintained their own record of hours. In some cases these records did not accord with their scheduled hours of work. The inconsistency between the hours of work recorded by the individuals and the hours of work shown on the employer's schedule was addressed in the Determination as follows:

> The records as supplied by the employer leave many questions in terms of the record of hours recorded and the deciefering of same.
>
> The records provided by all three complainants are clear and concise records of the hours worked in support of their claims.

On May 7, 1998, Hicks and a customer had a light-hearted exchange about a pizza the customer was receiving. The exchange was overheard by Peterson and Billie Joe Skalicky ("Skalicky"), the other owner of Subby's, and both confronted Hicks, criticizing her for the exchange. In response to the criticism, Hicks made the comment, "It really sucks around here lately", to which Peterson replied to the effect (the exact words alleged to have been used are disputed by Peterson), "if you don't like working here, you can leave; there is the door". Hicks left.

ANALYSIS

With the exception of one matter, Subby's has failed to satisfy their onus to show any error in the Determination. I agree with the Director that the employer's records are not clear and leave many questions about their accuracy.

The first area of dispute raised by the appeal concerns the matter of deducting ½ hour for meal breaks. It is not disputed that no meals breaks were scheduled by Subby's. They say that employees were told to take them. The Determination accepts that employees were required to be available for work during their meal break. No evidence was given to refute that conclusion. Section 32 of the *Act* says:

32. (1) An employer must ensure

(a) that no employee works more than 5 consecutive hours without a meal break; and

(b) that each meal break lasts at least ½ hour.

(2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

In presenting its evidence on this part of the appeal, Subby's succeeded in establishing that it failed in its statutory obligation to ensure that no employee works more than 5 consecutive hours without a meal break. I am quite certain, mainly because Peterson said so, that they were not aware this had occurred. Section 31 of the *Act* also requires an employer to schedule meal breaks. There is no dispute that Subby's did not do this. They argue that each employee was told to take a meal break and suggest that ought to be sufficient evidence that all employees received the required meal break at the required time. I do not agree. The *Act* places a positive obligation on an employer to *ensure* appropriate meal breaks are given and taken at the required time. Their failure to schedule meal breaks and their apparent inability to ensure compliance with

the requirements of Section 32 in one significant respect substantially affects the strength of their position. Nothing in the evidence provided by Subby's detracts from the reasonableness of the conclusion reached in the Determination concerning the meal breaks and this aspect of the appeal is denied.

There were several matters raised in respect of the calculations of wages owing to Mearns. In preparation for the hearing, Subby's did a summary of the differences between the employer's work schedules for Mearns and the Mearns' records. There is no doubt there are differences. What is in doubt is whether the employer's schedules are an accurate reflection of the hours actually worked by Mearns. Having listened to the employer's evidence, I am not convinced that the employer's records are an accurate reflection of the hours worked and, accordingly, there is no basis for concluding the Director was wrong to accept Mearns' records over those of the employer. For example, on one of the schedules, Mearns was not originally scheduled to work and appeared to have been added to the schedule for one or more shifts after it was originally prepared. However, there was no reference on the schedule to show what days those scheduled hours referred to. In their evidence, Subby's was not able to say what days those hours referred to, although it was acknowledged she had worked those hours in that period. In the summary, however, no reference is made to those additional hours. It was also agreed by Peterson at the hearing that employees could trade shifts and, while approval for the change had to be acquired from her or Skalicky, the change did not necessarily appear on the schedule.

In the Calculation Report, Mearns was credited with having worked the B.C. Day statutory holiday, August 3. The evidence of the employer, and it was supported by some evidence from one other witness, Susan Dixie, was that Subby's did not open either location on that statutory holiday. This was also supported by the schedules, at least to the extent that they showed no employee at either location scheduled to work that day. Mearns also testified, in respect of that particular day, that she had no specific recollection of having worked it, even though she did have some specific recollection of other days, close to the day in question, of the hours she worked and the work she performed. She did not challenge the evidence of the employer that both locations were closed on that day.

Apart from this issue, I accept that Mearns records are a reasonably accurate account of her hours of work. I reach this conclusion on the basis of her evidence about how she maintained her record of hours and on her ability to recall quite specifically the hours she worked and the work she performed during her brief period of employment.

Mearns began her employment on April 18, 1998. In the calculation sheet prepared by the Director, she was given statutory holiday pay for May 18, 1998, the Victoria Day holiday. Subby's says she should not have been paid for the statutory holiday. The relevant provisions of the *Act* relating to statutory holiday pay is Section 45, the opening words of which state:

> *45. An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off: . . .*

Subby's says that Mearns would not have been entitled to a day off on the statutory holiday because she had not worked for 30 days before the holiday (see Section 44). Subby's is correct that Mearns would not have been entitled to a day off for the statutory holiday because she had not worked 30 days prior to the particular statutory holiday. However, time off for a statutory holiday and statutory holiday pay are two different entitlements under the *Act* and while Mearns was not entitled to time off, Section 45 contains no pre-requisites to statutory holiday *pay* entitlement and she was entitled to be paid for the day according to the formula set out in Section 24 of the *Employment Standards Regulations*. I can find no error in the calculation of her holiday pay entitlement.

Finally, Subby's says the Director was wrong to conclude that Hicks was entitled to length of service compensation. Subby's says, in effect, that Hicks quit her employment and that relieves them of the

obligation to pay length of service compensation. The Director concluded from the available facts that Hicks did not quit. No new facts were added to this issue in the hearing.

As the Tribunal has said in many decisions that the act of quitting is a right that is personal to the employee and there must be clear and unequivocal evidence this right has been voluntarily exercised by the employee. There is an objective and a subjective element involved in the act of quitting: objectively, the employee must carry out an act that is inconsistent with further employment; subjectively, the facts must point to an intention on the part of the employee to quit. It is arguable that Hicks' leaving Subby's on May 7 satisfies the objective aspect of the act of quitting, but the facts fairly support a conclusion that her leaving was not a voluntary act performed with an intention to terminate her own employment. It was reasonable to conclude, as the Director did, that Hicks left the premises at the insistence of the employer and not of her own volition. There is no reason for me to change that conclusion.

For the above reasons, the appeal, except in respect of the inclusion of August 3 in Mearns' hours of work, is denied.

ORDER

Pursuant to Section 115 of the *Act*, the Determination is varied to reduce the amount payable to Mearns by the August 3 hours (9.5 hours). Interest pursuant to Section 88 of the *Act* will be added to the resulting amount.

David Stevenson
Adjudicator
Employment Standards Tribunal