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 -

Chrisbe Holding Ltd.
Operating as Aldergrove Dairy Queen
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/420

DATE OF HEARING: September 5, 2000

DATE OF DECISION: December 7, 2000

DECISION

SUBMISSIONS/APPEARANCES

Mr. Rene Peeman	on behalf of the Employer
Ms. Michelle Oswald	on behalf of herself

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on May 25, 2000. The Determination concluded that Oswald was owed $2,499.19 by the Employer.

The issue before the delegate was broadly speaking whether Oswald had been compensated for all hours worked, including meal breaks, and whether she had been required to pay for till shortages. From the determination, the following background facts may be gleaned. The Employer operates a fast food restaurant. Oswald worked at the restaurant from June 3, 1996 to July 22, 1999 as a cashier/supervisor. Her rate of pay was $7.15 per hour.

The Determination states that the Employer acknowledged that Oswald was required to be at work at 9:30 a.m. for the opening shift, even though she was only paid for work performed during her scheduled shift commencing at 10:00 a.m., and that she was allowed only 30 minutes, during her shift, to cash out after the store closed and that she would spend another 15-30 minutes after her shift. The delegate also found that Oswald was encouraged to stay during her meal breaks without compensation and that she was required to pay for till shortages.

The delegate concluded that the Employer had failed to pay minimum wages because Oswald was not compensated for all hours worked (Section 16) and that her wages were not paid as required by the *Act* (Section 17). The delegate concluded that an agreement between the Employer and the employees at the restaurant that they come to work before their shift and remain after their shift was of no effect (Section 4). The delegate also concluded that Oswald was required to be available for work during her meal breaks contrary to Section 32, that she had worked hours in excess of 8 in a day without overtime pay (Section 40), and, finally, that the Employer had failed to pay vacation pay (Section 58).

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 has not, in my opinion, discharged that burden. In large measure, the issues on appeal are of a factual nature.

The Employer was represented at the hearing by Peeman. He is the general manager for the Employer's Canadian operations and a relative of the owners. He resides in Williams Lake. That

is also where his office is located. In cross examination by Oswald, Peeman admitted that he did not spend much (if any) time on a regular basis at the restaurant. He explained that he kept in contact with the restaurant, which was managed by a relative, through the telephone on a daily basis. That is how he would know what was going on. He admitted that he did not have first hand knowledge of the matters that he testified to.

Peeman explained that there was an agreement with staff to come to work half an hour early, *i.e.*, at 9:30 a.m. for the shift commencing at 10:00, which is also the time the restaurant opens. The employees would set up the restaurant. This would allow the employees to have coffee and "smoke break" at 10:00 a.m. The employees would "punch in" at 10:00 a.m. Peeman explained that this arrangement came about as the request of the employees. As well, in cross examination, Peeman agreed that an employee has to be at the work place 15 minutes before the start of the shift. He admitted that he was not present when the agreement, relied upon by the Employer with respect to the early shift, was made with the employees. He also stated that he did not know, but "assumed," that the employees would be allowed to sit and have coffee for one half hour at 10:00 a.m. In any event, even if I accept that the arrangement for employees to come to work half an hour early was done with the consent of the employees, in my view, such an arrangement contravenes the *Act* and, under Section 4, is of no effect.

Oswald testified that she never agreed to come in half an hour early, she was simply told to be there at 9:30 a.m. In fact, she said, if she came in a few minutes late, she would be given "heck." She explained that she never got to sit down for half an hour from 10:00 a.m. because that was when the restaurant opened and the customers started coming. She also said that, in fact, the restaurant opened earlier than 10:00 a.m. Oswald explained that when her shift started later, say at 4:30 p.m., she had to be at work 15 minutes early. Peeman disagreed that it would take 15 minutes after the end of the shift to count the till.

Peeman explained that employees receive their meal breaks. He did explain that there was a difference between high and low season, the former being April to August. He admitted that the Employer has asked employees to be available during meal breaks during the busy high season. He also explained that during the low season, things are more relaxed and employees are allowed out early. Peeman presented timecards, which, he says, supports the Employer's case. In cross-examination, Peeman said that the Employer is agreeable to pay for the meal breaks during the high season. Oswald testified that she had to stay during meal breaks and that, in fact, on a few occasions where she had left the restaurant, she "was told to be back in 10 minutes." She took issue with Peeman's statement that she was less busy during the winter months. She stated that the Employer always had something for her to do.

Peeman denied that the Employer deducted till shortages. Oswald stated that she had been required to pay till shortages. In fact, she explained that the till shortages had to be paid in cash in order to get her pay cheque. I agree with the delegate that this constitutes an unauthorized deduction.

In the circumstances, I prefer Oswald's evidence over Peeman's. It is difficult for the Employer to succeed when its sole witness was a person who was not regularly present at the operation and did not have much first hand knowledge of the details of the facts at issue. As Oswald stated in her evidence: "I was there. Peeman was not there." A more appropriate witness would have been

someone actually involved with the day-to-day management of the operation. Moreover, it is appropriate to draw an adverse inference from the Employer's failure to call as a witness, someone with knowledge of the particulars. I accept the delegate's findings with respect to hours worked and the conclusions that Oswald is entitled to be compensated for those hours of work.

In short, I am of the view that 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 May 25, 2000, be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal

ISP/bls