



An appeal

- by -

T.S.L. Enterprises Ltd. operating as Michael's Restaurant
(“TSL”)

- 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: Lorne D. Collingwood

FILE No.: 2001/325

DATE OF HEARING: August 14, 2001

DATE OF DECISION: August 21, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) and by T.S.L. Enterprises Ltd. operating as Michael’s Restaurant (which I will refer to as “TSL”, “the employer” and also “the Appellant”). TSL appeals a Determination issued on April 4, 2001 by a delegate of the Director of Employment Standards (“the Director”). In that Determination, TSL is ordered to pay Gail Duncan, Kristen Garland and Leleah Schaufert (“the employees”) wages and interest, \$670.46, \$2,927.55, and \$422.13, respectively.

The delegate found that the employees did not always receive an uninterrupted lunch break of one-half hour and that there was a failure to pay statutory holiday pay as is required by the *Act*. Duncan claimed compensation for length of service but in that respect the delegate found that she was given two weeks’ written notice of termination and that, as such, the employee is not owed such compensation.

TSL, on appeal, does not argue the order to pay statutory holiday pay but only the decision on lunch breaks. It argues that the delegate should have taken into account the fact that the employees received two paid 15 minute coffee breaks, the fact that the employees always received a lunch break of sorts, and that their breaks in total were often longer than one-half hour. The Appellant also suggests that the employees did not work as is shown by their time cards. I find, however, that it is clear that there is no better record than the time cards and that it is clear that the employer did not provide meal breaks as are required by the *Act*. The Determination is therefore confirmed.

An oral hearing was held in this case.

APPEARANCES:

Rocky and Debbi Schiller	For TSL
Gail Duncan	On her own behalf
Kristin Tonks (formerly Garland)	On her own behalf

ISSUES TO BE DECIDED

The sole issue before me is whether the employees should or should not be paid for lunch breaks as set out in the Determination.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Gail Duncan, Kristen Tonks (formerly Kristen Garland) and Leleah Schaufert were employed by the Appellant and they worked at Michael's restaurant and in a convenience store which is adjacent to the restaurant. Tonks worked as a chef for the restaurant.

The employees received two, paid, 15 minute coffee breaks each day.

The employees were paid on the basis of time cards with a half hour being deducted for lunch. There is some question of whether the time cards are accurate but the employer used the time cards as a basis for paying the employees and it recognizes that there is no better record of work, indeed, no other record than the time cards. The employer operates on the basis of trust. It does not worry about the length of the breaks that staff are taken so long as they work when required. Rocky Schiller goes so far as to tell me that neither he, nor anyone else has "a clue when and if they (the employees) took their breaks". The same applies to when the employees started and ended their shifts.

The employees, like all of TSL's workers, took their lunch breaks when and as they could. If a customer arrived, someone had, of course, to attend to the customer at that point. Depending on the circumstances, one employee might cover for another and that allowed them to take a full half hour for lunch. Tonks estimates that the employees were able to complete a meal break without interruption about once a week on average.

The Determination recognizes that, once every week, the employees did receive a lunch break.

As matters are presented to me, I find that the employees were expected to stay at the restaurant during meal breaks. They were on call in the sense that if a customer needed their attention, that put an end to their meal break. Various witnesses attest to the latter, those produced by the employer as well as those produced by Garland and Tonks.

The employees could resume taking a meal break and they regularly did so as time and customers permitted. In total, the employees received a break of half an hour if not longer.

ANALYSIS

It is suggested that the employees did not work as shown by their time cards but less than that. I am shown, however, that the employer itself relied on those time cards. That is the basis on which they were paid. I am satisfied that the Determination should reflect the time cards in the absence of any evidence that a better record is available.

The employees have been awarded additional pay on the basis of evidence that they did not receive lunch breaks as the *Act* requires.

The law is clear in respect to lunch breaks. Sections 31 and 32 are governing. Section 31 provides that an employer is to notify all of its employees when they will receive a meal break.

- 31** (1) An employer must display hours-of-work notices in each workplace in locations where the notices can be read by all employees.
- (2) An hours-of-work notice must include
- (a) when work starts and ends,
 - (b) when each shift starts and ends, and
 - (c) **the meal breaks scheduled during the work period.** (my emphasis)

Section 32 of the *Act* provides that employees are not to work more than 5 consecutive hours without a meal break and that the meal break must be at least half an hour long. If an employer requires an employee to be available for work during a meal break, it is to count the meal break as time worked.

- 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 a 1/2 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.** (again, my emphasis)

In this case, it is clear to me that the employees were both required to be available for work during meal breaks and that they did not always receive a break that lasted at least one-half hour because the breaks were regularly interrupted by the need to go back to work. It follows that the employees are entitled to be paid for any meal breaks which did not last half an hour.

It is immaterial that the employees were able to resume their breaks once they had finished attending to customers and that they received, in total, breaks that were greater than half an hour. The meal break is not to be interrupted.

The fact that the employees received two paid coffee breaks is also unimportant. Again that is not provide an uninterrupted meal break of at least half an hour. And while it is to provide for more that what the *Act* requires in one respect, it does not somehow lessen the obligation of the employer to provide a meal break of at least one-half hour. The requirement that employees work no more than 5 hours before they receive a meal break of at least half an hour is a minimum employment standard.

The employer appears to be a good employer, one that treats its employees fairly. It has been operating in contravention of the *Act*, however, as it has not been scheduling work so that employees receive proper meal breaks.

I can see no reason to vary or cancel the Determination, nor do I see any need to refer a matter back to the Director in this case.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 4, 2001 be confirmed and that Gail Duncan, Kristen Tonks (formerly Garland) and Leleah Schaufert be paid \$670.46, \$2,927.55, and \$422.13, respectively, and to those amounts I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal