

An appeal

- by -

Susan Ann Kelly carrying on business as
Kel-Mic Pizza and Takeout (Rockies Pizzeria)
(the “Employer”)

- 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: Yuki Matsuno

FILE No.: 2009A/161

DATE OF DECISION: February 23, 2010

DECISION

SUBMISSIONS

Susan Ann Kelly	on behalf of Susan Ann Kelly carrying on business as Kel-Mic Pizza and Takeout (Rockies Pizzeria)
Eva J. Rutherford	on her own behalf
James Mickelson	on his own behalf
Linda Mickelson-Tegart	on her own behalf
Ed Wall	on behalf of the Director of Employment Standards

OVERVIEW AND BACKGROUND

1. Susan Ann Kelly (“Ms. Kelly”) appeals a Determination of the Director of Employment Standards issued October 29, 2009, (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). The Determination was issued by a delegate of the Director of Employment Standards (the “Delegate”) after an investigation of complaints filed under section 74 of the *Act* against Susan Ann Kelly carrying on business as Kel-Mic Pizza and Takeout (Rockies Pizzeria) (the “Employer”) by three people: James Mickelson, Linda Mickelson-Tegart and Eva J. Rutherford (collectively, the “Employees”). The Employees alleged in their complaints that Ms. Kelly failed to pay wages owing to them.
2. In the Determination, the Delegate found after examining the evidence and applying the *Act*’s definition of “employee” and “employer” that the Employees were employees of the Employer. With respect to the wage rate, the Employees stated their view that they were to be paid \$15.00 per hour, while Ms. Kelly stated that she told the Employees she could not afford to pay them anything. Since there was no agreement as to the wage rate, the Delegate applied Employment Standards Branch policy and applied the minimum wage to all hours worked, determining that a collective total of wages in the amount of \$2,221.40 was owed to the Employees. The Delegate also imposed two administrative penalties of \$500.00 each on the Employer for contraventions of sections 46 (requirement to produce records) of the *Employment Standards Regulation* and section 18 (payment of wages after employee terminates employment) of the *Act*.
3. Ms. Kelly appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made.
4. I am able to decide this appeal on the basis of the written materials submitted before me, namely: the appeal form, submissions, and correspondence; the submissions of the Director and the Employees; and the Record forwarded by the Director under section 112(5).

ISSUE

5. 1. Did the delegate, on behalf of the Director, fail to observe the principles of natural justice in making the Determination?

6. 2. Has evidence become available that was not available at the time the Determination was being made?

ARGUMENT AND ANALYSIS

7. It should be noted that the onus is on Ms. Kelly to establish the grounds of the appeal. In this decision I will address the submissions of the parties only to the extent they are relevant to the issues being decided.

Principles of Natural Justice

8. The principles of natural justice refer to the procedural rights to which a party to a dispute is entitled, such as: the right to know the case against oneself; the right to have an opportunity to respond; the right to have the matter decided by an unbiased decision maker; and the right to be given reasons for the decision.
9. Ms. Kelly says that the Determination was made unfairly on the evidence that was provided. She says that she never hired the Employees and implies that the administrative penalty for not submitting employer records was therefore unfair. She says that one of the Employees, her cousin, had convinced her to open the restaurant and was going to be her partner but backed out of the partnership. She says this Employee then recruited the other two Employees to help her with cleaning the restaurant knowing there were no funds to hire anyone, and with the intention of damaging Ms. Kelly.
10. The Delegate points out in his submissions that Ms. Kelly does not dispute that the Employees worked, nor does she dispute the number of hours they claim to have worked. He says that regardless of how the Employees were hired, the protections afforded by the *Act* are triggered by the fact of an employee working for an employer. In this case the Employees were found to have performed services normally performed by employees; therefore they are owed wages, and Ms. Kelly as a result was required to keep records. He says that Ms. Kelly was aware of the activities in the restaurant and was in a position to stop the activities in the restaurant if she had any concerns. The Delegate also points out that the intentions of the parties are irrelevant unless the facts show that the complaints were filed in bad faith.
11. My review of the submissions of Ms. Kelly and the Delegate, as well as the Record, does not reveal any lack in the procedural rights afforded to Ms. Kelly. It appears that Ms. Kelly was fully informed of the complaints filed by the Employees and had opportunities to respond to those complaints. She received a Demand for Employer Records and submitted a response. There is no evidence that the decision maker, the Delegate, was biased, and no suggestion that the reasons for the Determination were inadequate in any way. Ms. Kelly clearly disagrees with the Delegate's conclusions, but such disagreement does not prove that the Delegate failed to observe the principles of natural justice. Ms. Kelly's arguments fail to support this ground of appeal.

Evidence Not Available at the Time of Determination

12. Although this ground of appeal is checked off in Ms. Kelly's appeal form, there is no indication in her submissions of any new evidence that was not available at the time the Determination was being made. No other evidence is attached to the appeal form.
13. This ground of appeal fails.

Disposition of the Appeal

14. The appeal fails on both grounds.

ORDER

15. Pursuant to Section 115 of the *Act*, I order that the Determination dated October 29, 2009, be confirmed, along with any interest that has accrued pursuant to section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal