Employment Standards TRIBUNAL

An appeal

- by -

RHS Holdings Ltd. operating as Woodfire Gasthaus
("RHS")

- 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: David B. Stevenson

FILE No.: 2001/536

DATE OF HEARING: October 2, 2001

DATE OF DECISION: October 22, 2001

DECISION

APPEARANCES:

on behalf of RHS Holdings Ltd.	Hans Schroth Ruth Schroth
on behalf of the individual	In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by RHS Holdings Ltd. operating as Woodfire Gasthaus ("RHS") of a Determination that was issued on June 27, 20001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that RHS had contravened Part 3, Section 18(1), Part 4, Section 40, Part 5, Section 44, 45 and 46 and Part 7, Section 58(3) of the *Act* in respect of the employment of Ted S. Lachut ("Lachut") and ordered RHS to cease contravening and to comply with the *Act* and to pay an amount of $4,465.81.

RHS has appealed the decision, contending that the Director erred in concluding RHS owed any overtime wages to Lachut. RHS concedes it owes statutory holiday pay to Lachut for one day.

ISSUE

The issue in this appeal is whether RHS has demonstrated there is an error in the Determination sufficient to justify the Tribunal exercising its authority under Section 115 to vary it. More particularly, the question is whether RHS has shown the conclusion of the Director that Lachut was owed overtime wages is wrong.

THE FACTS

The determination set out the following as background to the Determination:

> RHS Holdings Ltd. operating as Woodfire Gasthaus (Woodfire) is a restaurant which is under the jurisdiction of the Act. Lachut worked from December 8, 1999 to April 24, 2000 as Sous Chef at the rate of $10.00 per hour.
>
> The complaint was filed on October 16, 2000, which is in the time period allowed under the Act.

Woodfire was located at Big White Resort and was in operation for the 1999-2000 ski season, closing in April, 2000. Woodfire did not reopen for the 2000-2001 ski season.

Ruth and Hans Schroth are the owners and Directors/Officers of Woodfire. They have continued to operate other restaurants in the Kelowna and surrounding area.

The Determination set out the following findings of fact:

1. The complainant was hired December 8, 1999.

2. His rate of pay started at $8.00 per hour, increasing to $9.00 per hour on December 16, 1999 again increasing to $10.00 per hour on March 1, 2000 to the end of his employment when the ski season ended and he was laid off.

3. The complainant filled out time sheets on a daily basis, noting the start and finish time of each work day.

4. The complainant was paid twice a month.

5. The employer paid the hours claimed on the pay sheets filled out by the complainant, but only at his regular rate. No overtime wages or statutory holiday pay was paid to the complainant.

6. In addition to his regular wage, the complainant was paid $1,640.00 without statutory deductions being made.

There was an indication from RHS during the investigation that Lachut was owed some overtime wages. There was, however, a factual dispute about the $1,640.00 that was paid to Lachut without statutory deductions being made. RHS argued that amount was comprised of a number of advances for overtime worked and should be deducted from any wages found owing to Lachut. Lachut said it was money paid to him for hours worked preparing for catering to private parties and weddings in addition to those shown on the time sheets. No record was kept of these hours, but RHS presented a series of hand-written notes indicating payments made to Lachut, showing the date, the amount and, in some cases, the hours. These notes were initialled by Lachut. The Director accepted the assertions made by Lachut, allocated the $1640.00 to additional work beyond that recorded on the time sheets and did not deduct that amount from the overtime wages calculated to be owed. Mrs. Schroth testified that in addition to the money paid to Lachut and recorded there was money paid to him in December, 1999 that was not recorded anywhere. She specifically recalled making two payments to Lachut of $200.00 each.

There was evidence given by Mr. Schroth that during the time it was open, RHS catered only three events and that Lachut was only involved in one of those. He was paid in cash for that event and no record was kept of the payment. In his evidence, Lachut said he was involved in at

least 10 events. He was asked to identify any of the events he had been involved in beyond the one referred to by Mr. Schroth and he could not.

Mr. Schroth and Mrs. Schroth also alleged that the times cards filled out by Lachut were not an accurate reflection of the actual time he worked. They were not, however, able to provide any cogent evidence to support their view that he had worked less hours than shown on the time sheets.

ARGUMENT AND ANALYSIS

The burden is on RHS in this appeal to persuade me that the Determination is wrong in law, in fact or in some combination of law and fact (see *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, as a matter of law or as a matter of mixed fact and law, sufficient to justify intervention by the Tribunal under Section 115 of the *Act*.

The appeal alleges an error in a conclusion of fact. In such a case, RHS must show that the conclusion of fact was either based on wrong information, that it was manifestly unfair or that there was no rational basis upon which the factual conclusions could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98). In this appeal, I find that RHS has met its burden on the matter of the additional money paid to Lachut, but they have not satisfied the burden on the matter of the hours worked.

During the investigation, Lachut said the $1,640.00 was for hours worked in addition to those shown on the time sheets. He said he was paid at a lower rate, $8.00 an hour, and no source deductions were taken. Based on that evidence, Lachut needed to have worked approximately 200 hours more than what was shown on his time sheets in order to account for the amount he acknowledged he had received. He gave evidence at the hearing that he had catered at least 10 events. It seems improbable that Lachut could have accumulated 200 additional hours worked without catering a substantially higher number of events than indicated in his evidence. The more probable number would be 35 to 50 events. Lachut's claim becomes even more improbable considering he cannot remember a single event outside of the one wedding it is acknowledged he assisted with. Finally, on review of the hand-written record provided by RHS during the investigation, I have noted that the hand-written record dated March 16, 2000 makes reference to amount paid, $252, as being comprised of 31.5 [hours] x 8 [dollars an hour]. The previous payment was dated March 3, 2000. Coincidently, the Wage Calculation Details prepared by the Director show Lachut recorded exactly 31.5 overtime hours on his time sheets during the period from March 3 to March 16, 2000. The Wage Calculation Details indicate Lachut worked 294 overtime hours during his period of employment.

The Director was influenced by the absence of any record showing the advances on overtime worked. However, having listened to the evidence of the parties involved and reviewed the

material on file, I am not at all concerned about the absence of records, as the scheme agreed between Lachut and RHS would have been defeated by the existence of any record of the transactions.

I am not, however, persuaded that the calculation of wages owed should not have been based on the time sheets made up by Lachut on a daily basis, approved by his supervisors, submitted to and accepted by RHS and paid. As noted in the Determination:

> The evidence establishes the employer acknowledged the validity of the hours claimed by the complainant on his time sheets.

The difficulty for the position asserted by RHS in this appeal is compounded by the inability to identify what Lachut's "actual" hours of work were. The complaints about taking time off during his shift and adding time to his daily sheets were lacking in any specificity that would have indicated what adjustments should be made to the hours shown on the time sheets. As I have indicated above, an appeal is not a re-investigation of the complaint. Lachut does not have to re-establish the validity of the complaint. The burden on RHS is to provide some valid reason, supported by cogent evidence, to deviate from the Determination. For the same reason, I am unable to find that RHS paid any additional amounts to Lachut other than those recorded by the hand-written notes provided during the investigation.

The appeal succeeds in part.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 24, 2001 be varied by deducting the amount of $1640.00 from the amount found to be owed in the Determination, together with appropriate adjustments to annual vacation entitlement and the interest payable under Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal