

An appeal

- by -

Khowutzun Heritage Centre Ltd. operating as
Quw'utsun Cultural & Conference Centre
("KHC")

- 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 Wolfgang

FILE No.: 2002/233

DATE OF HEARING: July 31, 2002

DATE OF DECISION: September 9, 2002

DECISION

APPEARANCES:

Paul Rice	for himself
Dora Swustus	for Khowutzun heritage Centre Ltd.
Lana Pagaduan	for Khowutzun heritage Centre Ltd.
Francine Peter	for Khowutzun heritage Centre Ltd.
Dean Crawford	Counsel for Khowutzun heritage Centre Ltd.
Elizabeth Lyle	for the Director

OVERVIEW

This is a continuation of an appeal by Khowutzun Heritage Centre Ltd operating as Quw'utsun Cultural & Conference Centre ("KHC") pursuant to Section 112 of the *Employment Standards Act* (the "Act") of a Determination issued by the Director of Employment Standards (the "Director") dated November 2, 2001.

There were two complainants, Colleen Jimmy ("Jimmy") and Paul Rice ("Rice"), who alleged they did not receive payment for wages, overtime, statutory holiday pay or compensation for length of service.

According to the Determination, in the case of Paul Rice the employer argued: Rice was a manager and not entitled to receive overtime and statutory holiday pay; all wages and vacation pay were paid; he did not work full time in the month prior to accepting the position of Chef/Kitchen Manager Trainee so he did not have the three months of service required to receive compensation for length of service; and they had just cause for his dismissal but declined to say what it was.

The delegate found Rice was not a manager in the true sense of the regulation, but primarily a chef with the majority of his day, a full shift, spent cooking. He had a supervisor, Sandra Carswell ("Carswell"), who supervised him and when he was not cooking, trained him to supervise kitchen staff, order supplies, schedule staff and interview applicants. Rice was not able to make major decisions without her approval.

In the investigation of Rice's duties the delegate found it difficult to believe he would not have any overtime. Her calculations were made from the employer's records and from the original Time Exemption Report, which was completed by Rice. She further believed the employer's records did not reflect the actual hours worked and Rice was owed additional wages.

The delegate did not accept the employer's argument that Rice's part time work was not consecutive and should not be counted. She argued if one were to accept the employer's definition of "consecutive", no part time employee would ever qualify for compensation for length of service. Rice may not have worked full time hours but he worked in each month. If KHC had terminated his employment prior to offering him the new position he would still have had 5 consecutive months of service and compensation for length of service would have been payable at that time.

Finally the delegate stated the employer had provided no proof of any wrong doing by Rice. They had no explanation or any proof to support their position of just cause. After being referred to the employer's

legal counsel the delegate, to the date of issuing the Determination, never received a detailed explanation of the reason for Rice's dismissal.

The delegate stated efforts to speak with other employees or supervisors were unsuccessful.

The Determination found KHC had failed to pay wages, overtime, statutory holiday pay and compensation for length of service. It found violations of Section 18(1), Section 40(1), Section 45, Section 58(3) and Section 63(1) of the *Act* and determined KHC owed Paul Rice and Colleen Jimmy \$2477.64 for overtime, statutory holiday pay, vacation pay, compensation for length of service and interest. Rice was entitled to \$1,044.97 and Jimmy was entitled to \$1,432.70. (There is an error of 3 cents in the total that may have been a typing error.)

The delegate did not issue a penalty because the management team that created these problems had been replaced.

The Director issued a Demand for Records to KHC on December 06, 2000. Apparently there was a letter from the delegate to KHC dated June 04, 2001, which included a Wage Calculation Summary from the Branch. This was not included in the Tribunal file.

KHC responded in a letter dated August 15, 2001. KHC stated, "Mr. Rice was hired on a part time, on call position on November 29, 1999". They claimed Rice was working part time for another employer at the same time. They argued the Wage Calculation Summary did not support Rice's claim for statutory holiday pay and that Rice was entitled to receive \$328.90 as vacation pay. KHC claimed they paid Rice \$340.81 by direct deposit into Rice's bank account.

KHC further stated, in part:

The full-time management position was subject to a 90-day probationary period. This was clearly outlined in the offer to Mr. Rice, a copy of which is attached to this letter. The purpose of the probationary period was to allow KHC to assess Mr. Rice's suitability to this management position. In doing so, KHC was entitled to consider factors which go beyond what would be considered as grounds for dismissal outside of the probationary context, including Mr. Rice's compatibility and ability to meet KHC's expectations for an employee in that position.

Mr. Rice's performance was not satisfactory during the probation period. The nature of Mr. Rice's shortcomings was such that he was not considered suitable for any other positions in the Food and Services Department of KHC, where he was working.

KHC did not offer any response to Rice's claim for overtime in that letter.

The appeal deadline for KHC was 4:30 pm on November 26, 2001. The Tribunal received an Appeal Form from KHC on November 26, 2001 sent at 4:22 pm and date stamped by the Tribunal at 4:29 pm.

The Appeal Form stated the Determination did not take into account payments made to both complainants, which were supported by documentary evidence. They claimed the Determination was based on errors of law and a more particularized account of the reasons for appeal would follow by courier. The Tribunal received the couriered material December 03, 2001.

In the material legal counsel for KHC referred to their letter of August 15, 2001 to the delegate, which they supplied. They claimed that letter outlined the Centre's position in respect to the allegations of the two complainants.

In the November 30, 2000 letter received with the above material KHC claimed they had telephone discussions with the delegate where they addressed the complaints that were the subject of the Determination. They stated, in part:

As a preliminary point, we take the view that, instead of verifying whether the Centre has satisfied its statutory obligations with respect to the actual allegations made by Ms. Jimmy and Mr. Rice, Ms. Lyle simply calculated what she thought should have been the total payments to each of the complainants, including vacation pay, overtime pay and statutory holiday pay, based on their entire wages throughout their last year of employment. She then subtracted from this total amount what she believes was actually paid to each complainant, and used the difference as the basis for her assessments.

In our view, this approach is not acceptable, given that Ms. Lyle has broadened the investigation beyond the original complaint. In addition, and as will be further particularized below, the investigation has resulted in findings against the Centre where specific evidence was provided that the Centre made the payments that Ms. Jimmy and Mr. Rice alleged were not made. Finally, Ms. Lyle issued her determination prior to us having the opportunity to submit all of the Centre's relevant documents.

KHC further claimed that the delegate disregarded the information they gave with respect to Rice having falsified his overtime records.

The delegate responded to the appeal by KHC in a letter to the Tribunal dated January 02, 2002. She stated, in part:

5. In the case of Paul Rice, the calculations were made from the employer's records and from the original time exemption report. It should be noted that if an employer permits or allows an employee to work overtime they must pay for that time at premium rates. In Mr. Rice's case, he states that the employer stated that overtime had to be approved but created a situation that required overtime in order to accomplish the tasks he was expected to complete.

6. As stated in the Determination Mr. Rice was in a training position, he was under the direct supervision of Sandra Carswell, and his primary duties were those of a chef who was not supervising others, but actually cooking. Therefore he does not meet the definition of a manager.

7. It is the employer's right to call any period of employment probationary, however for the purposes of calculating compensation for length of service the entire period of employment is taken into consideration. A copy of the employee's record of employment is attached and the first day of work is indicated as November 29, 1999. Also the employer did not indicate that the complainant's employment was terminated because he did not complete his probationary period to their satisfaction; they claimed to have "just cause" although they never did disclose what that just cause was, despite repeated requests for the information. It is interesting to note that Mr. Rice was featured in an article published by the Times Colonist newspaper on August 09, 2000, in which the writer quotes Mr. Rice on cooking tips and recipes. That Mr. Rice's employment was terminated three days later because of poor performance is difficult to believe.

8. Regarding the allegation of legal counsel that the Determination was issued without giving them time to submit the centre's relevant documents. Please note that the first conversation with legal counsel took place December 11, 2000 and the letter from counsel is dated August 15, 2001, the Determination was issued on November 02, 2001. To this date no additional documents have been received either from Legal Counsel or the Employer.

In their letter to the Tribunal dated February 1, 2002, KHC, in response to the delegate's letter of January 02, 2002, stated, in part:

Where we do not make a specific response to a matter raised in the Lyle Submissions or the Rice Submissions, we will be relying upon the submissions already made in our letters of November 30, 2001, August 15, 2001.

They further state:

Due to some significant staffing changes in KHC's organization, it took considerable time and effort for KHC to verify the issues raised by Ms. Lyle in the September 27, 2001 discussion. By the time our client was able to obtain the information requested, we received Ms. Lyle's Determination, without any prior indication that she would no longer wait for the information sought.

Further in the same letter, under the heading: (b) Paul Rice

Termination of Employment

In our letter of August 15, 2001, we advised Ms. Lyle that Mr. Rice's employment was terminated due to unsatisfactory performance of his duties. In accordance with the terms of the offer of full time employment, KHC was entitled to terminate Mr. Rice's employment during the 90-day probationary period if it considered him to be unsuitable for the position.

2. Rice Submissions

We reiterate our submissions made in our letter of November 30, 2001, and August 15, 2001, and those which were made above in this letter, in full answer to the Rice Submissions.

There is also a letter to the Tribunal from KHC dated February 04, 2002 with additional information regarding Rice's duty as a manager. It states, in part:

.....We can advise you that, as a manager, Mr. Rice was responsible for inventory control and for the ultimate supervision of other workers in the kitchen. Additionally, Mr. Rice was charged with the responsibility of hiring additional help whenever it was necessary. For this purpose, all incoming resumes were directed to Mr. Rice, who reviewed same and interviewed the most desirable candidates. Mr. Rice would then prepare and maintain a list to call-in additional help whenever it was necessary.

A hearing was held March 21, 2002. It became evident the information supplied to the Delegate and to the Tribunal by KHC varied and in fact was different than the evidence adduced at the hearing. The previous administration had failed to keep proper records of hours worked, at least in the case of Rice. There had been a change in the management structure of QCCC. (Note that QCCC was used to describe what is now referred to as KHC.) By mutual agreement the matter was referred back to the Branch and KHC, with instructions to work together and develop an accurate record of the facts relating to Rice and Jimmy. Colleen Jimmy did not attend the hearing. Decision BCEST #D157/02 was issued.

Subsequent to the hearing of March 21, 2002, the parties have been successful in resolving the complaint of Jimmy. She has been paid all outstanding wages owed and has signed a release. That matter is no longer before the Tribunal. The parties however were unable to resolve Rice's complaint.

At the request of KHC, a pre-hearing teleconference was held on July 25, 2002 with Dean Crawford, Legal Counsel for KHC, Francine Peter, Lana Pagaduan for KHC, Paul Rice for himself, Beth Lyle for the Director and myself in attendance.

The parties each presented their respective positions and it was clear the matter could not be resolved without a formal hearing. There is agreement Rice had received all of the straight time wages earned.

KHC argued all monies owed Rice had been paid and identified the issues outstanding as:

- Rice falsified his overtime claim.
- Rice was not entitled to be paid overtime as he was a manager.
- Rice was not authorized to work overtime by anyone in authority.

No compensation for length of service is payable as he was terminated during his probationary period and if that is not correct, he was terminated for just cause.

Rice sought to include additional overtime. He was required to take inventory of all items in the kitchen on a monthly basis. It took 6 hours to conduct the inventory and input the information into the computer for the bookkeeper. He also claimed 6 hours when he assisted during the flood. KHC objected to this being included, arguing it was untimely and the Tribunal were without jurisdiction.

Late on Friday, July 26, 2002 KHC submitted a considerable amount of material to the Tribunal. This consisted of Function Report sheets for the period May 13, 2000 until August 31, 2000. They claimed it would show Rice had falsified his claim and was not entitled to overtime for the period July 03 to August 08, 2000.

A second hearing was held on July 31, 2002.

Preliminary matters

Prior to the formal hearing there was a discussion regarding the introduction of the Function Report sheets at this point in the process. The delegate objected to the introduction of evidence KHC had in their possession from the beginning of the investigation however had not presented to the delegate. References were made to previous Tribunal cases where the failure to produce documents in the possession of the employer at the time of the investigation could not be relied on during an appeal.

KHC argued Rice would probably not contest the Function Report evidence. It would only be used to support the other evidence they were relying on. I agreed to proceed and would determine later what, if any, of that evidence would be considered.

KHC again objected to the claim by Rice for 6 hours pay for the time he worked during the flood of the gift shop. They argued it could not be accepted now, as it was never presented to the delegate within 6

months of the incident therefore the Tribunal has no jurisdiction. I agreed to hear evidence on Rice's claim and rule on the eligibility later.

The hearing proceeded with evidence taken under oath from all witnesses.

ISSUE

Was Rice a manager within the meaning of the *Act*? If not, is Rice entitled to overtime and statutory holiday pay?

Is Rice entitled to compensation for length of service?

THE FACTS AND ARGUMENT

KHC claim that Rice was a manager and, as such, was not entitled to overtime. They submitted a copy of the letter offering Rice employment as "Supervisor, Kitchen Services" in the Food Services Department. It indicated he would be working with Carswell who would be providing training and on the job experience to assist him in mastering all of the skills required for managing a full service Food and Beverage operation.

KHC took the position if the Tribunal does not accept that Rice was a manager within the meaning of the *Act* they contend he had no authority to work overtime. They claim it is a requirement to have prior approval before working overtime.

The current KHC Director, Lana Pagaduan ("Pagaduan") was the Tour Function Coordinator during the time Rice was working full time. She explained Rice's duties as a Kitchen Manager. He was responsible for overseeing staff such as the dishwasher, setup crew, wait crew, busing and the cleanup crew. He was to ensure safe practices were observed and, in her view, had authority to take corrective action. She claimed Rice called in the wait crew and any extra help needed with an event. She claimed he assisted in selecting new hires with Carswell however she was not sure if Rice conducted any interviews for new hires. She also claimed Rice was responsible for ordering the food and supplies for the kitchen and took monthly inventory.

Pagaduan indicated KHC had a policy regarding personal use of the new computer system. The employees were told to use the programs on their own time. There was no policy in respect to employees being required to become proficient on the computer. This information was given to all employees, including Rice.

Pagaduan was responsible for booking and arranging the functions. She gave evidence as to the number of functions when Rice would be required to work overtime. Counsel for KHC began relying on the Function Report sheets in his examination. I warned him there was a question about the admissibility of that evidence, as it had not been presented during the original investigation. He continued reviewing the reports on a day-by-day basis. It became evident this was an attempt to introduce new evidence into the hearing. I took the position he could not now rely on those reports in view of the objection by the delegate. I proposed he continue his case without relying on the reports.

Legal Counsel for KHC wished it noted that I had stopped him from presenting his case.

It should be also noted the first references to the Function Reports were in the delegate's submission to the Tribunal dated April 15, 2002 and in Rice's submission to the Tribunal dated April 29, 2002.

In response to those submissions, the Tribunal wrote KHC on April 30, 2002 and advised if they wished to reply to any of that material they must do so **by 4:00 p.m. on May 21, 2002**. It further stated:

In your response, specify your reasons for agreeing or disagreeing with the calculations made and give your reasons for preferring one or the other of the alternatives proposed by the Director. **You must also include a copy of all records and documents that support your position.**

The Tribunal did not receive a response to that letter however, copies of the Function Reports referred to above were delivered by KHC to the Tribunal on July 26, 2002.

Counsel for KHC wanted it further noted that the delegate had denied KHC the opportunity to present their case by issuing the Determination without forewarning them. They claimed they had a letter from the delegate dated September 27, 2001 requesting any further submissions and without warning the delegate issued the Determination on November 02, 2001. We reviewed the many months KHC had to present evidence before the Determination was issued. The hearing resumed with KHC relying on the other evidence they were prepared to lead.

KHC referred to Section 65(1)(a) of the *Act*. They claimed Rice was a part time, on-call employee covered by that section and, as such, was not eligible for any benefit under Section 63(1).

The final issue raised by KHC involved the 6 hours claimed by Rice for working on the Gift Shop flood. They took the position if the Tribunal finds Rice is eligible for pay for that time it should not be 6 hours. The Assistant Gift Shop Manager stated she kept records of all the people who helped during the flood. She stated Rice had been asked to help and her records showed he worked for one hour forty-five minutes. We have no evidence if this time was ever paid to Rice.

Rice was hired as a part time cook by KHC on November 29, 1999. He worked between 20.75 and 74.5 hours per month from December until May 20, 2000. He had another job as a cook and KHC would call him to see if he was available to take their assignment. Pagaduan could not recall a time Rice was called that he was not able to work for KHC. During this period KHC opened a restaurant on the premises for lunch and they required a full time cook.

On May 21, 2000 Rice was offered a full time position as Supervisor, Kitchen Services. The Record of Employment issued to Rice on August 09, 2000 indicates his occupation was Kitchen Manager. The Determination identifies the position as a Chef/Kitchen Manager Trainee.

Carswell, Rice's supervisor and Director of Business Services, terminated Rice on August 08, 2000. The Director of Operations and Carswell signed his termination letter on August 09, 2000. Rice claims he was terminated without warning or notice. He stated Carswell called him into her office at 5:00 pm and told him he was terminated. When he asked why he was being fired she told him "you wouldn't want to know".

Rice filed a complaint with the Employment Standards Branch (the "Branch") on August 16, 2000. In his complaint Rice claimed overtime, statutory holiday pay and severance pay.

Rice claims he was told in June by the KHC Director of Operations to begin keeping a record of his hours. He began on July 03, 2000 and continued until August 08, 2000. The record of hours was kept on a "Time Exception Report" form, which he claims was given to him by Carswell. This form is used by management to record the overtime worked with an objective of being able to take compensatory leave off at a later date. This form was kept on the wall in the office by the door in full view of anyone in the office. Pagaduan stated she had not seen the form on the wall in the times she visited the kitchen.

Rice claims he was not computer literate and was not properly taught how to use the computer by Carswell and had to learn on his own. Rice and Carswell shared an office, which she occupied most of the time. She told him he could not use the computer when she was using it. The only time available for Rice was before she arrived in the morning or after she left for the day, normally between 5:00 and 6:00 pm each day. According to Rice, it was necessary for him to learn some computer skills in order to perform his job. He indicated he learned to make internal reports, how to receive e-mails, how to delete them and how to search the Internet for recipes and other cooking information.

Rice admits most of the overtime he claimed was for time he spent on the computer. The remainder would be cooking for after regular hour functions and the time needed for preparation and cleanup.

Rice claims he was at the Gift Shop on the day of the flood from 5:30 pm until everyone left at 11:30 pm. He indicated there was a foot of water on the floor when he arrived and he would not leave after 1 ¾ hours.

In Rice's letter to the Tribunal dated June 05, 2002, he claims the Function Reports would not properly reflect his duties. He was also angry that the "lawyers are still saying I falsified my overtime records but offer no proof". He claims KHC stated:

They reserved the right to withhold evidence pertaining to this case but they have evidence to prove what they say.

The delegate stated she had issued a Demand for Records dated December 06, 2000. KHC supplied only payroll records and, following KHC's letter in August 2001, her office received nothing. As a result she issued the Determination on November 02, 2001. Rice was terminated August 09, 2000 and the Determination was not issued until over one year had passed. That, according to the delegate, should have been more than sufficient time for KHC to provide any pertinent information or records they were relying on.

In the letter from the delegate to the Tribunal dated May 29, 2002 the delegate states, in part:

The most difficult part of this case has been the lack of information provided during the investigation. Most of the contentious issues are a result of the employer's either refusal or inability, to answer questions and provide proof of the statements made by or on behalf of the employer. This was finally resolved by a meeting with the employer's accounting department.

The delegate takes the position Rice was not a manager and worked substantial overtime with the consent of management. She also takes the position KHC consistently claimed Rice was terminated for just cause however they never provided any evidence of just cause. The delegate also claims Rice was employed much longer than his probationary period as a full time cook and that time was taken into consideration in determining the time Rice was employed by KHC. The delegate admits the first calculations made for Rice's wages were incorrect as they were taken from T-4 slips and included tips. The amended

calculation was taken from the employee records and the Time Exception Report. KHC did not have any record of the hours worked by Rice from the time he was put on salary until he was terminated.

No letters of warning or reprimand or memos relating to Rice's performance were presented to the Branch or Tribunal.

ANALYSIS

I will first deal with the allegation by KHC that the delegate had broadened the investigation beyond the original complaint and found the practice "not acceptable".

Section 76(1) of the *Act* states;

(1) Subject to subsection (2), the director must investigate a complaint made under section 74.

Once an investigation is underway the director is required to investigate the full extent of any violation of the *Act*, not only the specific event or circumstance that a complainant may identify. If the *Act* has been violated the obligation of the director is to rectify that situation. They may do so even without a complaint being filed.

Section 76 (3) states:

Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

If the director can conduct an investigation without a complain the delegate must have the legal authority to review the entire period when operating within the framework of a complaint.

KHC objected to the delegate issuing the Determination, in their words "without warning", claiming they were not given the opportunity to properly prepare and present their case. As indicated earlier, the Determination was issued some 15 months after Rice was terminated. The last letter from the delegate to KHC was dated September 27, 2001. It specifically requested they provide any additional information they had concerning the complaints. It must be remembered that letter was issued over one year after the complaint had been filed and should have served as a warning the investigation was coming to a close. KHC knew, or should have known, the next step by the Director would be to issue a Determination. KHC never responded to the September 27th letter. Even considering the delegate may have caused some of the delay, KHC were aware they were defending against two complaints and had ample time to prepare their case. There is no obligation on the part of the Director to notify the parties in advance of a Determination being issued.

Section 2(d) of the *Act* states:

The purposes of the Act are to

(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.(emphasis added)

When a complaint takes nearly two years to get to a Tribunal hearing it is hardly an efficient procedure in dealing with complaints.

KHC state Rice had falsified his overtime claim and they had just cause to terminate him. To make such a claim is serious and must be supported by strong evidence. It is not enough to simply make the statement. KHC claim the Function Reports would show Rice had falsified his claim. If the reports were such a key piece of evidence for KHC they had every opportunity to present them at the time of the investigation by the delegate or, at the very latest, as part of their appeal to the March 31, 2002 Tribunal hearing.

In their letter to the Tribunal dated February 1, 2002 KHC state, in part:

By the time our client was able to obtain the information requested, we received Ms. Lyle's Determination, without any prior indication that she would no longer wait for the information sought. (emphasis added)

This clearly indicates KHC had this material in their possession at the time the Determination was issued. If this information was the Function Reports, they were in their possession and readily available at the time of the investigation. The Function Reports are prepared in advance of every function at the Centre and are retained in their files. I cannot explain why they would wait until July 26, 2002 to come forward with what they claim is their key evidence.

During the March 31st hearing the parties agreed they would attempt to determine the facts if the matter was referred back for further clarification. The decision to refer back was specific. It stated:

In accordance with section 115 of the Act I refer the Determination by the Director dated November 02, 2001 back to the Branch and they are to work with QCCC in preparing an accurate record of facts in the case.

This was not an invitation to introduce new evidence but to review the existing material for clarification.

That resulted in a submission from the delegate to the Tribunal dated April 15, 2002, which offered two settlement proposals. One was based on the employer's records and the other was based on the employee's records and the exception report. That proposal was circulated to the parties and they were invited to respond, selecting one of the proposals and indicating their reasons for doing so. They were also ordered to include a copy of all records and documents that supported their position. That did not give KHC the right to present evidence that was withheld from the delegate. On July 26, 2002 KHC delivered the Function Reports to the Tribunal. KHC cannot now rely on the Function Reports to prepare a defence after withholding that evidence from the delegate during the investigation.

Tribunal adjudicators have often referred to the Tri-West decision. BC EST #D268/96 *Tri-west Tractor Ltd.* (1996), which states:

But I also dismiss the appeal as it relates to cause on another ground. This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that

should have and could have been given to the delegate in the investigative process. It rings hollow to cast the blame for the failure of Tri-West to respond to the inquiries of the delegate onto its legal counsel. Legal counsel is the agent for Tri-West. Its failure is Tri-West's failure

Further in the Tri-west Tractor decision it states, in part:

Tri-West says she was terminated because she committed a serious breach of confidentiality. During the investigative procedure the delegate of the director requested Tri-West to detail and support, with any available documentation, the allegations against Begley. They failed to do so. In making the Determination, the delegate cited three findings relevant to this appeal:

1. The employer produced no documented evidence to establish the claim of cause;
2. Verbal and written requests for documents establishing the reasons for termination were ignored by the employer; and
3. There was no evidence to validate the claim of breach of confidentiality.

In its appeal, Tri-West provided an outline of the events occurring at the time it terminated Begley. It attempted to justify its failure to provide this information to the delegate by stating the information had been given to their lawyers "on the understanding" it would be passed on to the delegate.

The decision making process was quasi-judicial in the case before me. The Employer was given an opportunity to make a submission to the Director. The Director made numerous attempts to discuss the records and information submitted by the Complainants. The Director's August 19, 1996 letter clearly explained the consequence of his refusal to cooperate with the investigation. He ignored the Director's concerted efforts to give him the opportunity to participate. That was his decision.

Notwithstanding the above, if KHC were allowed to rely on the Function Reports to prove Rice had falsified his overtime claim I believe they would have failed. The Function Reports do not address what Rice's duties were. They reflect the activities at the Centre but are not specific to Rice. Rice was more active in preparing food and cooking for the restaurant, which is not mentioned in the Function Reports. They do not address what Rice was doing in the kitchen, the office area or anywhere else for that matter.

KHC have offered multiple reasons for Rice's termination. The Determination states, in the Employer's position:

Further the employer argues that because the complainant did not work full time in the months prior to accepting the position of Chef/Kitchen Manager Trainee, he does not have the three months of service required to receive compensation for length of service. They also state that they had just cause for the dismissal, but have declined to state what that just cause was.

During the teleconference, counsel for KHC stated they had just cause for terminating Rice and he was not entitled to severance.

At the hearing KHC took the position Rice was terminated during his probationary period for poor performance however if that was not the case they had just cause to terminate him. Finally, if Rice was not terminated for poor performance or just cause, Section 65 of the Act bars him from receiving compensation in lieu of notice.

Without evidence it is impossible to support an allegation of just cause. I find KHC have not presented any evidence to the delegate or to the Tribunal, which supports a just cause termination.

KHC raised the issue of Rice being terminated during his first 90 days of employment therefore he was ineligible for compensation in lieu of notice. Rice had worked for KHC for almost 6 months as a part time employee before being offered the full time position. Under examination, Pagaduan admitted KHC did not layoff an employee and rehire them if they were changing jobs or classification within KHC. Specifically, Rice was not laid off from his part time job and rehired as a full time employee. That places his employment with KHC at close to 8 months and makes him eligible for compensation in lieu of notice.

Section 65 of the *Act* states:

(1) Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which

(i) the employer may request the employee to come to work at any time for a temporary period, and

(ii) the employee has the option of accepting or rejecting one or more of the temporary periods,

The reference by KHC to Section 65 (1) of the *Act* has no bearing on this case. Rice was not a part time on-call employee covered by that section at the time of his termination but a full time employee.

KHC claimed Rice was terminated for not being suitable, not only for the position he held, but for any other positions in the Food and Services Department. Rice had worked for KHC for over five months as a part time cook before being offered the full time position. He worked 80 days of his probationary period before being terminated. The week before his termination KHC had featured him in a newspaper article. There were no letters of warning or memos regarding his performance presented to either the delegate or the Tribunal. KHC had many opportunities to not recall Rice during his part time position if his performance was so unsatisfactory. They continued to recall him, giving him more hours each month until they offered him the full time position. The majority of the work he performed as a full time employee was exactly what he had been doing during his part time employment, cooking. It seems unusual a person would become so unsuitable and no reason is given.

The Tribunal must decide whether Rice was a manager within the meaning of the *Act*. If Rice was a manager he has no claim for overtime or statutory holiday pay. If he was not a manager we must then decide if his claim for overtime is an accurate reflection of work performed by him for KHC.

Pagaduan claimed he was hired as a Kitchen Manager. As Kitchen Manager, he was responsible for overseeing staff including calling them to work. She also claimed Rice was responsible for ordering the food and supplies for the kitchen and took monthly inventory. That is consistent with KHC's letter to the Tribunal dated February 04, 2002.

This is contrary to the evidence of Rice, who stated he had nothing to do with the staff outside the kitchen. He claimed he only called staff to work on the instructions of Carswell. Further he claimed he was not consulted on the selection and hiring of new employees. He did take inventory once a month, which took about 6 hours and was done on his day off. His evidence was he did not order food but

prepared a list for Carswell who ordered the food and supplies. He claimed he was being trained for the position of Kitchen Manager and one day would perform all of those duties and more.

Much of Pagaduan evidence was hearsay as she was not Rice's supervisor. From her evidence she only visited the kitchen 2 or 3 times a week. She was primarily involved in booking functions and organizing the events. If food were to be served, which in the majority of functions it was not, she would then be in contact with the kitchen to make those arrangements.

KHC have supplied four Tribunal decisions as Authorities. In two of those decisions, the issue is whether the employee was a manager or not. The first case is an appeal by 429485 B.C. Ltd. op. as Amelia Street Bistro of a Determination issued by the Director. The Determination found the employee was not a manager and overtime was owed. In the appeal, BCEST #D170/97 found the employee to be a manager and cancelled the Determination.

The second Decision arose from a request for reconsideration of the first Decision by the employee. The reconsideration panel, in decision BCEST #D479/97, referred the matter back to the original panel with instructions.

The above referral resulted in a third Decision that was not supplied to the Tribunal by KHC. Upon investigation I found the case was re-heard by the original panel and Decision BCEST #D108/98 was issued. That Decision found, in part:

Among his duties Telemans (who was hired as a Chef by Amelia Street Bistro):

1. designed new menus;
2. kept the inventory and performed food cost duties;
3. ordered supplies and dealt with suppliers
4. supervised staff including hiring, firing, scheduling and training;
5. maintained computer records but did not do the payroll;
6. dealt with customers and the public; and
7. performed cooking and kitchen duties with clean up as required.

Although no one held a title of manager, Telemans was the person whom the employees considered in charge. He was considered the manager.

I have reviewed all of the submissions, evidence and arguments from both hearings and considered the Tribunals' analysis and directions. I find that Telemans was originally hired as a chef with a number of kitchen management duties. Throughout his employment he did management duties with respect to the operation of the kitchen in that he designed new menus, kept the inventory and performed food cost duties, ordered supplies and dealt with suppliers. He also maintained computer records. These duties are important ones for a small business, especially at a restaurant where there is no one else present to perform such duties. In these areas he did exercise independent power and authority typical of a manager. They are not, however the duties which address the definition of "manager" in the *Regulation*. See *Anducci's Pasta Bar Ltd. (supra)*.

After considering all of the evidence, guidelines and arguments, I find that Telemans' duties were not those that (sic) set out by the definition of "manager" in the *Regulation*.

In summary, I find that Telemans' primary employment duties were not those that fit with the definition of "manager" in the *Regulation*. Having come to this conclusion I vary the original order and confirm the Determination.

Carswell was the “kitchen manager”, Rice was in training to be a manager; he was not a manager within the meaning of the *Act*. Even if he independently performed all the duties claimed by KHC, according to the above decision he would still not qualify as a manager.

KHC have no evidence in respect to the hours that Rice worked. He was told by the previous Director of Operations in June to keep a record of the hours he worked. Neither the Director of Operations nor the Director of Business Services during the period Rice worked at KHC is still employed nor did they attend the hearing as witnesses. They may have been able to offer some indication of the events as they recalled them during Rice’s employment. Rice started reporting his hours in July on the Time Exception Report and posted it on the office wall. It would seem surprising if Carswell was not aware of a form she supplied which was posted in her office. As indicated by the delegate, if an employer authorizes or allows an employee to work overtime they are liable to pay for that time at the overtime rate.

When Rice was terminated he stated he returned to the office the next day and requested the Time Exception Report from Carswell. He was either given the original or a copy of it, which was used by the delegate in her calculations. It would seem reasonable to assume if Carswell believed Rice had not worked those hours she would have refused to give him the document or at least make some report to that effect.

There was a procedure to be followed in the event overtime was anticipated. The policy of KHC was to have prior approval from the employee’s supervisor. The overtime sheet was to be signed by the supervisor and submitted to payroll every two weeks. Rice admits he did not follow these rules however that does not establish he did not work the hours claimed. Rice has attempted to retroactively apply the hours he worked in July and August to June claiming he worked similar or greater hours in June.

The remaining two Tribunal decisions KHC have supplied, BCEST #D046/96 Dione Maddox and BCEST #D161/96 Sasinapa Prapakamol, deal with hours of work and a claim for overtime. In both cases, the appellants were seeking overtime for hours they claimed to have worked and had not been paid. In the case of Maddox, the Director found neither the company or Maddox had any records of hours and dismissed the claim. In the case of Prapakamol, the Director found Prapakamol had no records of hours worked and dismissed the claim. Both appeals failed on the basis there were no record of hours worked by the appellants. Without records of the hours worked in June it is not possible to use the July/August hours for that purpose. That part of Rice’s claim is denied.

According to the delegate, the calculations for the majority of Rice’s claim were made from the records supplied by the employee. The Employer had no records of the time Rice was on salary. It has been well established by the Tribunal that in the absence of records by the Employer, the records of the employee should be used.

For example, Hi-Rise Salvage Ltd. BC EST#D 293/97 states, in part:

In several previous decisions this Tribunal has found that where the employer has not kept accurate records of the hours worked the evidence of the employee should be preferred and that any partial records should be accepted unless there is substantial credible evidence to establish the facts alleged by the employer. (emphasis added)

Rice had records for July and August in the form of the Time Exception Reports. His evidence was he marked the overtime hours worked each day before he left work. We have no evidence that Rice took any compensatory leave in lieu of overtime therefore I find the claim by Rice for overtime in July and August, as determined by the delegate, is upheld.

KHC objected to the claim by Rice to include the time worked doing inventory each month and the time spent helping during the flood in his overtime calculation. They argued these were not included in his complaint and, as over six months had passed, the Tribunal could not now consider them.

KHC is correct that Tribunal policy does not allow claims to be added after filing the original complaint. If it is within the six-month time limit of the incident a new complaint can be filed with the Branch, which would be recognized.

Section 74 (3) of the *Act* states:

A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

It is my opinion Rice has not added to his complaint. His original complaint included a claim for unpaid overtime. These items are both unpaid overtime. The delegate could have included the new items in her calculations had she found those hours during her investigation. It must be remembered this claim has been ongoing for over two years. The Determination was not issued until November 2001, nearly 15 months after the original complaint. None of the delay, to my knowledge, was the fault of Rice. I fail to see why he should be penalized. The 6 hours per month for taking inventory is allowed and those hours are to be paid at the overtime rate, as it was the undisputed evidence of Rice that the inventory was taken on his day off.

The claim for the 6 hours during the flood is a different matter. The Assistant Gift Shop Manager only logged Rice as having worked 1 hour and 45 minutes. Her evidence was that Rice was asked to assist with the flood damage. Rice gave evidence that he was not requested to help with the flood cleanup but when he heard of the flood he, along with others, rushed to help. Rice has no evidence he worked longer although he claims he stayed to the end when everyone left. We have no evidence Rice took the overtime off or was paid for that time therefore he is entitled to 1 hour and 45 minutes pay at the overtime rate.

I find, on the basis of probabilities, that the evidence of Rice more accurately reflects the events during the period in dispute.

There is an obligation for the appellant to prove the Determination is in error, either in fact or in law. I find that KHC has failed in this regard and the calculation listed as **Calculation for Paul Rice – Calculation #2** in the amount of \$2,232.63 in the submission by the delegate to the Tribunal dated April 15, 2002 is confirmed. The matter of overtime for taking inventory each month and for the cleanup following the flood is referred back to the Director for calculation of the proper amount to be paid Rice.

ORDER

In accordance with Section 115 of the *Act* I refer the Determination dated November 02, 2001 back to the Director for the calculation of the additional overtime and vacation pay for inventory and the flood cleanup and this to be added to the calculation by the delegate listed as **Calculation for Paul Rice - Calculation #2**. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal