

An appeal

- by -

FS Food Equipment & Operating Inc. carrying on business as Fresh Slice Pizza
("FS Foods")

- 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: Carol L. Roberts

FILE No.: 2008A/132

DATE OF DECISION: January 13, 2009

FACTS AND ARGUMENT

7. Although there were a number of issues before the delegate, the sole issue on appeal is whether Mr. Khalilzadeh was an owner operator of FS Foods or a FS Foods employee. Therefore, I have set out only those facts and findings relevant to this issue.
8. Mr. Khalilzadeh held various positions with FS Foods from August 1, 2004 until December 15, 2007. On December 31, 2007, the parties entered into an “Owner Operator” agreement for the Granville Street Fresh Slice location. The agreement specified that Mr. Khalilzadeh would lease the location for a specified amount, implement the rules and regulations as set out in FS Foods’ operating manual and implement certain requirements as specified in the inspection report. That included the requirement that Mr. Khalilzadeh deposit the money from his daily sales into FS Foods’ bank account. They also entered into a “Self Employee Contract” which specified that Mr. Khalilzadeh would be responsible for such things as income tax, vehicle maintenance, insurance and Workers Compensation. According to a separate “annual agreement”, FS Foods was to pay Mr. Khalilzadeh 10% of the net profit less \$1500 deductible weekly plus 15% of the royalties. According to that document, Mr. Khalilzadeh was to receive two weeks’ annual vacation and a medical and dental plan. It specified that Mr. Khalilzadeh was to give two month’s notice of termination, one month’s notice before taking vacation, and if he worked more or less than 90 hours in one two week period, he could work “less or more following period only it does not go beyond that (sic)”. All of the documents appear to have been drafted by FS Foods.
9. The record shows that Mr. Khalilzadeh and FS Foods had entered into similar agreements for the two other locations he worked at, one in September, 2004 and the other in January, 2005.
10. Upon entering into these agreements, Mr. Khalilzadeh gave FS Foods a \$14,000 deposit. Shortly after assuming responsibility for the Granville Street location, Mr. Khalilzadeh encountered difficulties with the lease and FS Foods returned the \$14,000 to him. At the hearing Mr. Russel testified that because Mr. Khalilzadeh had a poor credit history, FS Foods subleased the location on Mr. Khalilzadeh’s behalf and operated the premises under a new business agreement. Although the details of that agreement are not part of the documentary record, it appears from the oral evidence given at the hearing that Mr. Khalilzadeh would receive 100% of the profit while FS Foods assumed responsibility for the lease payments, staff payroll, advertising and assets.
11. By February 18, 2008, the business arrangement between Mr. Khalilzadeh and FS Foods had dissolved and FS Foods had locked Mr. Khalilazeh out of the Granville Street location. FS Foods subsequently commenced a small claims action to recover certain funds paid to Mr. Khalilazeh.
12. The delegate found that the relationship between the parties was not “clear cut” and that it could only be decided on “the basis of a preponderance of evidence and a balance of probabilities”. She noted that deciding whether or not a person is an employee often involved complicated issues of fact. She considered the purposes of the *Act*, the definitions of “employee” “employer” and “work”, Tribunal decisions and jurisprudence.
13. The delegate reviewed the December 31, 2007 “owner-operator” agreement, noting that it did not set out how Mr. Khalilzadeh was to be paid (if he was an employee) or what portion of income he was to receive (if he was an owner).

14. She found that, although the documentary evidence did not clearly evidence the intention of the parties in terms of their business relationship, the verbal evidence suggested that Mr. Khalilzadeh wanted to establish and operate an independent business similar to that of the other subleased locations he had operated previously.
15. Applying the four-fold test, the delegate concluded that Mr. Khalilzadeh was an employee. She noted that FS Foods exercised substantial direction and control over the workplace including all persons performing work. She determined that Mr. Khalilzadeh had to operate the outlet within FS Foods' guidelines, implement the rules and regulations outlined in the operations manual and operate within established business hours. She also found that he worked under the supervision of the "general manager".
16. The delegate determined that Mr. Khalilzadeh was not a director or officer of the business and that all assets, liabilities and third party contracts remained in FS Foods' name. She concluded that the business was not that of Mr. Khalilzadeh but FS Foods and that Mr. Khalilzadeh was an integral part of that business.
17. Although Mr. Khalilzadeh had the authority to hire and dismiss employees and negotiate wages and received a percentage of profits rather than a salary, the delegate found that this arrangement was no different than anyone else hired to manage other Fresh Slice locations.
18. The key factor in the delegate's analysis were the events of January and February 2008 when Mr. Khalilzadeh began to use sales revenue to pay personal expenses. She noted that Mr. Russell decided Mr. Khalilzadeh was in breach of his contract when he did not deposit the daily sales revenues to the corporate bank account and locked him out of the premises. She concluded that "this type of action is not inconsistent with an employment relationship coming to an end."
19. The delegate's final conclusion was that Mr. Khalilzadeh was an employee.
20. FS Foods says that the delegate erred in this conclusion. It asserts that Mr. Khalilzadeh was an independent contractor/franchisor, and that although the relationship was not as defined as it could have been, that was simply because FS Foods was attempting to assist him because of his past relationship with the company. FS Foods contends that, in coming to her conclusion, the delegate ignored the facts, witness evidence and the documentary evidence.
21. FS Foods contends that the delegate erred in concluding that there was substantial direction and control because Mr. Khalilzadeh had to operate the franchise within guidelines established by FS Foods. Mr. Russell argues that this arrangement is no different than any other franchise agreement and is necessary to "protect the brand".
22. FS Foods also argues that the delegate failed to give sufficient weight to the financial risk and opportunity for profit Mr. Khalilzadeh had. It argues that Mr. Khalilzadeh was responsible for the success or failure of the business. Mr. Russell contends that Mr. Khalilzadeh could hire as many employees as he deemed necessary and work as much or as little as he wanted and that the outlet's success was entirely dependent on him.
23. In response, the delegate says that the evidence supported her conclusion that Mr. Khalilzadeh was an employee. She noted that he had no financial investment in the outlet and therefore assumed no financial liability for its operation. The location was leased to FS Foods, all assets, accounts receivable/payable,

banking authority, staff payroll and advertising were controlled by FS Foods. She submits that even Mr. Khalilzadeh's hours of work were fixed by FS Foods. She contends that even if he was to receive 100% of the profits that point alone does not make him an independent contractor. Finally, she submits that FS Foods' termination of the relationship when Mr. Khalilzadeh did not deposit his daily cash revenues into the corporate account was one that was more akin to an employee-employer relationship than one of "owner/operator".

24. In conclusion, the delegate submits that the evidence before her supported a conclusion that the direction and control over the operation and legal and financial affairs of the business by FS Food was well beyond that of an independent contractor.

ANALYSIS

25. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
26. The burden of establishing the grounds for an appeal rests with an Appellant. A disagreement with the result, in and of itself, is not a ground of appeal. An appellant must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.
27. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
28. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
29. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.

30. Although FS Foods argues that the delegate ignored or misconstrued the evidence, I am not persuaded that is the case. FS Foods suggests that the delegate erroneously found that Mr. Khalizadeh retained a percentage of the profits rather than 100% of the profits. On page 3, the delegate did say that FS Food paid all the operating expenses after which 100% of the remaining profits were returned to Mr. Khalizadeh. In any event, even if the delegate misstated Mr. Khalizadeh's profit share, I am unable to conclude that the misstatement was material to her conclusions.
31. The Tribunal has recognized that not all franchise arrangements are the same.
32. In *3717 Investments Ltd.* (BC EST #D337/98), the Tribunal noted that although a franchisor exercises a significant degree of control over certain important aspects of the franchisee's business through owner operator agreements, that control fell short of establishing an employer-employee relationship between the franchisor and the franchisee. What must be determined was whether the experience of the franchisee was an *entrepreneurial one*.
33. In *Robyn Bourgeois* (BC EST #D466/01) the Tribunal found that the key factor in assessing whether an employee-employer or a franchisee-franchisor relationship existed was the degree and kind of influence exerted, or not exerted, on the daily operations of the franchisee. The Tribunal adopted principles set out in *Re White Spot Ltd.*, a decision of the BC Labour Relations Board (Dec. No. B352/96). In that decision, the Board recognised that some degree of control by the franchisor over the business of the franchisee was an inherent feature of any franchising arrangement and analyzed three types of franchising arrangements: "Product Distribution" or "Product and Trade Name", "Master Franchising" and "Business Format Franchising". The "Business Format Franchising" model employs the most extensive legal and operational controls as, under the agreement,
- the franchisor provides the franchisee with a total package including training, trademarks, logos, standard design for buildings, standard furnishings, colour schemes and uniforms for employees, marketing plans, operating systems, formulas and continuous advice. The franchisor dictates how the business will be operated by the franchisee including pricing policy, standards of cleanliness, hours of operation, sources of supply, hiring and training practises, quality of service and so on. In return, the franchisee must usually pay an initial franchise fee and continuing fees on a royalty basis to the franchisor, as well as adhere strictly to the rules/guidelines set out by the franchisor.
34. The Board found this type of franchise operation to employ more extensive legal and operational controls than other franchise operations. Although the issue in *Bourgeois* was on whether two entities should have been found to be associated for the purpose of section 95 of the *Act*, I find the analysis to be applicable to the facts in this case. In essence, each operation will be looked at to determine, on a factual basis, how much and what kind of influence is exerted over the "franchisee".
35. I am not persuaded that the delegate's analysis or conclusions were incorrect.
36. While it might have been the intention of the parties to enter into a franchise operation in which Mr. Khalilzadeh was an independent contractor, that was not the reality of their arrangement. In fact, Mr. Khalilzadeh bore no risk of profit or loss. Although Mr. Khalilzadeh had initially made a small investment in the business, that money was returned to him. The lease and all business assets were in FS Foods' name. All advertising and accounts payable and receivable were controlled by FS Foods. Staff were paid by FS Foods. All sales were deposited into an account set up and administered by FS Foods.

37. On all FS Foods documents, Mr. Khalizadeh was identified as the location ‘manager’. An FS Foods employee, identified as the ‘General Manager’ visited the location several times per week to oversee the operations. In sum, the facts disclose that FS Foods exerted a significant degree of control over the operations such that Mr. Khalizadeh’s experience was not an entrepreneurial one.
38. There is no basis to interfere with the delegate’s conclusion that Mr. Khalizadeh was an employee.

Natural Justice

39. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
40. There is no evidence, or suggestion, that FS Foods was denied an opportunity to know the case and respond to it. I find no basis for this ground of appeal.

New Evidence

41. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - 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.
42. All of the “new” evidence provided with FS Foods’ submission was available at the time of the hearing. I am also unable to conclude that had it been presented at the hearing, it would have led the delegate to a different conclusion on the issue of whether or not Mr. Khalilzadeh was an employee.
43. The appeal is dismissed.

ORDER

44. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated October 3, 2008, be confirmed together with whatever interest may have accrued since that date.

Carol L. Roberts
Member
Employment Standards Tribunal