Citation: Romano's Pizza Ltd. (Re)
2021 BCEST 44

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Romano's Pizza Ltd.
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: James F. Maxwell

FILE NO.: 2020/167

DATE OF DECISION: May 17, 2021

DECISION

SUBMISSIONS

Asif Hatimzade	on his own behalf
Trevor R. Thomas	counsel for Roman's Pizza Ltd.
Sarah Vander Veen	delegate of the Director of Employment Standards

OVERVIEW

1. Romano's Pizza Ltd. (the "Appellant") has filed an appeal of a determination dated November 4, 2020 (the "Determination"), issued by a delegate of the Director of Employment Standards (the "Director"), pursuant to the *Employment Standards Act* (the "*ESA*"). The Director held that the Appellant had failed to pay sums owing to Asif Hatimzade (the "Employee") for regular wages, overtime wages, statutory holiday pay, and annual vacation pay, together with interest accrued thereon. In addition, the Director assessed administrative penalties in the sum of $3,000.00. The Director concluded that the total amount payable by the Appellant was $24,435.95.

ISSUE(S)

2. The following issues arise in this appeal:

   a. Did the Director err in law in the making of the Determination?

   b. Did the Director fail to observe the principles of natural justice in making the Determination?

FACTS

3. The Appellant is a corporation operating a pizza restaurant in Vancouver, British Columbia. Kenan Gov ("Gov") is the sole director of the Appellant corporation.

4. The Employee is an individual who was employed by the Appellant commencing January 15, 2011.

5. The Employee worked at the restaurant on Wednesdays through Sundays, on a shift that started about 5:00 or 6:00 p.m., until the restaurant closed, typically about 4:00 a.m.

6. The Employee resigned from the restaurant on May 15, 2019.

7. On June 21, 2019, the Employee filed a complaint with the Employment Standards Branch (the "Complaint"). The Complaint alleged that the Employee earned $19.00 per hour as a Pizza Maker but had not been paid all sums owing for overtime, annual vacation pay, and statutory holiday pay. The Appellant alleged that $8,294.64 was owing.

The Hearing

8. On July 22, 2020, the Director undertook a hearing into the Complaint. The Director heard evidence from the Employee; a witness on behalf of the employee; Gov; the Appellant's accountant; and four current or former employees of the Appellant. In addition, the Director received documents tendered by the parties.

9. The hearing was conducted by teleconference. The hearing commenced at 9:00 a.m. Despite receiving notice of the hearing, the Employee did not enter the teleconference until 9:50 a.m. The Director summarized, for the benefit of the Employee, the evidence that had been provided up to that point in the hearing. The hearing thereafter resumed.

10. The following summarizes the information supplied by the Employee:

    a. the Employee worked as a "shift supervisor" at the restaurant. In this capacity, the Employee took orders, made pizza and dough, served customers, and cleaned. The Employee had an assistant and had a key to the restaurant. At the end of each shift, the Employee placed the restaurant's earnings into an envelope which was inserted through a hole into the locked desk of Gov.

    b. the Employee's duties did not include responsibility for hiring or firing. The Appellant participated in some employee interviews, but hiring decisions were made by Gov.

    c. the Employee was not responsible for disciplining other employees. The Employee reported any misconduct by other employees to Gov.

    d. the Employee was not responsible for scheduling staff; this was handled by Gov.

    e. the Employee and other senior staff covered when Gov was absent or on vacation, typically for about 6 weeks per year.

    f. the Employee met with Gov, typically twice per month, on the Employee's day off, at a local coffee shop. The purpose of these meetings was to discuss business and personal matters. The Employee was not paid for these meetings, which typically lasted 30 to 40 minutes.

    g. the Appellant paid the Employee 3% of total earnings as vacation pay during the whole of the Employee's employment.

11. C.Y., a former employee of the restaurant, gave evidence on behalf of the Employee. C.Y. worked at the restaurant from 2009 to 2013. C.Y. performed the same duties as the Employee. C.Y. testified that the Employee did not hire or fire other employees.

12. The following summarizes the information supplied by Gov:

    a. at the times material to this matter, the Appellant restaurant employed 10 to 12 employees. On the "graveyard" shift that the Employee worked there would normally be 1 or 2 employees on duty.

    b. While Gov was responsible for hiring, firing and disciplining employees on the day shift, the Employee did so with respect to the graveyard shift. In addition, the Employee was responsible for training and scheduling employees on the graveyard shift, and for managing the kitchen's budget.

c. Gov and the Employee met every week or two at a coffee shop to discuss employee performance and other business management issues.

d. the Employee paid suppliers with funds from the cash register.

e. the Employee was permitted, because he was a manager, to exchange large bills in the cash register for smaller bills in the possession of the Employee.

f. the Employee was solely responsible for the restaurant during Gov's vacation absences.

g. the Employee was at liberty to take breaks of any duration during working hours.

13. The Appellant tendered two written statements, each signed by 5 current or former restaurant employees. The following summarizes the contents of these statements:

a. the first statement, apparently executed by "the workers/staff of Romano's Pizza" on December 19, 2019, states that the Employee "was the in-charge manager" (the "December 19 Statement").

b. the second statement, dated March 16, 2020, was signed by five "workers/employees of Romano's Pizza", four of whom were the same employees who executed the December 19 Statement (the "March 16 Statement"). This statement states that the Employee "was the manager/supervising/directing us [sic] at Romano's Pizza." The Employee "was training the employees, calling to fill the shift, policies are followed, authorizing the overtime, off and absence of employees, arranging work schedules, altering work processes and has a great advantage and responsibility for the store." The Employee "handled all the money and transactions."

14. Five current or former employees of the restaurant gave evidence on behalf of the Appellant. The following summarizes the evidence of those witnesses:

a. H.R. is a current restaurant employee. H.R. was hired by Gov but worked with the Employee on the graveyard shift for a year or two. H.R. stated that the Employee hired, fired and scheduled employees, and dealt with money.

b. W.D. was formerly an employee of the Appellant. W.D. testified that the Employee was the manager of the restaurant and had "big power", including the ability to hire and fire employees. In addition, the Appellant tendered a statement signed by W.D. on March 11, 2020, in which W.D. stated that the Employee "became the manager of Romano's Pizza and he has big power."

c. P.N. is a former employee of the Appellant. P.N. stated that all employees voluntarily agreed to work overtime at regular time rates. P.N. stated that the Employee was "the principal manager" who was "in-charge" and ordered supplies and scheduled employees. The Appellant tendered a statement signed by P.N. on March 13, 2020, in which P.N. stated that the Employee "became the principal manager, he supervised and directed, also he is the one in-charge of the store."

d. S.S. replaced the Employee and is currently described as the "manager". S.S. testified that the Employee was the manager solely responsible for hiring and scheduling of employees, and for handling of money. The Appellant tendered a statement signed by S.S. on March 18,

> 2020, in which S.S. stated that the Employee "was the only one manager that supervised, directed, held responsibilities for employees by hiring and calling for shifts, making sure policies were followed, handling money and all kinds of transactions, doing the schedules and training." S.S. stated that the Employee "had the great advantage of responsibilities including charged [sic] of safety key when Mr. Kenan Gov, the owner is on holidays."

15. Mr. M. testified as the Appellant's accountant. Mr. M. stated that the Employee's job title was "manager". Mr. M. had no knowledge, however, of the Employee's duties.

16. Following the hearing, on July 27, 2020, Gov sent an email to a colleague of the Director questioning the manner in which the hearing was conducted. Specifically, Gov raised the following concerns:

a. Mr. M was allegedly presented as the representative for the Appellant. The Director allegedly "refused to talk to [Mr. M]";

b. the Employee was permitted to join the hearing late;

c. during the hearing, the Director asked Gov to leave the room while the Director asked a witness if she had been threatened in order to secure her testimony; and

d. during the hearing, the Director allegedly became annoyed at the participation of a translator for one of the Appellant's witnesses who speaks little English.

The Determination

17. The Director considered the information provided by the Employee, the Appellant and all of the witnesses, and issued the Determination.

18. The Director considered the question of whether the Employee was a manager, in accordance with the provisions of the *Employment Standard Regulation*, B.C. Reg 396/95 (the "*Regulation*"), s.1, which states that:

> "manager" means
>
> a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
>
> b) a person employed in an executive capacity;

19. The Director stated that the question of whether or not an individual is a manager, and exempt from the requirement to pay overtime and statutory holiday pay, turns not on the individual's job title, but on an examination of the totality of the employee's duties. Consideration is to be given, the Director held, to the amount of time the employee spends directing human and other resources, and the degree to which the employee exercise management power and authority. The Director noted that the onus is on an employer to show that an employee is a manager.

20. The Director examined the evidence as to the Employee's duties and found that:

a. the Employee had authority to close the restaurant early, if there was little business;

b. the Employee stated that he never hired or fired staff. In contrast to this, Gov claimed that the Employee hired, trained and fired staff; and scheduled staff;

c. the Employee claimed that the limit of the Employee's involvement with financial resources was ordering food and paying suppliers during his shift. Gov claimed that the Employee managed the kitchen budget of $500.00. The Director concluded that the Employee was permitted to pay suppliers with cash from the register, and handled the cash collected during a shift;

d. the Employee had a key to the restaurant;

e. the Employee met semi-regularly with Gov to discuss restaurant matters; and

f. the Employee and other employees would act for Gov during his vacation absences.

21. The Director considered the December 19 Statement and the March 16 Statement, and noted that the Appellant presented no evidence as to who authored these statements, the circumstances in which the employees signed the documents, or that the statement had been translated for the benefit of S.S. Due to these concerns, the Director attached little weight to these two statements.

22. The Director attached little weight to the evidence of H.R., as H.R. was unable to recall any names of persons hired or fired by the Employee, and because the questions that Gov put to H.R. during direct examination were leading.

23. The Director attached no weight to the evidence of W.D. because W.D. was unable to recall any names of persons hired or fired by the Employee, and because W.D. "displayed significant animus" toward the Employee.

24. The Director declined to rely on the evidence of P.N. or S.S., because neither was able to describe any managerial duties performed by the Employee, and because they simply assented to Gov's leading questions in direct examination.

25. On an assessment of all of the evidence, the Director evaluated whether the Employee's principal duties were managerial and found that they were not. The Director found that the Employee's principal duties were making pizza, dealing with customers, and cleaning up. The Director held that the Employee did not spend a significant amount of time in supervising or directing human or other resources and did not act in an executive capacity. The Director held that the duties performed by the Employee did not establish that the Employee was a manager, as defined in the *Regulation*.

26. The Director concluded that the Appellant was not exempt from liability to the Employee for overtime and statutory holiday pay.

27. The Director undertook a detailed calculation of the amounts owing for overtime and statutory holiday pay.

The Appeal

28. On December 14, 2020, the Appellant filed, within the statutory appeal period, an appeal of the Determination (the "Appellant's Submission"). Included in the filing were the completed Appeal Form, written reasons and arguments in support of the appeal, the Determination, and the Reasons for the Determination.

29. In the Appeal Form, the Appellant indicated that the grounds for the appeal of the Determination were that the Director erred in law, and that the Director failed to observe the principles of natural justice, in making the Determination.

30. The office of the Tribunal requested that the Director provide a complete copy of the documentary record (the "Record") which was before the Director at the time that the Determination was made. The Record was supplied by the Director on January 21, 2021 and was cross disclosed to the Appellant and the Employee.

The Submissions

(i) *The Appellant's Submission*

31. In the Appellant's Submission, the Appellant presented the following arguments:

a. the Director erred in law by:

i. attaching little weight to the evidence of H.R., ignoring this witness' evidence that the Employee arranged work schedules, had possession of keys, and dealt with money for the Appellant. The Appellant characterized this as acting on a view of the facts that could not reasonably be entertained;

ii. attaching no weight to the evidence of W.D., failing to consider this witness' evidence that the Employee had possession of key and "had the full power of the shop";

iii. attaching no weight to the evidence of P.N., failing to consider this witness' evidence that the Employee had the authority to schedule and determine other employees' hours. The Appellant characterized this as acting on a view of the facts that could not reasonably be entertained;

iv. attaching no weight to the evidence of S.S., failing to consider this witness' evidence that the Employee was a manager. The Appellant characterized this as acting on a view of the facts that could not reasonably be entertained;

v. concluding that the Employee had devoted little time to managerial duties, despite the evidence that the Employee was the most senior person in attendance during shifts, had a key to the restaurant, handled cash, and had authority to close the restaurant as business required. The Appellant characterized this as acting on a view of the facts that could not reasonably be entertained.

vi. failing to recognize that the Employee and Gov met regularly "to discuss Restaurant matters", thus acting on a view of the facts that could not reasonably be entertained;

vii. failing to recognize that the Employee was paid in cash for the period May 16 – 22, 2019;

viii. failing to recognize that the Employee had access to a company stamp; and

ix. acting on a view of the facts that could not reasonably be entertained by failing to consider that the Employee had an assistant.

b. the Director failed to observe the principles of natural justice because:

i. the Director excluded Mr. M., the Appellant's representative, from the hearing until Mr. M. gave oral evidence; and

ii. the Director failed to give the Appellant an opportunity to address the Director's concerns about the December 19 Statement and the March 16 Statement.

(ii) *The Director's Submissions*

32. In response to this Appeal the Director filed the following submissions:

a. the Director considered the evidence of the parties and the witnesses and considered whether the evidence supported the argument that the Employee's principal duties consisted of supervising or directing human or other resources. The Director concluded that the evidence did not support this argument;

b. the Director reasonably declined to apply weight to the evidence of some of the witnesses based upon an assessment of their credibility;

c. the Director considered, and rejected, the argument that having an assistant demonstrated that the Employee worked in a managerial capacity, pursuant to the provisions of the *ESA*;

d. there was no evidence before the Director that the Employee had been paid in cash for the period May 16 - 22, 2019.

e. the Director was not aware that Gov wanted Mr. M. to act as both the Appellant's representative and a witness at the hearing. The Director excluded Mr. M. to ensure that Mr. M.'s testimony was not affected by the evidence of others. The Director was not told that Mr. M. had better English-language skills than Gov. During the hearing, the Director did not sense that Gov had any trouble speaking or understanding English; and

f. the Director did not have an obligation, pursuant to the principles of natural justice, to provide the Appellant an opportunity to clarify evidence that appeared to the Director to be inconsistent or unrealistic. The Director cited the decision of this Tribunal in *Re Ulrike Roth and Benoit Brochu*, 2020 BC EST 44, in support of this argument.

(iii) *The Submissions of the Employee*

33. In response to this Appeal, the Employee tendered submissions by email, after the date set to do so. The following is a summary of the relevant submissions:

a. Gov speaks English well, and better than the Employee;

b. all employees had access to the Roman's Pizza stamp;

c. it was inappropriate that testimony was provided by current employees, some of whom were relatives of Gov;

d. none of the Appellant's employees were designated as manager. The Employee could not have been a manager because he had little education; and

e. the Employee was paid hourly, not by way of fixed salary.

(iv) *The Appellant's Final Reply Submissions*

34. In the Appellant's Final Reply Submissions, the Appellant tendered the following arguments:

a. the Employee has demonstrated a competence in English;

b. the Employee possessed a "safety key" "because he was the manager";

c. the Romano's Pizza stamp was always locked in a drawer;

d. evidence has become available that was not available at the time the Determination was being made. This evidence consists of:

i. a handwritten statement by S.S. (translated to English) dated April 1, 2021;

ii. a handwritten statement by W.D., dated April 2, 2021;

iii. a handwritten statement by H.R. dated April 4, 2021;

iv. a handwritten statement by P.N. dated April 5, 2021.

e. this evidence was not available at the time the Determination was being made because the Appellant was not aware that the Director would attach little weight to the testimony of these witnesses. This evidence is relevant to the issues in this appeal. The evidence represents knowledge of the employees about the operation of the restaurant and demonstrates that the Employee was a manager.

(v) *The Further Submissions of the Employee*

35. On April 15, 2021, the Employee tendered an unsolicited email in further response to the Appellant's Final Reply Submissions. There was nothing new or relevant in the Employee's further submission.

ANALYSIS

Did the Director err in law in making the Determination?

36. In the appeal submissions the Appellant alleges that the Director committed errors of law in making the Determination.

37. This Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

38. The Appellant has challenged the Director's decision to attach little or no weight to the evidence of H.R., W.D. P.N. S.S., on the basis that doing so amounted to acting on a view of the facts that could not reasonably be entertained.

39. The function of this Tribunal "is not to re-weigh or second guess the Delegate respecting findings of fact, such as matters of credibility, or the weight to be given certain evidence": *Re Takhar Electric Ltd.*, BC EST #D052/08. Assessments of credibility are questions of fact, which are entitled to deference. As this Tribunal stated in *Re: Garrick Automotive Ltd.*, 2020 B EST 85:

> The assessment of the reliability of evidence as well as the credibility of the witnesses is within the authority of the delegate. The issue of what weight to be given to certain evidence and the credibility of any witnesses are questions of fact, not law.

40. The Director made the following findings of fact with respect to the evidence presented by the Appellant:

a. the oral evidence of the four employee witnesses was not reliable and should attract little or no weight: and

b. the two statement, each signed by five of the Appellant's employees, were not reliable, and should attract little or no weight.

41. I am not prepared to disturb those findings of fact.

42. Having made those findings, the Director then went on to consider the balance of the evidence presented at the hearing. That evidence consisted, in large measure, of the oral evidence of the Employee and of Gov on the issue of whether or not the Employee was a manager. The Director considered the duties performed by the Employee, as described above, and considered the provisions of the *Regulation*, and its definition of "manager".

43. The Director examined what were the principal responsibilities of the Employee, and found that these consisted of making pizza, dealing with customers, and cleaning the restaurant. The Director also considered the amount of time that the Employee spent in performing various duties for the Appellant. The Director concluded that the Employee's principal duties were not managerial, and that the Employee did not act in an executive capacity.

44. I find that the Director correctly applied the statutory provision, and correctly assessed the test for determining whether an employee is a manager, by examining the principal duties performed by the Employee. In *Lazy F-D Ranches & Hay Sales Ltd.*, 2021 BCEST 6 ("*F-D Ranches*"), this Tribunal stated that

> The phrase "principal employment responsibilities" in relation to a "manager" was formerly worded as "primary employment duties". In *Director of Employment Standards (Amelia Street Bistro)*, BC EST # D479/97, a three-person reconsideration panel held (at page 6):
>
> > Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager".
>
> The *Amelia Street* decision, which has frequently been cited with approval in later Tribunal decisions, supports the notion that an analysis of the individual's actual duties should be undertaken, with a view to determining the employee's **predominant** duties among all of the duties that the employee actually performed (see *Lockerbie*, *supra*). While the weight to be attributed to the individual factors identified in *Amelia Street* will depend on the circumstances of the particular case, the person's actual job title will invariably be of little or no assistance. Further, provisions exempting employees from minimum statutory protections should be strictly construed, consistent with the well-established notion that *ESA* provisions that limit or restrict statutory entitlements should be interpreted narrowly. [**Bold** emphasis added.]

45. The Appellant argues that the Director acted on a view of the facts that could not reasonably be entertained. I disagree. The Director correctly applied section 1 of the *Regulation*, and properly considered whether the evidence demonstrated that the Employee's principal duties were managerial. The Director concluded that they were not. I find that the Director acted on a view of the facts that was reasonable.

46. The Appellant also argues that the Director erred in law by failing to recognize that the Employee was paid in cash for the period May 16 – 22, 2019. The Director has responded by arguing that there was no evidence presented that the Employee was paid in cash for that period. From my review of the record, I find no evidence that establishes that the Employee was paid in cash for that period.

47. Based upon the foregoing, I find that the Director did not err in law in making the Determination.

Did the Director fail to observe the principles of natural justice in making the Determination?

48. In its appeal, the Appellant alleges that the Director failed to observe the principles of natural justice in making the Determination. More specifically, the Appellant alleged that the Director failed to observe the principles of natural justice by excluding Mr. M., the Appellant's representative, from the hearing until the time for Mr. M. to give oral evidence; and by failing to give the Appellant an opportunity to address the Director's concerns about the December 19 Statement and the March 16 Statement.

49. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies, as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D 050/96).

50. Natural justice thus requires the Director to provide certain procedural protections to both parties, and to conduct investigations in an unbiased and neutral manner.

51. The Director has stated, in its submissions, that the Appellant did not inform the Director that Mr. M. was to appear as the Appellant's representative at the hearing. The Director also stated there was nothing in the Appellant's conduct at the hearing that would have led the Director to conclude that Gov was at a disadvantage with respect to the English language. I am satisfied with that explanation. I am also satisfied that the Director afforded the Appellant the procedural protections required by the principles of natural justice, by affording the Appellant the opportunity to know the case against it, and by affording the Appellant the opportunity to present its case in the form of documents and the oral evidence of Gov and the Appellant's employees.

52. The Appellant also alleges that the Director should have given the Appellant the opportunity to address concerns the Director had about the reliability of the Appellant's evidence. The Director referred, in submissions to this appeal, to the decision of this Tribunal in *Re Ulrike Roth and Benoit Brochu*, 2020 BC EST 44. In that case, the Tribunal stated that:

> … the Director had no obligation to return to [the appellant] for an explanation of statements the Director found to be inconsistent or unrealistic. It was Ms. Roth's obligation to present a consistent and realistic framework for her claim. She alone bears the responsibility for the effect of the case she presented.

53. I concur. The Appellant was afforded the opportunity to present its evidence, both documentary and oral. The fact that the Director did not find some of that evidence reliable, and did not find the remainder of the evidence compelling, did not then require the Director to afford the Appellant a further opportunity to argue its case and attempt to bolster its evidence.

54. I am satisfied that the Director observed the principles of natural justice, by affording sufficient opportunities to the Appellant to know the case and the right to present evidence. I dismiss this ground of appeal.

Has new evidence come to light that was not available at the time that the Determination was made?

55. The Appellant has attempted, in its Final Reply Submissions, to raise a further ground of appeal that was not raised in its initial filing. The Appellant argues that new evidence has become available that was not available at the time that the Determination was made. That new evidence allegedly consists of four statements signed by employees of the Appellant in April 2021, long after the hearing into this matter. The Appellant argues that these statements could not have been discovered and presented prior to the

hearing because the Appellant "was not aware that the Director would put little, if any, weight in the evidence of the witnesses".

56. The issue of the admissibility of new evidence before this Tribunal was addressed in the decision of *Re Davies et al.*, BC EST # D171/03. In that case, the Tribunal noted that an appeal to the Tribunal is not an opportunity for an appellant to have the matter re-tried. The Tribunal stated that:

> This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made.

57. The Tribunal in *Re Davies* set out a test that must be met for the admission of new evidence on appeal:

> In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> b) the evidence must be relevant to a material issue arising from the complaint;
>
> c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

58. In essence, the Appellant argues that the statements of the four employees, created in April 2021, constitute new evidence, as the Appellant could not have known that the Director would have concerns about the reliability of the evidence of the Appellant's employees. The Appellant argues that the statements constitute evidence that has now been discovered and which should be considered as part of this appeal.

59. The statements clearly did not exist at the time of the hearing; they were created much later in an attempt by the Appellant to have this Tribunal re-try the matter that was before the Director. However, the content of the statements, namely information in the knowledge of the employees, was clearly available and discoverable in advance of the hearing. In fact, the Appellant attempted, by tendering earlier statements signed by the same employees and by presenting the employees themselves to give oral evidence at the hearing, to convince the Director that the employees' information established that the Employee was a manager. The Director was not convinced. By presenting the statements at this time and characterizing them as "fresh evidence", the Appellant is attempting to have this Tribunal re-assess the evidence of the employees, which evidence was rejected by the Director.

60. There is nothing probative about the statements themselves. The contents of the statements, being information in the knowledge of the employees, was clearly discoverable before the hearing.

61. The Appellant has advanced further arguments, in its Final Reply Submissions, related to the "safety key" and the Romano's Pizza stamp. I find that this is a further attempt by the Appellant to re-try the facts that were before the Director at the hearing, and I decline to consider these arguments.

62. The Appellant has not satisfied the test for the admission of the statements as new evidence that should be considered by this Tribunal, and I dismiss this late ground of appeal.

CONCLUSION

63. I find that the Director committed no error of law in making the Determination. I am satisfied that the Director correctly applied the relevant statutory provision in assessing whether the Employee was a manager. I am satisfied that the Director considered all of the evidence presented and acted reasonably in concluding that that evidence did not establish that the Employee's principal duties were managerial.

64. I find that the Director appropriately observed the principles of natural justice in conducting the hearing and in making the Determination.

65. I do not find that there is new evidence available that was not available at the time that the Determination was made.

ORDER

66. Having reviewed the Determination, the Appellant's submissions, the submissions of the Director and the Employee, and the Record, I dismiss this appeal, and confirm the Determination pursuant to section 115(1) of the *ESA*.

James F. Maxwell
Member
Employment Standards Tribunal