

An appeal

- by -

Darshi's Pizza Ltd.
("Darshi's Pizza")

- 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.: 2006A/4

DATE OF DECISION: March 7, 2006

DECISION

SUBMISSIONS

Tejinder Pal Singh Gill,
Kuldip Singh Sandhu &
Jatinder Kaur Purewal

for Darshi's Pizza Ltd.

Susan Claydon

on her own behalf

M. Elaine Phillips

for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Darshi's Pizza Ltd. ("Darshi's Pizza") pursuant to section 112 of the *Employment Standards Act* (the "Act"). Darshi's Pizza appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on December 6th, 2005 (the "Determination"). The Determination was issued following an oral evidentiary hearing that was held on July 26th, 2005. The delegate's separate "Reasons for the Determination" (the "delegate's Reasons") are appended to the Determination.
2. By way of the Determination, the Director's delegate ordered Darshi's Pizza to pay its former employee, Susan B. Claydon ("Claydon"), the sum of \$1,311.04 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied eight separate \$500 administrative penalties—see section 98 of the *Act* and section 29(1)(a) of the *Employment Standards Regulation*—against Darshi's Pizza. The \$500 penalties were levied based on Darshi's Pizza's contraventions of sections 16 (failure to pay minimum wage), 17 (regular paydays), 18 (payment of wages on termination), 27 (failure to provide wage statements), 34 (minimum daily hours), 40 (overtime pay) and 63 (compensation for length of service) of the *Act*. Thus, the total amount payable under the Determination is \$5,311.04.
3. In a letter dated February 14th, 2006, the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. I note that none of the parties asked the Tribunal to hold an oral appeal hearing.
4. In adjudicating this appeal I have reviewed the section 112(5) "record" and considered the following submissions:
 - Darshi's Pizza's submissions dated January 3rd and February 10th, 2006;
 - Ms. Claydon's submission dated January 21st, 2006; and
 - the Director's delegate's submissions dated January 13th and February 1st, 2006.

ISSUES ON APPEAL

5. Darshi's Pizza appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination [section 112(1)(b)] and on the ground that evidence is now available that was not available when the Determination was being made [section 112(1)(c)]. However, a closer review of Darshi's Pizza's material indicates that one of its principal arguments is not founded on natural justice grounds but, rather, on an alleged error of law, namely, that the delegate erred in determining that Ms. Claydon was an "employee" for purposes of the *Act*.
6. I shall address the appellant's grounds of appeal after I have summarized the delegate's findings.

THE DELEGATE'S DETERMINATION AND REASONS

7. On May 12th, 2005 Ms. Claydon filed a complaint against "Love at First Bite Pizza" alleging that she worked from October 19th, 2004 to March 28th, 2005. She stated in her complaint form that her job was "sales and deliveries" and she claimed unpaid regular wages, vacation pay, statutory holiday pay and compensation for length of service.
8. As noted above, the delegate conducted a "Complaint Hearing" on July 26th, 2005 where she heard the testimony of Ms. Claydon and Mr. Tejinderpal Singh Gill.
9. Ms. Claydon testified that she was employed to make, sell and deliver pizzas and was paid \$7 per hour for work in the restaurant and a "flat rate" of \$20 per delivery (typically, she delivered pizzas on Sundays between 5 and 11 P.M.). Ms. Claydon said she often used Mr. Gill's car to make deliveries. She also testified she occasionally did some "cleaning". Mr. Gill asserted that Ms. Claydon was not an employee.
10. The delegate made the following finding (at page 2) regarding the proper identity of the employer:

[Mr. Gill], known to Claydon as Bobby, ran the business under the name "Darshi's Pizza Ltd". The business had been previously operated at the same address under the name "Love at First Bite Pizza", however, Gill never got around to changing the name on the menus or on the windows. Based on the evidence, I find as a fact the restaurant in question is properly known as Darshi's Pizza Ltd. The restaurant ceased operating some time in the spring of 2005.
11. Mr. Gill denied that Ms. Claydon was employed by Darshi's Pizza, however, the delegate found that Mr. Gill's evidence lacked credibility and the delegate thus preferred Ms. Claydon's evidence (which was independently corroborated) that she did in fact work in the restaurant and was an "employee" as defined in section 1 of the *Act*.
12. Ms. Claydon testified that she was paid \$7 per hour (in cash)—save for hours worked in March 2005 for which she was not paid at all—and she also provided a documentary record of her working hours. Mr. Gill, despite having been served with a Demand for Employer Records, did not tender any payroll records. The delegate found Ms. Claydon's evidence and records to be reliable and, accordingly, ordered a \$1 per hour "adjustment" for all paid hours so that she received at least the \$8 per hour minimum wage for all hours worked.
13. The delegate accepted Ms. Claydon's evidence that she was not paid at all for hours worked from March 1st to 31st, 2005. The delegate also determined that Ms. Claydon did not qualify for any statutory holiday pay during the period of her employment but was entitled to an adjustment for some overtime pay,

“minimum daily hours” (section 34) for three particular shifts, vacation pay and one week’s wages as compensation for length of service.

FINDINGS AND ANALYSIS

Was there an employment relationship?

14. Mr. Gill asserts in his appeal documents that “based on my recollection and to the best of my knowledge”, Ms. Claydon was not an employee of Darshi’s Pizza Ltd. and nor did I engage her as an employee of this organization”. Ms. Claydon, of course, takes issue with this latter assertion.
15. This question was the subject of disputed evidence before the delegate. Mr. Gill’s evidence was found to lack credibility—the delegate characterized Mr. Gill’s testimony as “evasive” and “lacking detail”. Mr. Gill’s continuing assertion that Ms. Claydon was never employed at his restaurant strains credulity. Ms. Claydon’s submission to the Tribunal includes photographs of her working in the restaurant and statements from two regular customers confirming that Ms. Claydon worked in the restaurant. I am fully satisfied that the delegate did not err in finding that Ms. Claydon was employed by Darshi’s Pizza.

Natural Justice

16. The basis of this allegation appears to be the suggestion that Mr. Gill, who testified at the Complaint Hearing, was prejudiced by an inability to speak and comprehend english. Mr. Gill never asked for an interpreter nor did he ever indicate that he was not fully able to participate in the hearing by reason of a lack of facility with the english language. Mr. Gill’s self-described girlfriend, Jatinder Purewal, acknowledged in her February 10th submission that “Mr. Gill does have decent verbal skills”; the problem appears to be less one of comprehension and more attributable to the fact that, as Ms. Purewal put it, Mr. Gill “is not a detail oriented person”.
17. As recounted in the delegate’s submission, Mr. Gill fully participated in the hearing and responded appropriately (though evasively) to all questions posed of him. Mr. Gill was very much aware of the financial consequences his company faced—including the likelihood of administrative penalties should the case not go his way—well in advance of the hearing. I find no merit whatsoever in the suggestion that the delegate somehow breached the rules of natural justice in conducting the hearing or in making the Determination.

Administrative Penalty for failing to produce payroll records

18. Mr. Gill makes the point that the delegate should not have issued a \$500 administrative penalty for failing to produce payroll records since there were no such records that could have been produced: “No payroll records could have been produced since there were none maintained by Mr. Gill or his partner at the time”. I consider this allegation to raise an issue of law, or at least, one of mixed fact and law.
19. The record before me discloses that on June 8th, 2005 a delegate issued a “Demand for Employer Records”. The Demand sought production of payroll records relating to Ms. Claydon and the records were to be produced by no later than June 22nd, 2005. The Demand was mailed, by certified mail, to Darshi’s Pizza’s business address (to the attention of both Mr. Gill and his partner, Mr. Sandhu—the latter being a signatory to Darshi’s Pizza’s originating appeal submissions). The Demand was also sent

by certified mail to the company's registered and records office and to each of the two directors (Messrs. Gill and Sandhu). Canada Post records indicate that each of the separate Demands was delivered to the addressee on June 9th, 2005.

20. The Demands were simply ignored; no response of any kind (letter, telephone call, e-mail etc.) was forthcoming—a pattern in this case; I note that no one representing the employer attended a scheduled “mediation meeting” held prior to the Complaint Hearing and no one from the employer had the courtesy to even notify the Employment Standards Branch that the employer would not be attending the mediation session.
21. Thus, a valid Demand for production of records was issued, received and then completely ignored. If the Darshi's Pizza had responded with the assertion that it had no records to produce, then perhaps it might have had a defence to a “failure to produce” penalty but would, in any event, have been liable for a \$500 “failure to maintain records” [section 28] penalty. However, as matters transpired in this instance, in my view, the \$500 administrative penalty issued for failing to respond to the Demand was properly levied.

New Evidence

22. The material before me does not include any evidence that is “new” in the sense that it was not available at the time the Complaint Hearing was held, or available after the hearing but before the Determination was issued. For the most part, the appellant's case is simply founded on the assertion that the delegate should not have rejected Mr. Gill's evidence and on the reiteration of the argument that Ms. Claydon was never employed by Darshi's Pizza.
23. In her February 10th submission, Ms. Purewal refers to (but did not provide) a “list of names and numbers” but has not provided any particulars regarding the nature of the evidence such persons (only one of whom—Mr. Gill's former employer—is identified) might provide and why their evidence would be relevant to the issues raised in this case. So far as I can determine, Mr. Gill's former employer's evidence is not even remotely relevant let alone probative.
24. To summarize, I am not satisfied that there is any basis for setting aside the Determination and, accordingly, this appeal is dismissed.

ORDER

25. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the total amount of **\$5,311.04** 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