

An appeal

- by -

The Pacific Investment Corporation Limited operating as Peaks Coffee House (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:Ib S. PetersenFILE No.:2001/419DATE OF HEARING:August 22, 2001DATE OF DECISION:August 23, 2001



DECISION

APPEARANCES:

Mr. Mark Wolverton	on behalf of the Employer
Ms. Sheila Westwell	on behalf of herself

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on March 8, 2001. The Determination concluded that Westwell was owed \$6,611.48 by the Employer on account of wages, overtime wages and statutory holiday pay.

The delegate's findings and conclusions may be briefly set out as follows. The Employer operated a coffee house in Whistler, British Columbia. Westwell worked a manager from July 21, 1998 to January 4, 1999 at the rate of \$8.75 per hour or \$700 bi-weekly. The Delegate found that Westwell, who was 17 years old when she was hired had to put in long hours. He concluded that she was not a manager under the Act and estimated the hours of work. In his Determination, the Delegate stated that Westwell agreed with his calculation and that the Employer did not respond.

FACTS AND ANALYSIS

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong.

The Employer disagrees with the Determination for two reasons: (1) It did, in fact, supply time sheets, recorded by Westwell, to the Delegate and that he refused to take those into account. The Employer says that the amount awarded should be based on the these time sheets. The Employer did not take issue with the Delegate's conclusion that Westwell was a manager. (2) The Employer says that an amount awarded to Westwell in the Provincial Court should be deducted.

I will briefly deal with the second issue first. While there was no documentation before me regarding the Provincial Court action, Wolverton explained that it was in respect damages for the termination. The matter before me concerns wages owed and is not related to the termination. In the result, I do not find that there is any basis for deducting this amount.

Turning now to the issue of hours worked and the resulting wages owed, I am of the view that Employer has not discharged the burden on appeal. My reasons are set out below.

The Employer explained that Westwell filled out time sheets during her employment. Westwell does not disagree with that. She did explain, however, that Wolverton's wife, who was a

"partner" in the business, told her not to record hours in excess of 40 in a week and that on the one occasion where she did, she was not paid for those hours. Wolverton's wife did not testify at the hearing and Westwell's tetimony, therefore, stands uncontradicted. Westwell explained that she was only 17 years old when she started working for the Employer, was living away from home, and that she was concerned that she might not have a job if she claimed the hours actually worked. In my view, this raises serious questions about the records the Employer seeks to rely on.

I understand from the determination and evidence presented at the hearing, that the Delegate in his assessment of the hours worked by Westwell considered the opening hours of the coffee house, the schedules of other staff, and Westwell's explanation. While I agree that the Delegate ought to consider records submitted by the parties, such as the time sheets, in this case, it does not follow that the he must accept them as true reflections of the work done. The records must be considered in light of the surrounding circumstances. In the circumstances of this case, I agree with the Delegate's conclusions. I do not accept that the "estimate" is arbitrary as suggested by the Employer.

At the hearing, Westwell indicated her agreement with the Delegate's estimate as a true reflection of her hours worked. While the Employer suggested that the time sheets properly reflected, they were not in evidence at the hearing, or part of the file. The Employer could not, in the result, point me to specific errors in the Delegate's calculations. The Employer conceded that, while the original time sheets were provided to the Delegate, it likely had copies of the documents. I do not accept, therefore, that the documents were not available to the Employer. In note in that regard, the Tribunal's "Appeal Form" specifically reflect the requirement that any document that supports a party's appeal must be included.

In short, I not persuaded that the delegate erred in his conclusions. The Employer has not discharged the burden on the appeal and it is dismissed.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination dated March 8, 2001, be confirmed.

Ib S. Petersen Adjudicator Employment Standards Tribunal