

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 -

Louise McAstocker
("McAstocker")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson
FILE NO.: 1999/516
DATE OF HEARING: November 16, 1999
DATE OF DECISION: December 6, 1999

DECISION

APPEARANCES

for the appellant	in person
for Golden Tourist Development Ltd. operating Golden Village Inn	Baldave (Dave) Khunkhun
for the Director	Joe LeBlanc

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Louise McAstocker (“McAstocker”) of a Determination which was issued on July 29, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that McAstocker was not owed any wages by her former employer, Golden Tourist Development Ltd. operating Golden Village Inn (“Golden Village”), and no further action would be taken by the Director on her complaint. The Determination also noted that McAstocker appeared to have been overpaid by an amount of \$3494.79.

McAstocker says the Determination is wrong and has raised three reasons for appeal:

- (1) The overtime calculation report attached to the determination wrongly indicates that she did not work any hours in April and May, 1998, when in fact she worked a total of 524.5 hours in those two months;
- (2) The Director wrongly concluded that she had received a \$450.00 advance in September, 1998, when in fact she did not; and
- (3) Golden Village had incorrectly amended her T4 slip, increasing the total employment income in 1998 from \$8,827.31 to \$9,394.97.

ISSUES TO BE DECIDED

The issue to be decided in this case is whether McAstocker has been able to show the Determination is wrong.

FACTS

Golden Village is a motor inn operating approximately 76 units in Golden, B.C. McAstocker was employed by Golden Village for a period commencing October, 1996 and ending September, 1998. She was employed as a chambermaid and laundry worker, and, in addition to the duties associated with those jobs, did some occasional outside work and general cleaning during seasonally low occupancy periods.

During her employment, McAstocker lived in Golden in an apartment owned, or partly owned, by Dave Khunkhun, who is a Director/Officer of Golden Village. In July, 1998, McAstocker moved from the apartment to a trailer owned by Mr. Khunkhun. When McAstocker left her employment she was, according to Mr. Khunkhun, four months in arrears on her rent. McAstocker also left her employment and the trailer in the middle of September, 1998 without having paid any rent for September. The rent was \$450.00 a month - the exact amount that Golden Village said had been "advanced" to her in September. Mr. Khunkhun said this amount had been a cash advance and was not recorded anywhere except as a notation on a calendar. The calendar was produced at the hearing, but there is no way of determining whether the notation was contemporaneous to the alleged advance.

The key factual dispute that has arisen in this appeal is whether McAstocker had any hours worked in April and May, 1998 and, if so, how many hours worked. The Overtime Calculation Report prepared by the Director did not allocate any hours worked for those months. This conclusion was based on records provided by Golden Village during the investigation and confirmed in discussions between the investigating delegate and Mr. Khunkhun. In the submission filed on behalf of the Director by the investigating delegate in response to the appeal, he says:

. . . the calculation was done on the payroll information provided by the employer. I enclose all of the time sheets that were used for your perusal. There are no hours recorded for the months of April and May, 1998 as can be seen from the time sheets. However, there were cheques issued for this time period because Ms. McAstocker had banked hours from November and December of 1997 that were paid in April, 1998 (see note on bottom of time sheet for April, 1998). Then in May, 1998, she was paid for hours banked from March, 1998, a similar note is at the bottom of this time sheet as well.

At the hearing, the investigating delegate, who appeared on behalf of the Director, said he had a discussion with Mr. Khunkhun in which he confirmed that McAstocker had worked no hours in those months.

Golden Village filed two responses to the appeal, one dated September 1, 1999 and the other dated September 27, 1999. The first was filed over the signature of M. Relan, CGA, who was identified to me during the hearing as the employer's accountant. In that submission, Mr. Relan reiterates that the amounts McAstocker was paid in April and

May, 1998 were for work performed in November and December, 1997 and for work performed in March and May, 1998, respectively. I note that a time sheet for McAstocker for November, 1997 was provided to the Director during the investigation and this time sheet shows McAstocker worked, *and was paid for*, 62.5 hours in that month. There was no other document or evidence showing that McAstocker worked any additional hours in November, 1997 nor that she worked any hours in December, 1997. Nor was any record showing an established time bank for any employee, including McAstocker, ever produced by the employer. The second submission was filed over the signature of Mr. Khunkhun and it is worthwhile setting out that submission in full:

In response to your request about the details of hours worked by employees during April and May, 1999[sic], I wish to state that employees were recording their own times. The time sheets were in the laundry room and each employee was recording their own time worked.

For the months of April and May, 1999 [sic], Louise McAstocker did not record the time worked and made excuses. Louise gave me some hours, she worked and asked me to add some hours that she had banked during the winter months. For May, 1999 [sic], something happened and I paid her the hours she said she had worked. I had to believe her words although she never recorded her hours everyday. I never received that time sheet from her. Louise was always doing things in her own way and I always took her words for the hours worked. Next thing I know that I paid her for few hundred hours extra which was a mistake on my part.

I am sending you all the cheques that you asked for. I trust you will find this all satisfactory. If you have any questions or comments, please do not hesitate in contacting me at . . .

Mr. Khunkhun adopted the above position at the hearing. Based on the second submission and on the position taken at the hearing by Mr. Khunkhun, I conclude that the records provided to the Director for hours worked by McAstocker in April, 1998, which stated that the hours paid to McAstocker in April, 1998 were from hours banked in November and December, 1997, is false. I also conclude that Golden Village attempted to mislead the investigating delegate by suggesting McAstocker did not work any hours in May, 1998, even though she was paid for 274 hours of work in that month.

ANALYSIS

I find that McAstocker did have hours worked in both April and May, 1998. As a result, the Determination has been shown to be wrong because no hours worked were allocated to those months and, as a consequence, no hours worked were included or considered in the overtime calculation.. There are a total of 524.5 hours involved. Potentially, all of those could be found to be hours worked in April and May, 1998 and introduced into the

calculation report as such. If so, the overtime liability of Golden Village would be considerable. Other results are possible.

It may be that some of these hours do relate to work that was performed during other periods of time. There is some evidence suggesting that McAstocker worked for Golden Village during March, 1998, but there is no record that she was ever paid for those hours and they may have been carried into April. The number of hours for which McAstocker was paid in April and May appears to be an unusually high number for those months relative to the nature of the business and relative to other employees. However, there is some evidence suggesting that McAstocker was doing extra work in April and May, 1998 that could account for the high number of hours.

Another matter raised by Golden Village was whether McAstocker was inflating her hours and being paid for time not worked. It may be that she was, but the burden of proving that allegation is, in the circumstances of this case, on the employer. In that respect, it is relevant that Golden Village paid her for those hours without complaint and without otherwise demanding confirmation that she had, in fact, worked those hours. I noted that Mr. Khunkhun testified that his wife and his daughter all performed a substantial amount of work at the Golden Village and that his niece also worked there during this period of time.

There are other aspects of the evidence which, in light of the above conclusion, do not have to be examined in detail but will undoubtedly bear on the further consideration that will be given to this file by the Director. It is fortunate that the Director chose to attend and heard the evidence and positions of the parties directly.

In sum, the effect of adding 524.5 hours into the calculations done by the Director will be significant, regardless of whether any of those hours are found to be overtime hours. As a result, the Determination must be canceled and the matter referred back to the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 29, 1999 be canceled and the matter referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal