

**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 -

Chetwynd Elks Lodge #500  
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 1999/502

**DATE OF HEARING:** October 14, 1999

**DATE OF DECISION:** November 8, 1999

**DECISION**

**APPEARANCES**

Bernie Currie                                    on behalf of Chetwynd Elks Lodge #500  
Gary Cragg                                        on behalf of Chetwynd Elks Lodge #500  
Brian George                                      on behalf of Chetwynd Elks Lodge #500

**OVERVIEW**

This is an appeal by Chetwynd Elks Lodge #500 ( the “Employer”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated July 27, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). The Employer alleges that the delegate of the Director erred in the Determination by concluding that Elaine Fontaine (“Fontaine”) was owed additional wages in the total amount of **\$453.00**.

**ISSUE**

The issue to be decided in this appeal is whether the delegate of the Director erred in determining that wages were owed to Fontaine.

**FACTS**

The following facts are not in dispute:

- Fontaine was employed as a bartender/server from December 9, 1997 to December 8, 1998;
- Fontaine was hired at the rate of \$7.50 per hour;
- Fontaine received two raises, first to \$8.00 per hour and shortly thereafter to \$9.00 per hour;
- in addition to her duties at the Employer’s place of business, Fontaine also performed shopping and laundry services for the Employer.

Fontaine alleges that she performed a significant amount of extra work for the Employer for which she did not receive wages. Fontaine did not keep any records of this extra work at the time she alleges it was performed, however, Fontaine prepared a reconstruction of her alleged extra hours for the benefit of the delegate of the Director. This reconstruction was only prepared after Fontaine’s employment was terminated.

Brian George (“George”) testified on behalf of the Employer and stated that:

- the reason Fontaine was given a raise from \$8.00 to \$9.00 per hour was to compensate her for the extra work she performed doing the shopping and laundry on occasion;
- this was discussed with Fontaine and she had agreed to this method of compensation;

- Fontaine only performed some extra work for a portion of her employment period and the charge slips / till tapes for the merchandise picked up confirm that;
- Fontaine filled out her own timesheets and was paid for all of the hours, at both regular wage and overtime wage rates as required, that were noted on the timesheets;
- no separate Employer records were kept of either Fontaine's normal work or the extra work she is now claiming to have performed;

The delegate of the Director considered Fontaine's reconstruction of the extra hours and stated in the Determination " .... *it is established that the records were not made at the time rather at the end of her employment. As such I do not accept them as accurate...*". The delegate did however determine that Fontaine was owed additional wages and stated "*Considering all the information in this matter and in keeping with the intent of Section 2 Employment Standards Act, I will establish and accept a time of further entitlement of 1 hour per week*". The Determination was issued July 27, 1999 for the amount of \$453.00.

## ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, the Employer.

The *Act* sets forth a number of requirements to be met by an employer. Among those is the requirement to keep payroll records. Section 28 of the *Act* provides:

### *Section 28, Payroll records*

(1) *For each employee, an employer must keep records of the following information:*

- (a) the employee's name, date of birth, occupation, telephone number and residential address;*
- (b) the date employment began;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
- (e) the benefits paid to the employee by the employer;*
- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;*
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*

(2) *Payroll records must*  
*(a) be in English,*

- (b) be kept at the employer's principal place of business in British Columbia,*
  - and*
  - (c) be retained by the employer for 7 years after the employment terminates.*
- (emphasis added)

The evidence is that the only payroll records kept by the Employer were the timesheets filled out by Fontaine each pay period. In reviewing those payroll records it is clear that Fontaine was paid for every hour she recorded on the timesheets.

The evidence is also that the Employer did not keep any records of the extra work performed by Fontaine. The evidence further discloses that Fontaine did not keep any records of the extra hours worked either, however, she did create a reconstruction of the disputed hours for the delegate of the Director after her employment terminated. The delegate of the Director considered those reconstructed hours and determined that they could not be considered to be accurate.

Oft times it is possible to confirm that an employee has performed work by interviewing customers, other employees or perhaps neighbouring business establishments, however, in this case, the work performed was away from the workplace and anyone observing Fontaine would likely not have been able to distinguish if what she was doing was for the Employer's benefit or for her own personal benefit.

The only evidence provided that any other independent information would be able to either confirm or refute the claim with respect to the number of the extra hours worked were some of the charge slips / till tapes from the stores where Fontaine picked up merchandise on behalf of the Employer. While these charge slips / till tapes do provide the date and time of the transaction, there is no evidence of how long the purchase of this merchandise actually took; ie. was the merchandise already collected by the store and Fontaine merely had to pick it up on the way to work or did Fontaine have to go around the store shopping for the merchandise. The only value of these charge slips / till tapes, in my view, is that they establish that on a certain date and at a certain time a transaction took place; that is certainly a long way from establishing how much time was involved in performing this task. There is no dispute between the parties that Fontaine did perform some extra work rather, the issue is, how much extra work was performed by Fontaine.

In the absence of any records from the Employer with respect to the disputed hours and, in the absence of *accurate* records from Fontaine, the delegate of the Director determined that in keeping with the intent of Section 2 of the *Act*, he would establish and accept a further entitlement of 1 hour per week for the extra hours of work performed by Fontaine.

Section 2 of the *Act* sets forth the purposes of the *Act* and reads as follows:

*Section 2, Purposes of this Act*

*The purposes of this Act are to*

- (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
- (b) promote the fair treatment of employees and employers,*

- (c) encourage open communication between employers and employees,*
- (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*
- (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and*
- (f) contribute in assisting employees to meet work and family responsibilities.*

After a careful review of the provisions of Section 2, I am unable to conclude that the intent of these provisions is to create an entitlement where the evidence is not able to substantiate such entitlement. In fact, in my view, the creation of an entitlement that is not supported by evidence would **not** be consistent with the intent of Section 2.

It would be neither appropriate nor correct, in the absence of credible evidence, to speculate how many extra hours may have been worked by Fontaine during her period of employment.

For all of the above reasons and on the balance of probabilities, I conclude that Fontaine did work some extra hours during her period of employment. I further conclude that in the absence of any evidence to establish how many hours were actually worked, I am not prepared to speculate what Fontaine's entitlement *might* have been. I finally conclude that the delegate of the Director erred in determining that wages in the amount of \$453.00 were owed to Fontaine.

The appeal by the Employer is therefore granted.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 27, 1999 be cancelled.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**