Employment Standards TRIBUNAL

An appeal

- by -

FS Food Equipment & Operating Inc. operating as Fresh Slice Pizza
(the "Appellant")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2005A/211

DATE OF DECISION: February 27, 2006

DECISION

SUBMISSIONS

Ray Russell	for FS Food Equipment & Operating Ltd.
Masoud Arbabi	on his own behalf
M. Elaine Phillips	for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by FS Food Equipment & Operating Ltd., carrying on business as "Fresh Slice Pizza" (the "Appellant"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Appellant appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director"), following an investigation, on November 18th, 2005 (the "Determination"). The Determination is supported by the delegate's "Reasons for the Determination" ("Reasons") also issued on November 18th, 2005

2. By way of the Determination, the Appellant was ordered to pay its former employee, Masoud Arbabi Ghahroudi ("Arbabi"), the sum of $474.65 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the Director levied four separate $500 administrative penalties pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.* Thus, the Appellant was ordered to pay the total sum of $2,474.65.

3. The Appellant asserted in its Appeal Form that an oral appeal hearing was necessary. I do not agree. The Appellant acknowledges that the delegate "did talk with witness and party involve [sic] in this dispute" but suggests that the Tribunal should "rehear" this evidence. However, save for exceptional circumstances (and that is not the situation here), it is not the statutory mandate of this Tribunal to conduct a new evidentiary hearing (i.e., a hearing *de novo*) into the dispute between the parties.

4. By way of a letter dated February 9th, 2006 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and in that regard I have the following submissions before me:

   - The Appellant's submission dated December 17th, 2005 appended to its Appeal Form and its further submissions filed December 21st, 2005 and February 3rd, 2006;
   - Masoud Arbabi's undated submission filed January 16th, 2006; and
   - the delegate's submission dated January 6th and filed January 9th, 2006.

5. In addition to the above submissions, I have also reviewed the delegate's Reasons and the section 112(5) record.

THE DETERMINATION

6. The Appellant operates a chain of pizza outlets in the Lower Mainland. Mr. Masoud Arbabi filed a complaint alleging that the Appellant failed to pay him for all of his working hours during the period November 1st to 12th, 2004. He alleged that he "trained" at the Appellant's corporate head office on November 1st to 3rd and thereafter worked at the Appellant's West Broadway (Vancouver) outlet from November 5th to 12th, 2004. Mr. Arbabi also alleged that the Appellant unlawfully deducted from his wages the cost of a work uniform and that the Appellant did not pay him according to their pre-hire wage agreement.

7. The delegate addressed several issues in his Reasons. First, the delegate rejected the Appellant's position that Mr. Arbabi was an independent contractor rather than an "employee". Second, the delegate concluded that the Appellant failed to pay Mr. Arbabi at least the minimum wage for all hours worked up to November 7th, 2004. Third, the delegate determined that the parties agreed Mr. Arbabi would be paid $10 per hour after he completed his training period and was thus entitled to further pay for the period November 5th to 12th, 2004. Fourth, the delegate concluded that the Appellant failed to pay Mr. Arbabi his wages within 6 days after he resigned, contrary to section 18(2) of the *Act*, and thus should be penalized on that account. Fifth, the delegate determined that Mr. Arbabi returned his work uniform (a shirt) but that the Appellant nonetheless deducted $50 from Mr. Arbabi's pay contrary to section 25 of the *Act* and thus was liable for a further $500 penalty. Sixth, the delegate concluded that the Appellant failed to provide payroll records in response to a proper demand for production and, accordingly, was liable for another $500 penalty.

REASONS FOR APPEAL

8. The Appellant appeals the Determination on all three of the statutory grounds set out in section 112(1) of the *Act*: the Appellants says the delegate erred in law [section 112(1)(a)]; failed to observe the principles of natural justice [section 112(1)(b); and also says it has new and relevant evidence [section 112(1)(c)]. The Appellant has not identified what particular evidence it wishes to tender that was not tendered, or was available to be tendered, to the delegate during the course of his investigation. Accordingly, I cannot address the Appellant's third ground of appeal since there is no new evidence before me. This latter ground is thus summarily dismissed.

9. Although the Appellant's materials are rather diffuse and haphazardly organized (and, in some instances, almost wholly incomprehensible), so far as I can determine having reviewed the Appellant's various submissions, the particulars of the Appellant's reasons for appeal are as follows:

- *The delegate erred in law* by determining that Mr. Arbabi was an employee; was entitled to $10 per hour after completing his training period; that the Appellant failed to pay Mr. Arbabi's final pay within 6 days after termination; and that Mr. Arbabi actually returned his uniform; and

- *The delegate failed to observe the principles of natural justice* by failing, during the course of his investigation, to speak with relevant officials and witnesses associated with the Appellant.

10. I shall deal with each of the two above grounds—error in law and natural justice—in turn.

ANALYSIS

Alleged Errors of Law

11. Although Mr. Arbabi apparently signed a "contractor" agreement (this document is not before me), it is clear from the description of Mr. Arbabi's job duties—recounted at pages 10 and 11 of the delegate's Reasons—and a review of the section 112(5) record, that Mr. Arbabi was employed by the Appellant. I note that in several documents, the Appellant's own representatives and witnesses refer to having "hired" Mr. Arbabi and describe him as an "employee". The mere fact that Mr. Arbabi may have executed an agreement in which he was characterized as a "contractor" is wholly irrelevant. I agree with the delegate's analysis on this point.

12. As for the agreed wage rate, this is a matter of some contention between the parties. The Appellant insists—as it did during the course of the delegate's investigation—that it never agreed to a $10 per hour wage rate after Mr. Arbabi completed his introductory training period (which I take it ended as of November 3rd, 2004). Mr. Arbabi's position on this matter is, in effect, twofold. First, he says that the $10 per hour wage rate was the agreed wage rate; second, he says that he was told his wage rate would be $10 per hour after his training period ended—in essence, he relies on section 8(c) of the *Act* (pre-hire misrepresentation regarding wages).

13. The delegate had conflicting evidence before him and in the face of that conflicting evidence found in favour of Mr. Arbabi. I am unable to conclude, not having heard any of the conflicting *viva voce* evidence, that the delegate was clearly wrong in his conclusion on this particular issue. Certainly, there was evidence before the delegate that supports his finding of fact on the wage rate issue. I note that the Appellant was in a position to affirmatively refute Mr. Arbabi's evidence on this point but did not do so. Mr. Arbabi states that the Appellant's accountant, George Lee, wrote the words "$10 an hour starting wage" on Mr. Arbabi's resume—these words were apparently written on the resume when Mr. Arbabi was first offered a position. If Mr. Arbabi was lying about this matter, the Appellant could have simply submitted the resume into evidence, however, it did not do so.

14. The Appellant has not produced any evidence that would affirmatively show that it paid Mr. Arbabi all of his unpaid wages within 6 days after his employment ended. Mr. Arbabi's employment ended on November 12th, 2004 and thus his unpaid wages should have been paid by no later than 6 days after that date—see section 18(2). The Appellant submitted a final wage statement for Mr. Arbabi that is dated November 21st, 2004. Accordingly, *on its own evidence*, the Appellant contravened section 18(2) of the *Act.*

15. As for the matter of the uniform and the $50 wage deduction made from Mr. Arbabi's wages on that account, it does not really matter whether or not Mr. Arbabi actually returned the shirt in question. The Appellant's own records clearly show that the $50 deduction was made against Mr. Arbabi's pay for the pay period ending November 7th, 2004. Section 25(1) of the *Act* states that an employer must provide any required work uniform "without charge to the employee". Accordingly, the $50 deduction amounted to an unlawful attempt to foist a business cost on an employee contrary to section 21(2) of the *Act* and, as such, the amount in question was recoverable (as unpaid wages) by Mr. Arbabi pursuant to section 21(3) of the *Act.* Separate and apart from the foregoing, I am satisfied that the delegate was entitled to conclude, based on the evidence before him, that Mr. Arbabi had, in fact, returned the work shirt and thus was unarguably entitled to be reimbursed for its original cost.

Natural Justice

16. The record before me indicates that during the course of his investigation the delegate contacted the Appellant's representatives on several occasions—both by letter and by telephone—seeking their position and requesting information. The Appellant provided some information and ignored other requests. I am fully satisfied that the Appellant, in the language of section 77 of the *Act*, was given a reasonable opportunity to respond to the allegations made against it by Mr. Arbabi. So far as I can determine, the delegate considered all of the evidence and argument—sparse as it was—that was provided by the Appellant during the course of the delegate's investigation. I am unable to conclude based on the material before me that there was a denial of natural justice in this case.

ORDER

17. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$2,474.65** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal