

An appeal

- by -

Bakerview Motor Inn Ltd.
("Bakerview")

- 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: James E. Wolfgang

FILE No.: 2001/71

DATE OF HEARING: June 29, 2001

DATE OF DECISION: July 26, 2001

DECISION

APPEARANCES

Sherry Cathers	representing herself
Penny Elias	representing herself
Sam Lo	representing Bakerview Motor Inn Ltd.
Deb Swain	representing Bakerview Motor Inn Ltd.
Ian MacNeill	representing the Director of Employment Standards
Petter Lam	Interpreter

OVERVIEW

This is an appeal by Bakerview Motor Inn Ltd. (“Bakerview”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by the Director of Employment Standards (the “Director”) dated January 16, 2001. The Determination found Bakerview had violated Sections 34, 40 and 63 of the *Act* and owed Sherry Cathers (“Cathers”), Christine Brennen (“Brennen”) and Penny Elias (“Elias”) \$2157.29 for regular wages, minimum pay for hours worked, overtime and compensation for length of service.

The Determination found Sherry Cathers is owed \$845.72 for wages and compensation for length of service and interest. Christine Brennen is owed \$147.36 for wages and interest. Penny Elias is owed \$1,164.21 for wages and interest.

In their Notice of Appeal received by the Tribunal on January 24, 2001, Bakerview admit they made errors in the payroll of Cathers and Brennen and were forwarding cheques to correct the errors.

In a letter dated January 31, 2001 there was a revision to the Determination by the delegate amending the amount owed Cathers and Brennen. The new amounts are \$531.90 for Cathers and \$111.42 for Brennen. There was no change in the amount owed to Elias.

The delegate of the Director who originally conducted the investigation had left the Branch and another delegate completed the file.

The issue of a violation of Section 63 of the *Act* is no longer before the Tribunal as I believe all claims have been settled.

There was a penalty of \$0.00 imposed for violation of Sections 34, 40 and 63.

The appeal was heard by way of an oral hearing on June 29, 2001. Evidence was taken under oath from all parties.

ISSUE

Is Bakerview in violation of Section 34 and 40 of the *Act*? If so, do they owe Cathers, Brennen and Elias any money?

ARGUMENT

Cathers worked for Bakerview as a waitress from August 6, 1999 to October 17, 2000. She received an increase in wages from \$7.15 to \$7.50 effective August 16, 2000. When she started she did not do the schedule as Lisa, the restaurant manager, did that. When Lisa left, according to Cathers, she assumed the responsibility of doing the schedule.

Cathers claims she often came in on her days off to help a new girl for an hour or so with the till and never claimed wages for that time. She also stated she often ran errands, did banquet bookings and picked up supplies without claiming time or expenses. She also stated her claims for overtime were reduced or removed from the schedule. According to Cathers, the staff could not go home and leave customers sitting in the restaurant or in the banquet room so they worked the overtime. Finally, she claims the employees did not make the decision to go home early if the restaurant was not busy. Mr. Sam Lo (“Lo”) or Mrs. Lo would make that decision and would reduce the scheduled hours from 4 to 2 or 3, as they signed in.

When cleaning up after lunch one day she accidentally threw out some papers belonging to Mr. Lo. The next day Mr. Lo terminated her claiming she had dishonoured them by throwing out the papers. When Cathers tried to apologize she was told it did not matter. Bakerview claim she did not apologize and threatened them.

Cathers has claimed two weeks additional pay for “emotional compensation”.

Bakerview claim they could not pay employees if they did not sign in when they came to work extra time. They claim they paid Cathers if she worked a ½ hour or so longer and she was always paid as per the time she signed out. Also the decision to close early was mostly made by Cathers. The front office often had complaints from customers about the restaurant closing early. They admit they did sometimes circle hours written down by the staff, but always paid the amount the employees signed for.

At the hearing Bakerview agreed they owed Cathers the additional week of compensation for length of service. I believe that payment has been made to Cathers.

Brennen worked as a waitress for Bakerview from July 2, 2000 until October 14, 2000. She was paid \$7.15 per hour. Brennen has been paid for compensation for length of service and is claiming for minimum daily pay, overtime and regular wages.

Elias worked as a cook from April 8, 1999 until November 15, 2000. From April 11, 1999 to August 15, 1999 she was paid \$8.00 per hour. From August 16, 1999 to April 30, 2000 she was paid \$8.50 per hour. From May 1, 2000 to November 15, 2000 she was paid \$9.00 per hour.

Elias claims they had no choice in the amount of hours worked. They were told they could take days off with pay later. She claimed when she tried to take a day off with pay they accused her of stealing hours and did not pay her. They also cut her hours back. Her evidence was if an employee got into an argument with the Lo's they would cut their hours or put them on "on call" with no shifts scheduled.

Shortly after Lisa left a new person came to cook at the restaurant, Mr. Lee, who came from Hong Kong. Elias indicated he did not know how to cook Canadian food and she would spend a couple of hours each night teaching him.

Pauline Miller, in a letter dated May 2, 2001, stated she had worked as a waitress at Bakerview and was the sister of Elias. She claims after Elias left or was terminated all the employees had to sign a letter saying, "they would not take overtime".

Lo, the owner of Bakerview, indicated he did not make the schedule for the restaurant and left that up to Lisa, the restaurant manager, until she left on short notice. From that time Elias made up the schedule.

Elias claims Mrs. Lo, always approved the schedule before it was posted. She stated it was difficult to make the schedule as Bakerview were constantly changing the hours of operation in the restaurant. She also claimed the restaurant was a difficult place to schedule staff as the normal volume of business was low. They would get bus tours and would be very busy for a short time and then return to being quiet. They also did catering for from 2 to 200 people plus a Saturday and Sunday buffet.

Bakerview's written position on overtime and four hours pay is as follows:

Overtime: If the restaurant employees want to work overtime (over 8 hours.) they should discuss and seek approval from the employer. The employees have always asked us not to hire additional staff, which would decrease the number of hours they work. They choose to work longer days so that they can get more days off and, not come in for short shifts only. Our employees know how poorly our restaurant is doing and they know it does not generate enough income to support overtime pay. They always get statutory holiday pay.

Four hours pay: The staff record their own hours on the timesheet, 2 hours, 3 hours etc. The employer does not record hours on the timesheet. It is the employee's choice to work less than four hours, not a decision by the employer.

There were times when staff worked less than 4 hours. Apparently there was no employee scheduled to work less than 4 hours however if there was no business or they were shorthanded the staff could end up working less than 4 hours. The evidence given at the hearing showed there were times when employees would be called in for less than four hours, for example, if a bus tour arrived and extra help was needed employees would be called in for a couple of hours.

THE FACTS AND ANALYSIS

Though the employees, to some extent, did the scheduling of hours it the responsibility of the Employer to ensure the provisions of the *Act* are adhered to. While I agree there may have been some evidence of errors on both sides the Employer allowed that to happen.

There was a verbal understanding between the employees and Bakerview for working overtime hours with out pay and taking days off with pay at a later date. However we have evidence Elias attempted to use this option and was not compensated for the overtime worked.

There is evidence that overtime worked in conjunction with their regular shift was either not paid or reduced by Bakerview. If the employees objected they would be subject to reprisals in the form of reduced hours on the schedule or be put on "on call" with no shifts scheduled. Lo denies that happened however the evidence of the employees in this regard is compelling. If that were correct, that would establish Bakerview had control of the schedule and the amount of hours worked. The overtime that was paid was paid at straight time rate.

Bakerview cannot successfully argue a lack of knowledge of overtime or the four hour minimum requirement. By monitoring the payroll Lo should have been aware of the operation of the restaurant. He had owned the business for some years and should have been aware of the requirements of the *Act*. As indicated in the response of the Delegate dated January 31, 2001, there are provisions in the *Act* for an overtime variance and a flexible work schedule, neither of which was sought by the employer.

Bakerview maintained daily time records as required by the *Act*. They would be aware when overtime was worked or when employees worked less than 4 hours after starting work. If that was a concern for Bakerview they could have corrected the matter at that time. Lo admitted he had never told the employees not to work overtime. He also admitted management never informed the employees not to work overtime. Bakerview was aware some overtime is inevitable in their business if customers stay late or during banquets.

In response to The Director of Employment Standards' submission dated January 31, 2001 and Cathers' submission dated February 21, 2001, Bakerview stated in a letter dated March 12, 2001:

With regards to Sherry's comment that "if we wrote 4 hours they would circle it and only give us (2 or 3) hour" (sic) I would like to respond that yes, sometimes we would circle hours in question on the time sheet, but NEVER did we pay for less hours than she signed in for. I am attaching a copy of the time sheet for September 16-30, 2000. You will notice I have circled Sherry's hours on September 18. I was questioning why Sherry worked 4 hours & Christine 7 hours when the (sic) there was only 1 cook that worked 6.75 hours. Regardless, she was still paid for 4 hours that day.

That further indicates Bakerview apparently paid close attention to the time sheets of the employees and were aware of the hours they were working, for example, using the same time sheet it clearly indicates Penny (Elias) reported she worked 13.5 hours on September 24 and worked a split shift of 9 hours and 5 hours on September 25. Sherry (Cathers) reports working a 7 and 5 hour split shift on September 19 and an 11 hour shift on September 24. There are other examples on the time sheet however this clearly indicates Bakerview monitored the time sheets and were aware overtime was being worked. It should be noted on checking the payroll for that pay period Elias was paid straight time for working 92 hours. On checking the payroll for other employees it confirms overtime was paid at straight time rates in violation of the *Act*.

I agree with Lo when he says he did not pay if the staff did not write down the extra hours they worked coming in to assist the business. The staff, I believe, did not claim that time though they reported it to the Tribunal to indicate they were trying to help the business and not claiming pay for all of the hours worked.

The letter from Miller stated they all signed a letter after Elias left saying they would not "take overtime". The letter does not identify if that meant not work overtime or not be paid for overtime worked which would be a violation of the *Act*.

In the question of the four hour minimum pay, I do believe there may have been times when the employees booked off early at their request. There is also strong evidence in favour of the employee's argument their hours were reduced below four hours when the employer sent them home early. The onus is on the Employer to prove the employees requested permission to leave early and this onus was not met.

I find it hard to accept the claim by Bakerview that the employees closed the restaurant early without their knowledge. When, as they claim, they had complaints from customers regarding early closings one would presume they would ensure that would not happen again.

There was a request by Cathers for two additional weeks pay for "emotional compensation". There is no provision in the *Act* to provide for such pay.

There is a responsibility in an appeal for the appellant to prove the Determination is wrong, either in fact or in law. There has been no evidence presented by Bakerview that would lead me to that conclusion and therefore the Determination is confirmed.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated January 16, 2001 less any monies paid by Bakerview subsequent to that date. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal