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 -

Gina McIntosh
(the "Employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/431
HEARING DATE:	September 24, 1999
DECISION DATE:	October 21, 1999

DECISION

APPEARANCES

Ms. Gina McIntosh	on behalf of herself
Ms. Lynda Bentall	on behalf of Access Foundation operating as Ailanthus (the "Employer" or the "Foundation")

OVERVIEW

This is an appeal by Ms. McIntosh pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on June 17, 1999. The Determination concluded that Ms. McIntosh, who was employed by the Foundation as a drama instructor from June 1997 to July 3, 1998, was owed $415.22 on account of overtime wages for three days in April of 1998. Ms. McIntosh's scheduled hours were from 10:00 a.m. to 5:30 p.m. on Saturdays and Sundays. The delegate did not find that she was entitled to pay for meal breaks. McIntosh appeals the conclusion that she was not entitled to pay for the morning meal period, from 9:30 to 10:00 a.m.

FACTS AND ANALYSIS

A hearing was held at the Tribunal's offices in Vancouver on September 24, 1999.

Ms. Lynda Bentall, the president of the Access Foundation, testified on behalf of the Employer. Ms. Bentall takes an active part in the management of the operation of the Foundation, being present in the building six days a week. She explained that the Foundation provides arts classes for some 50 inner-city children each day. As part of the program, the Foundation provides breakfast and lunch to the children. The meals are taken in the "Green Room" and was supervised--at the time--by two staff members, Jordan Samek and David Flewelling, who were chosen because of their rapport with the children. Attendance at breakfast and lunch was a part of the job for these two staff members for which they were paid. No-one else was paid--or was supposed to be paid. Ms. McIntosh was, in fact, through error, paid for the lunch break. Ms. Bentall explained that staff often have lunch with the children, and participate in the catered meal functions, but that they were free to leave if they wished.

At the hearing, Ms. McIntosh explained her view that she was entitled to be paid based on an agreement between her and the Employer to the effect that she was required to be present during the 9:30 meal break. She says that her supervisors, Mike Ferrer and Peter Grasso, told her that she was required to be present. Apparently, this happened in October 1997. These employees did not testify. Ms. McIntosh introduced into evidence a letter from Jordan Samek. In the letter, the employee, who was one the employees paid to be available during the morning meal time, stated that she "worked the same hours as <he> did" and that she had "breakfast and lunch with the students at the Ailanthus centre". This former employee did not testify and, for that reason, I do not place much weight on this letter. Ms. McIntosh may have been present at the centre, the question; however, is whether she was working and entitled to be paid for such time.

Ms. Bentall disagreed that there was such an agreement. The number of hours of work and remuneration is recorded on the centre's "pay schedule". This schedule also expressly sets out the days and hours of work, in Ms. McIntosh case Saturdays and Sundays from 10:00 a.m. to 5:30 p.m. This schedule appears to have been attached to Ms. McIntosh's employment contract. Changes to terms and conditions of employment are recorded and documented. For example, when Ms. McIntosh was hired to work as "overnight relief" at the residence, a memorandum was prepared, setting out the dates, hours and pay which would be processed by payroll. Ms. Bentall explained that it was the Employer's practice to record changes in this manner. If there had been an agreement in Ms. McIntosh's case, it would have been recorded and payroll would have been informed. In other instances, where hours of work changed, a memorandum was issued. Ms. Bentall also explained that the pay stubs set out the pay and hours. If, as Ms. McIntosh says, there was an agreement that she be paid for the extra one half hour in the morning, why did she not speak to the Employer about it, and question her pay, between October and June, some eight months. Ms. McIntosh responded that she did not look at the pay stubs. In my view, this is neither reasonable nor credible.

The delegate investigated Ms. McIntosh's claim for pay for the meal breaks, including conversations with other employees, and rejected the claim, among others, based on the employment agreement, which expressly set out the hours of work. The delegate was also, in the circumstances, concerned that Ms. McIntosh had not raised the issue with the Employer during her employment. The appellant, Ms. McIntosh, has the burden to prove on the balance of probabilities that the Determination is wrong. In all of the circumstances, I am not satisfied that she has done so. I accept that her hours of work were those set out in the employment agreement between Ms. McIntosh when she commenced her employment and that, if there were an agreement to change those hours, that change would have been recorded as per the Employer's business practice, as, in fact, it did one occasion when Ms. McIntosh became "overnight relief" for a period. In the circumstances, I am concerned that Ms. McIntosh did not raise the issue of pay for the morning meal time during her employment. I do not mean to suggest that Ms. McIntosh may not have been present at the centre during the morning meal break and interacting with the students, she may well have been. However, I do not accept the claim that she was required to be there and that she worked during those times.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination in this matter, dated June 17, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal