Employment Standards TRIBUNAL

An appeal

- by -

Happy Day Inn Ltd. & Bhupal Hotels Ltd. & Royal West Management Ltd.
operating as Happy Day Inn and
Navtej Singh Bhupal aka Bob Bhupal, a Director or Officer of
Royal West Management Ltd. and
Satpaul Singh Bhupal, a Director or Officer of
Happy Day Inn Ltd. & Bhupal Hotels Ltd.

(the "Employer")

- 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: Mark Thompson

FILE No.: 2002/265

DATE OF DECISION: October 1, 2002

DECISION

OVERVIEW

This is an appeal by the Director of Employment Standards (the "Director") pursuant to Section 115 of the *Employment Standards Act* (the "*Act*") with respect to a Decision of the Tribunal between the same parties, BC EST #D091/02 (the "Decision"). The Decision found that the complainant, Claire Stewart ("Stewart") was a manager under the *Act* and thus not entitled to overtime pursuant to Part 4 of the *Act*. The Decision further found that the suite in the motel occupied by Stewart was not her residence under Section 1(2) of the *Act*, and thus she was not on call in her own residence. The Decision referred the case back to the Director to recalculate the time worked by Stewart and the amounts owed to her in light of those conclusions. The Director requested clarification of the intent of the Decision with regard to the time that Stewart worked and the applicable rate of pay. The Director's delegate posed a number of questions that she found "in dispute." She also provided calculations of the number of hours for which Stewart should be paid under the original Decision based on five sets of assumptions.

Stewart provided a statement to the Tribunal setting out her views on the appropriate calculation. In effect, she agreed with one of the delegate's calculations and provided copies of her tax returns in support of her position.

Counsel for Happy Day Inn Ltd., Bhupal Hotels Ltd., Royal West Management Ltd., Navtej Singh Bhupal, a Director or Officer of Royal West Management Ltd. and Satpaul Sing Bhupal, a Director or Officer of Happy Day Inn Ltd. and Bhupal Hotels (the "Employer") also provided a calculation of the numbers of hours Stewart worked and argued that hours worked should be paid at the minimum wage. He further stated that the imputed rent for the space Stewart occupied in the motel should be deducted from any wages owed to her.

This decision is based on written submissions.

ISSUEs TO BE DECIDED

The issues to be decided in this decision are: how many hours did Stewart work; what should be her rate of pay for that work; what compensation, if any, should be assigned to rental of the motel suite Stewart occupied.

FACTS

As the Decision explained, Stewart worked as a "live-in manager" for the Employer from August 28, 1998 until December 26, 1999. The Employer operates a 32-unit motel in Burnaby. Stewart filed a complaint on March 31, 2000, alleging that she had not been paid as required by the *Act*. Neither Stewart nor the Employer kept records of the time she worked. During the investigation of her complaint, Stewart compiled a statement of the hours she worked based on her recollection and staff schedules. The delegate checked these records against the diary of another employee who shared Stewart's duties. Where doubt existed about the hours Stewart worked, the delegate recorded the hours in the Employer's favour.

Much of the delegate's analysis concerned the hours Stewart worked at night. The Employer maintained that the motel unit it provided her was her residence, so she should only be paid when she actually performed services for the business or guests. Stewart's position was that the unit adjacent to the front desk was not her residence under the *Act*, and she was essentially at work between 11:00 p.m. and 7:00 a.m., although admittedly not busy all of the time.

The delegate found that the motel unit Stewart occupied was not her residence. She found that Stewart worked regular shifts between 11:00 p.m. and 7:00 p.m. and was entitled to payment of wages for all hours worked. Because Stewart was at work during the night shift, it was not necessary to decide if the motel unit was Stewart's residence under the *Act*.

Stewart's records of hours worked indicated that she worked an average of 125 hours per week. According to the delegate, during the investigation, the Employer argued that Stewart worked an average of 112 hours per week. Ken Johnston ("Johnston"), who represented the Employer during the investigation, submitted time sheets based to support the assertion that Stewart had worked 112 hours per week. On the balance of probabilities, the delegate accepted Stewart's statement of the hours she worked. In addition, she found that Stewart was entitled to overtime wages, overtime pay, statutory holiday pay, vacation pay and pay for an entitlement to 32 hours free from work.

The delegate found that several businesses were associated corporations under Section 95 of the *Act*, with the effect that one Employer existed for the purposes of this proceeding.

The delegate issued three determinations on July 27, 2001, one for the corporation, and two for directors and officers. The total amount due to Stewart under the determinations was $103,647.56.

The Employer appealed the determinations. The basis of the appeal was that Stewart was a manager and thus exempt from the provision of Part 4 of the *Act*. In the alternative, it argued that she was on call on the night shift from her residence and entitled to straight time only for time worked. Thirdly, the Employer maintained that the Determinations had not taken seasonal fluctuations in the occupancy rate at the motel in calculating the hours Stewart worked.

The Decision, which followed three days of hearings and post-hearing written submissions from the parties, concluded that Stewart was a manager under the *Act*. The effect of this conclusion was that Stewart was not entitled to compensation for the Employer's failure to ensure that she had 32 consecutive hours free from work and overtime payments. The Decision also found that the unit in the motel Stewart occupied was not her residence, so she was not on call in her own residence under the definition of "work" in Section 1 of the *Act*.

The Decision noted that evidence had been led to challenge the delegate's calculation of hours worked, but did not suggest the appropriate calculation of the hours Stewart had worked. The Decision referred the case back to the Director for re-calculation of Stewart's entitlements.

The delegate raised three issues to be decided in this decision: the number of hours Stewart actually worked; the appropriate rate of pay; and value as wages of the motel unit where Stewart lived.

The delegate argued that the calculation in the original Determination should be maintained, i.e., that Stewart had worked an average of 125 hours a week. Counsel for the Employer stated that Stewart

worked an average of 112 hours per week, based on calculations prepared by the delegate in the initial appeal.

The delegate in this appeal stated that Stewart's rate of pay should be $8.65 per hour and $9.62 per hour, depending on when she worked. The Employer argued that Stewart should be compensated at the minimum wage, i.e., $7.15 at the time she was employed.

The Employer argued that any money owed to Stewart should be reduced by the value of the accommodation she received from the Employer. Counsel stated that the market value of the unit was $1400 per month, so the Employer should be credited with an additional $14,000 in wages paid. The delegate argued that the issue was not raised in the original appeal and that the room was not part of "wages" as defined in the *Act*.

ANALYSIS

One principle should be stated in this case at the outset, that Section 18 of the *Act* requires that employees are entitled to be paid for all hours worked. The Tribunal reviewed that principle in *Kamloops Golf and Country Club Limited,* BC EST #D278/01, upheld on reconsideration in BC EST #RD544/01 and by the Supreme Count in *Re Kamloops Golf & Country Club v. BC (Director of Employment Standards), et al.*, 2002 BCSC 1224. Thus, the first issue raised by this case is the number of hours Stewart actually worked.

In the original Determination, the delegate concluded that Stewart had worked an average of 125 hours per week. Admittedly, the calculation was not precise, since neither the Employer nor Stewart had kept records of the hours she worked. According to the delegate, she resolved doubts in favour of the Employer. In initial argument at the hearing on the Employer's appeal, counsel stated that the calculations did not reflect fluctuations in the occupancy rate in the motel. While witnesses called by the Employer testified that in the fall and winter the occupancy rate was quite low, they did not provide an alternate calculation of the time Stewart worked.

In his response to the delegate's submission to the Tribunal, counsel for the Employer relied on calculations he stated had been prepared by the Employment Standards Branch (the "Branch"). He submitted copies of the documents used in support of the Employer's calculations. The delegate who represented the Director stated that she could not find the original documents the Branch had prepared during the investigation of Stewart's complaint.

The files for the original appeal, on which the Decision was based, contain a communication from Johnston, who represented the Employer during part of the complaint process, dated September 28, 2001. The covering letter presented a number of arguments for the Employer, as discussed in the Decision on page 6. Attached to the letter was a copy of a letter from a former employee who stated that Stewart had asked her to make untrue statements, 16 pages of forms identified "overtime calculation," and approximately 23 pages that were copies of extracts from the diary of Shabbir Gilani ("Gilani"). Gilani was another employee of the Employer who in effect relieved Stewart for a number of shifts each week. The Tribunal received the letter and attachments as part of the record for the hearing arising from the Employer's appeal of the determinations. In fact, a statement by Johnston in the covering letter was discussed in the hearing.

After reviewing the documents presented to me and the arguments of the delegate, the Employer and Stewart, I conclude that the documents provided by the Employer in this proceeding were not, in fact, prepared by the delegate or any other member of the Branch. They appear to have been prepared by Johnston, but neither the time sheets nor the accompanying documentation provide a credible alternative to the careful calculations the delegate made in response to the original complaint.

Therefore, on the balance of probabilities, I find that Stewart worked an average of 125 hours a week during the period of her employment.

The delegate in this proceeding proposed two wage rates for Stewart's period of employment. The Decision found that Stewart was paid $692.30 biweekly from the beginning of her employment until June 1999 and $769.23 biweekly from August to December 1999. Both parties accepted the evidence on that point as accurate. Stewart stated that these rates were correct, and offered copies of her payroll statement for pay periods in January and June 1999 in the amounts stated in the Decision, both based on 80 hours worked.

Neither party at the hearings that led the Decision argued for any other rate. No evidence or argument was presented during the complaint investigation or hearing to suggest that Stewart was receiving the minimum wage. The Decision relied on evidence from one of the owners of the Employer; Paul Bhupal that Stewart received a monthly salary with the possibility of a bonus if the business met performance targets. However, the business did not achieve the targets.

On the balance of probabilities, I conclude that Stewart's hourly rate of pay from August 1998 until June 1999 was $8.65, and the rate from August through December 1999 was $9.62 per hour, based on her biweekly salary. The net result that the delegate's calculations based on those assumptions are correct, i.e., that Stewart should receive $56,077.53 in unpaid wages, and the director's determination is in the amount of $11, 282.12, based on an average of 125 hours worked at the appropriate rate of pay.

Counsel for the Employer argued that any wages owed to Stewart should be reduced by the value of the accommodations she received. The *Act* does not support this position. Article 1 defines "wages" as follows to include:

(a) salaries, commissions or money, paid or payable by an employee for work,
(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act, money required to be paid in accordance with a determination or an order of the tribunal, and
(d) money required to be paid in accordance with a determination or an order of the tribunal, and
(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person
(f) but does include
(g) gratuities,
(h) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
(i) allowances or expenses, and
(j) penalties

No part of the definition could be held to include accommodation. Moreover, Section 20 of the *Act* requires that employer pay wages in Canadian currency. In other words, there is no provision for compensation in kind. See *Re Heichman (c.o.b. Blue Ridge Ranch)*, BC EST #D184.97.

The wisdom of the legislature in restricting the definition of wages is illustrated in the evidence (or lack of evidence) in this case. The Employer stated, without any supporting data, that the value of the accommodation was $1400 per month and reported that amount to taxation authorities. Johnston, when acting in the Employer's behalf, suggested that $1000 per month was an appropriate value for the accommodation, again without providing any evidence to back up his position. The delegate stated that a monthly rent of $1400 in the area near the motel "would rent a very nice three-bedroom town home," i.e., accommodations superior to those Stewart occupied. It appears that the *Act* anticipates that the parties to an employment relationship should agree on the value of accommodation provided. The employer then includes that amount in the employee's gross pay. With written authorization from the employee, the employer is able to deduct the appropriate amount from the employee's pay. None of those steps was followed in this case.

Thus, neither the law nor the evidence supports the Employer's contention that Stewart's compensation should be taken to include accommodation in her total compensation.

ORDER

For these reasons, the Decision is amended to include compensation due to Stewart of $56,077.53, plus interest accruing under Section 88 of the *Act*. The directors' determinations should be in the amount of $11,282.12, plus interest.

Mark Thompson
Adjudicator
Employment Standards Tribunal