

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 -

Sulakhan Hundial operating as Evergreen Inn
and Hundial Holding Ltd.
("Hundial")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ian Lawson
FILE NO.:	1999/186
DATE OF HEARING:	August 16, 1999
DATE OF DECISION:	November 17, 1999

DECISION

APPEARANCES

For the Appellant:	Don Dunster, Sulakhan Hundial
The Respondent:	no appearance
Interpreter:	Harbans Dhillon
For the Director of Employment Standards:	John Dafoe

OVERVIEW

This is an appeal by Sulakhan Hundial operating as Evergreen Inn and Hundial Holdings Ltd. ("Hundial") pursuant to s. 112 of the *Employment Standards Act* ("the Act"). The appeal is from a Determination issued by John Dafoe as a delegate of the Director of Employment Standards on March 5, 1999. The Determination required Hundial to pay wages, overtime pay, holiday pay and vacation pay in the amount of \$6,599.69 to former employee Kim Bork ("Bork"). Hundial filed an appeal on March 29, 1999. An oral hearing was held at Terrace, B.C. on August 16, 1999.

FACTS

Hundial operates the Evergreen Inn, an 18-unit motel in Terrace. Bork was the assistant manager of this motel between October 20, 1997 and February 23, 1998. Bork was paid a monthly salary of \$1,150.00, and resided in a suite on the motel premises. Following her termination on February 23, 1998 (which Mr. Dafoe found was without cause and from which Hundial makes no appeal), Bork complained that she was required to work between 8:00 AM and 11:00 PM daily for seven days a week with minimal time off and frequent interruptions outside regular hours. In support of this claim, Bork submitted a journal which recorded details of her work days. Bork's complaint alleged she worked 15 hours each day, but the Determination found she worked an average of 10 hours per day.

Hundial asserts that 10 hours per day is excessive and unreasonable for the work actually done by Bork. Instead, 6 hours per day was suggested as a more accurate figure. In support of this submission, Hundial called as a witness Mrs. Nirmal Sandhu, who worked as a chambermaid during the term of Bork's employment. While Mrs. Sandhu made allusions in her evidence to Bork being absent from her duties on several occasions each day, Mrs. Sandhu typically worked between 9:00 AM and 2:30 PM, and so could not comment on Bork's activities outside of that time frame. Hundial called no other evidence to establish Bork's hours of work were less than 10 hours each day. Hundial did, however, readily acknowledge that when the motel was full, there was no doubt that Bork would have worked at least 12 hours on those days. Hundial takes issue with the average hours of work found by Mr. Dafoe, mainly because the motel was full or nearly full on only a few occasions during Bork's employment.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Bork's hours of work were accurately determined by the Director's Delegate and whether there are any wages, overtime pay, vacation pay and holiday pay owing to her.

ANALYSIS

The parties and the Director's Delegate have all been hampered by the lack of any records relating to Bork's hours of work. Hundial had no records of any kind, and some doubt exists whether Bork's journal was kept in a regular or timely fashion. Mr. Dafoe expressed reservations about the credibility of Bork's claim of 15 hours per day, and he also had some doubt about the two previous managers he interviewed in the course of his investigation. Ms. MacDonald alleged she worked 21 hours each day of her employment by Hundial, and Ms. Reiger alleged she worked between 18 and 19 hours each day. Mr. Dafoe decided that 10 hours was a reasonable figure, to address the regular office hours of 8:00 AM to 11:00 PM and allowing for meals and breaks. Mr. Dafoe used Bork's journal only to make reductions from the average daily hours where the journal so indicated.

In the absence of any reliable evidence to the contrary, I find Mr. Dafoe's approach to calculating Bork's hours of work to be reasonable and appropriate. I reject Hundial's suggestion that 6 hours per day is more accurate, chiefly because Bork was required to address any task that arose between the hours of 8:00 AM and 11:00 PM, from supervision of the chambermaid and registration of guests, to receiving telephone calls. Bork's journal indicates many calls were received in the early hours of the morning for guests employed by CN Rail.

I was tempted to describe Bork as an "on call" worker, given the language found in section 1 of the *Act*:

An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

While Bork did reside on the work premises, it cannot be said that she was "called in" by her employer as the need arose. Indeed, there was no evidence that Hundial was involved at all whenever managerial tasks were required and no formal call was made to Bork when guests arrived or the telephone rang. Further, in my view the residence exception to the "on call" rule should be interpreted restrictively, so as not to thwart the remedial effect of minimum standards of employment set out in the *Act*. In the result, I find Bork worked an average of 10 hours on each day of her employment, and there is no reason to disturb the findings and calculations made in the Determination.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Dafoe is correct and the appeal should be dismissed. Pursuant to s. 115 of the *Act*, I order that the Determination dated March 5, 1999 be confirmed, together with interest pursuant to section 88 of the *Act*.

Ian Lawson
Adjudicator
Employment Standards Tribunal