An appeal

- by -

Sate Express Foods Inc.

- 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 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2006A/125

DATE OF DECISION: January 15, 2007

DECISION

OVERVIEW

1. This is an appeal by Sate Express Foods Inc. ("Sate") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Sate challenges a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") on September 18, 2006 in respect of a complaint filed by Brian Oentoro ("Mr. Oentoro").

2. The Delegate decided that Sate had contravened sections 18 and 58 of the *Act* by failing to pay Mr. Oentoro wages and annual vacation pay. He ordered Sate to cease contravening the *Act* and the *Employment Standards Regulation* (the "*Regulation*"). He also ordered Sate to pay wages, annual vacation pay, and interest to Mr. Oentoro in the amount of $270.40. Finally, the Delegate imposed an administrative penalty pursuant to section 29(1)(a) of the *Regulation* in the amount of $500.00, which meant that Sate was required to pay a total of $770.40.

3. I have before me Sate's Appeal Form and attachments including the Delegate's Reasons for Determination, a submission from Mr. Oentoro, a submission from the Delegate, the record that was before the Delegate at the time the Determination was made, and a reply submission from Sate.

4. The Tribunal has determined that the appeal will be decided on the basis of the written materials received from the various parties.

FACTS

5. Sate operates an Indonesian restaurant business falling under the jurisdiction of the *Act*.

6. Having been referred by a mutual friend, Mr. Oentoro approached Derrick Ghieuw ("Mr. Ghieuw"), an owner of Sate, in November 2005. It was agreed that Mr. Oentoro would attend at the restaurant during the month of December for approximately twenty-five hours to train as a server. It was also agreed that Mr. Oentoro would receive no pay in respect of his attendance during this period.

7. Mr. Oentoro attended at the Sate restaurant for periods of three and a half hours over lunch on nine days during December 2005, and completed his training on December 22. After that, Sate never called him into work. Mr. Gieuw did, however, send him an email which appears to inquire as to his availability for work. In another email, responding to a query from Mr. Oentoro, Mr. Gieuw advised that the restaurant was slow, that he would like to give Mr. Oentoro an opportunity to work and he hoped to be able to do so in future, but that he could not accommodate him at that time.

8. Mr. Oentoro subsequently contacted the Employment Standards Branch. He says he was advised that he might be entitled to payment for the period of time during which he had been in training. He later filed a complaint under section 74 of the *Act*. In it, he acknowledged that he agreed to "volunteer" for a period of time at the restaurant, before being paid. He also implied that he had assumed he would be provided with paying work once his training period had been successfully completed.

9. Sate's position is that it never hired Mr. Oentoro, and he never became its employee. In its submissions it stated that Mr. Oentoro was new to Canada and approached Mr. Gieuw requesting an opportunity to gain

experience in a restaurant, at least in part so that he could improve his English. From the perspective of Sate, its permitting Mr. Oentoro to be present at the restaurant was to be characterized as nothing more than a gesture of goodwill. He was there to job shadow only, and to learn by observation. He was assigned no work duties, and so it made no difference if Mr. Oentoro did not show up. Sate kept no record of his attendance. At no time was he offered a paying job. Indeed, he was specifically advised that there would be no guarantee of employment after he completed his volunteer experience.

10. The Delegate conducted a hearing attended by Mr. Oentoro and representatives of Sate, at which they led evidence and made submissions. In his Determination, the Delegate considered the legislation and case authority and decided that Mr. Oentoro's time spent in training, properly construed, meant that he must be considered to have been a Sate employee for the purposes of the *Act*. In coming to this conclusion the Delegate relied heavily on the definition of "employee" in section 1 of the *Act*, which includes "a person being trained by an employer for the employer's business". He was also influenced by the evidence of a witness tendered by Sate, one Royce Sin ("Mr. Sin"), another server employed at Sate at the time Mr. Oentoro was "on trial", who testified that while Mr. Oentoro spent much of his time merely observing, he did on occasion bring menus to customers and serve them water, as well as wipe tables, clear dishes and place them in the dishwasher. This led the Delegate to conclude that Mr. Oentoro was, in the words of another part of the definition of "employee" in section 1 of the *Act*, being allowed by Sate "to perform work normally performed by an employee" of Sate. The Delegate further stated that the *Act* should be given the fair and liberal interpretation mandated by section 2, by which he meant that an interpretation of its language which extends the protection of employees through minimum standards of employment should be preferred over one that does not. Finally, the Delegate referred to section 4 of the *Act*, which stipulates that an agreement to waive any of the requirements of the *Act*, by which the Delegate must have meant the agreement between Mr. Oentoro and Sate that Mr. Oentoro attend and perform tasks normally performed by an "employee" for free, was of no effect.

11. In the result, the Delegate ordered Sate to pay wages and annual vacation pay in respect of the hours Mr. Oentoro spent in training at the Sate premises. The number of those hours was not disputed by Sate. As no rate of pay had been stipulated for those hours, the Delegate ordered that Sate pay wages for them at the minimum wage rate of $8.00 per hour. Mr. Oentoro's complaint had contained a claim for payment of a portion of the tips collected during his time at the restaurant. The Delegate declined to allow this aspect of Mr. Oentoro's claim, relying on the definition of "wages" in section 1 of the *Act*, which specifically excludes "gratuities".

ISSUES

12. Can it be said that Sate's appeal should succeed for any of the reasons set out in Section 112 of the *Act*, that is:

- the Delegate erred in law;
- the Delegate failed to observe the principles of natural justice in making the Determination;
- evidence has become available that was not available at the time the Determination was being made.

ANALYSIS

13. Sate's Appeal Form identifies as its ground of appeal that the Delegate failed to observe the principles of natural justice in making the Determination. Such a challenge gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in Sate's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

14. I have reviewed the materials submitted by the parties on this appeal. It is not obvious to me that Sate was unaware that Mr. Oentoro was claiming wages as an employee for the time he spent in training at Sate's restaurant in December 2005. That was Mr. Oentoro's claim from the beginning, and the record shows that Sate took pains to challenge it immediately. The Delegate conducted a hearing at which Sate was offered, and accepted, the opportunity to lead evidence and tender arguments against an interpretation of the circumstances which might have led the Delegate to conclude that Mr. Oentoro was an employee, rather than a volunteer. There is nothing in the record the Delegate submitted for the purposes of this appeal, or in the submissions delivered by the various parties, which even remotely suggests that the proceedings before the Delegate were conducted unfairly in the sense that Sate was denied an opportunity to know the case it had to meet, or to be heard in its own defence.

15. Does this mean that Sate's appeal must be dismissed, without further consideration. It does not. There is no evidence the representatives of Sate who prepared the Appeal Form had the benefit of legal counsel. It is probable that as lay people they will have had but a dim understanding of the fine distinctions between an error of law, the principles of natural justice, or the basis on which evidence may be held to have become "available" on appeal when it was not so available at the time the Determination was being made. For these reasons, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, in order to do justice to the parties, regardless of the particular box an appellant has checked off on the Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03).

16. In my opinion, the nub of Sate's appeal is that the Delegate erred in deciding that Mr. Oentoro was an employee entitled to wages during his training period in December 20005. Whether a person is an employee for the purposes of the *Act* depends on the application of a legal standard to a set of facts. It is therefore a question of mixed fact and law (see *Housen v. Nikolaisen* 2002 SCC 33). In order for Sate to be successful in establishing that the Delegate made an error of mixed fact and law amounting to an error of law for the purposes of section 112 of the *Act*, it would have to show either that the Delegate made a finding of fact based on no evidence, acted on a view of the facts which could not reasonably be entertained, misinterpreted or misapplied a section of the *Act*, or misapplied an applicable principle of the general law (see *Jane Welch* BC EST #D161/05).

17. In my opinion, it cannot be said that the Delegate made findings of fact in the absence of any evidence. That Mr. Oentoro was being trained as a server was acknowledged by Sate. The real question was whether, in the language of the section 1 definition of "employee" in the *Act*, he was being trained "for the employer's business". Sate denies that he was. Mr. Oentoro thought that that was the reason he was being given the training. The Delegate agreed with Mr. Oentoro's position on this issue. In my view, there was evidence to support the Delegate's conclusion, principally in the form of the emails sent by Mr. Gieuw to Mr. Oentoro after the completion of Mr. Oentoro's training in which Mr. Gieuw asked about Mr. Oentoro's availability, and later that Sate wished to provide Mr. Oentoro with an opportunity to work

but the restaurant was slow and he could not be accommodated at that time. A reasonable inference to be drawn from this evidence was that Mr. Oentoro had been trained to perform work at Sate's restaurant, and that the expectation of both parties was that Mr. Oentoro would work at the restaurant thereafter, but that economic circumstances were preventing that plan from being implemented. In my view, on those facts, it was open to the Delegate to conclude that Mr. Oentoro had been trained for Sate's business, and not merely as a personal favour to Mr. Oentoro. In doing so, I cannot conclude that he misapplied the relevant definition of "employee" in the *Act*, or an applicable principle of the general law. It must be remembered in this regard that the *Act* is intended to be inclusive, not exclusive, and an interpretation of its provisions which extends the minimum protections is favoured over one that does not (see *Bero Investments Ltd.* BCEST #D035/06).

18. The Delegate also determined that Mr. Oentoro was an "employee" within the meaning of that word in section 1 of the *Act* in that he was a person Sate allowed, directly or indirectly "to perform work normally performed by an employee". The Delegate found as a fact that Mr. Oentoro served customers, loaded and unloaded the dishwasher, and to a limited extent, received training in how to prepare food. All of these tasks can legitimately be characterized as work normally performed by persons in Sate's restaurant. Sate argues that the time spent by Mr. Oentoro performing these tasks was minimal, and that the "majority" of his time was spent merely observing the activity in the restaurant. This characterization in itself constitutes a form of admission that Mr. Oentoro did provide some tangible assistance in the operation of the restaurant. Mr. Sin, a witness called on behalf of Sate at the hearing, confirmed it, and his statement submitted in support of Sate's appeal, in which he attempted to clarify some of his comments made at the hearing, does not, in my opinion, significantly detract from the force of his earlier comments. Finally, the fact that Sate provided Mr. Oentoro with meals while he was present for his training at the restaurant reinforces the inference that his presence was of some value, and needed to be rewarded.

19. In considering whether I should decide that the Delegate made an error of fact amounting to an error of law on this issue it also behooves me to remember that the Delegate conducted a hearing in this case, which provided him with an opportunity to see the witnesses and hear their evidence. I have not. In the absence of compelling evidence of what authorities like *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354 refer to as palpable and overriding error, I am not prepared, nor am I permitted, to second-guess the Delegate's finding of fact that Mr. Oentoro performed work normally performed by employees at the restaurant. Having found this as a fact, the Delegate was entitled, for this reason also, to conclude that Mr. Oentoro was an "employee" for the purposes of the *Act*.

20. The principal concern expressed by Sate throughout its material filed in support of its appeal was that Mr. Oentoro agreed to be trained on a volunteer basis, that is, without remuneration, and that there would be no guarantee of employment thereafter. In light of what it considered to be Mr. Oentoro's agreement to these terms of engagement Sate feels victimized by the Determination, and in particular by the imposition of the administrative penalty. The flaw in this analysis, however, is that it matters not whether Mr. Oentoro may have agreed to train for no pay. This is so because section 4 of the *Act* provides that an agreement to waive any of its requirements has no effect. Section 4 may seem to exact a harsh result on employers like Sate, but it is meant to ensure that they comply with the minimum standards set out in the legislation. It also reinforces the principle that employers must familiarize themselves with the provisions of the *Act*. If they fail to do so, they act at their peril.

21. For these reasons, I find that Sate's appeal cannot succeed.

ORDER

22. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated September 18, 2006 be confirmed.

Robert Groves
Member
Employment Standards Tribunal