

An appeal

- by -

Chefi's Bistro Ltd.
(Incorporation #BC0761343)

- 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: Philip J. MacAulay

FILE No.: 2007A/23

DATE OF DECISION: May 23, 2007

DECISION

SUBMISSIONS

Gwen Farrell	on behalf of Appellant
Don Prentice	on his own behalf
Chantel Martel	on behalf of the Director

OVERVIEW

- This is the appeal of Chefi's Bistro Ltd. (Incorporation No. BC0761343) (hereafter referred to as the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the "Act") against determination ER #146-313 (the "Determination") issued by the delegate of the Director of Employment Standards (the "Delegate") on March 2, 2007.
- The Delegate found that the Appellant had contravened section 18 of the Act and section 46 of the Regulation to the Act and ordered that the Appellant pay:
 - To the complainant, Don Prentice (the "Complainant"), the total sum of \$729.98 being wages due under section 18 of the Act (\$702.00) and interest accrued thereon under section 88 of the Act (\$27.98).

A.	Wages payable to Complainant	\$729.98
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 - Administrative penalties for first contraventions of the Act regarding:

<u>Section</u>	<u>Contravention</u>	<u>Amount</u>
18	(failure to pay wages)	\$500.00
46 of Regulations	(failure to produce records)	\$500.00
B.	Total Administrative penalties	<u>\$1,000.00</u>
	Total amount payable:	\$1,729.98
- The Appellant was also ordered to cease contravening the sections determined to have been contravened and to comply with all requirements of both the Act and its Regulations.
- In the exercise of its authority under section 36 of the *Administrative Tribunal Act*, the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.
- For the reasons set out below, I have concluded that the proper disposition of this Appeal is to cancel the Determination. It may be that, following consideration of this decision by the Director, a new Determination is issued. However, that is a matter entirely within the Director's discretion.

BACKGROUND

6. As will become apparent in this Decision, the critical question to be determined is whether or not the entity against which the Determination was made (the Appellant, Chefi's Bistro Ltd.) was, in fact, the "Employer" (as defined under the Act) of the Complainant.
7. Following from the answer to that question is the propriety of the administrative penalties that were assessed against the Appellant.
8. There seems to be no obvious issue on the appeal as to the amount ordered to be paid to the Complainant, Mr. Prentice, (\$729.98 inclusive of interest) for unpaid wages but, rather, whether the named "Employer" is the party against whom the Determination should have been made.

FACTS

9. Mr. Prentice filed a complaint on August 11, 2006. He named his employer as "Chefi's Seaside Bistro" (hereafter the "Seaside Bistro") in his complaint form. The street and mailing address of the alleged employer was stated to be 4372 Gallant Street in North Vancouver. His named "supervisor" was said to be one Jennifer Farrell. He noted his last day of work as June 24, 2006.
10. The Delegate found that the Complainant had worked as a chef at the Seaside Bistro.
11. The Delegate stated that:

"A search with the District of North Vancouver confirmed that a business licence had been issued to Chefi's Seaside Bistro for 2006 to Jennifer Farrell operating at 4371 Gallant Avenue, North Vancouver, B.C., V7G 1L1 and the mailing address being the same."
12. No document confirming this search formed part of the Record provided to this Tribunal by the Delegate.
13. However, of importance, was a September 7, 2006, Company Registry search which does form part of the Record indicating the registration of a proprietorship/firm named "Chefi's Seaside Bistro" on November 7, 2001, under registration number 01-0311942 listing two individuals, Bradley Ray Farrell and Jennifer Lynn Farrell as proprietors. One must note that a registration of a proprietorship is distinct from the registration of an incorporated entity such as the Appellant, Chefi's Bistro Ltd.
14. The Record further reveals that an Employee Insurance Benefit Record of Employment ("ROE") dated July 4, 2006, had been issued to Mr. Prentice by "Chefi's Seaside Bistro", apparently signed on its behalf by "J. Farrell". Also included was a copy of a July 14, 2006, cheque made payable from an account identified as that of Chefi's Seaside Bistro to Mr. Prentice, as well as correspondence addressed to Mr. Prentice on July 13, 2006 from "Jennifer Farrell, Owner Chefi's Seaside Bistro" concerning the cheque.
15. The Determination also records the efforts of the Delegate to engage the "Employer" in the complaint process.
16. She notes her efforts to make telephone contact. She also refers to a letter dated September 8, 2006, which was sent to Seaside Bistro advising of a scheduled mediation meeting. This letter was addressed to "Bradley Ray Farrell and Jennifer Lynn Farrell carrying on business as Chefi's Seaside Bistro" at 4371

Gallant Avenue in North Vancouver. Jennifer Lynn Farrell did respond by a letter dated September 31, 2006, apparently on behalf of Seaside Bistro. The Mediation meeting did not take place.

17. By letter dated October 31, 2006, the Delegate sent a letter to the same addressees as her September 8, 2006 letter advising that a hearing would be held regarding Mr. Prentice's Complaint on November 23, 2006. By letter dated November 2, 2006 (also sent to the same addressees), the Delegate made a Demand for Information and Documentation. The Record indicates that this letter was unclaimed. When no one appeared on November 23, 2006 on behalf of the "Employer", a voice-mail message was left by the Delegate on "Chefi's voice mail". Not having any response, the Delegate proceeded with the hearing in the Employer's absence on that date. Therefore, the only "Employer" evidence considered was the letter dated September 21, 2006, signed by Jennifer Farrell, apparently on behalf of the proprietorship, Seaside Bistro.
18. Critically, at no time up to the point of the Delegate's Determination of March 2, 2007, was any correspondence sent to the Appellant, Chefi's Bistro Ltd. nor any demands made of that company. No complaint was ever filed against the company. The naming of the company in the Determination in March 2007 was well after the six- month time limit set out in section 74 of the Act for the filing of a complaint.

DELEGATE'S FINDINGS

19. In the result, the Delegate found that reasonable efforts had been made to engage the Employer in the complaint resolution process as required by section 77 of the Act. As well, the Delegate was satisfied that "Chefi's was aware with sufficient notice of the November 23, 2006 hearing".
20. The Delegate was also satisfied that the Notice of Complaint Hearing was sent by certified and regular mail to "the Employer's last known mailing address" thus complying with the requirements of section 122 of the Act. She made a similar finding with regard to the Demand for Records.
21. It must be noted that all of the above activity was conducted with respect to the proprietorship, Chefi's Seaside Bistro, and not the entity that ended up being named as the employer in the Determination, the Appellant, Chefi's Bistro Ltd.
22. On page 6 of her Determination the Delegate states:

"On June 21, 2006, Chefi's Seaside Bistro was incorporated under the name of Chefi's Bistro Ltd. and Jennifer Farrell and Gwendolyn Ethel Farrell are listed as Directors/Officers."
23. On page 9 of the Determination the Delegate notes:

"Section 97 of the Act states when a business is transferred or sold without ceasing operation, the employees who continue to work become employees of the new employer. As Prentice was still employed by Chefi's Seaside Bistro at the time of the incorporation of Chefi's Bistro Ltd. I find that section 97 of the Act applies and accordingly Chefi's Bistro Ltd. is a successor employer to Chefi's Seaside Bistro and Prentice's employment is to be treated as if he worked for Chefi's Bistro Ltd. the entire time."
24. Attached and forming part of the Record is a January 5, 2007 search conducted through the B.C. Ministry of Finance, Corporate and Personal Property Registry, noting that "Chefi's Bistro Ltd." was incorporated

on June 21, 2006. It lists the company's registered and records offices as 1261 Seymour Boulevard, North Vancouver. It lists Jennifer Lynn Farrell and Gwendolyn Ethel Farrell as Directors. It is to be noted that this search was conducted approximately a month and a half after the November 2006 complaint hearing.

25. Apparently, on the above noted basis, the entity to whom the Determination of March 2, 2007, was addressed, and against whom the order to pay wages and two penalty payments was made, is the Appellant, Chefi's Bistro Ltd. as opposed to Chefi's Seaside Bistro. The Delegate, in effect, amended the "style of cause" changing the Respondent from the proprietorship, Chefi's Seaside Bistro, to the company, Chefi's Bistro Ltd.

ISSUE

26. The primary issue to be determined is whether or not the Determination Orders made by the Delegate of the Director against Chefi's Bistro Ltd. are valid.

ANALYSIS

27. Had the Delegate not altered the entity against which the Determination was made from the proprietorship, Chief's Seaside Bistro to the company, Chefi's Bistro Ltd., I do not see that any obvious errors were made such that any appeal against her findings could prevail. Seaside Bistro was Mr. Prentice's employer and the stated wages were due. As well, I would have found no fault in the two contraventions of the Act having been found against that proprietorship entity.
28. However, in the circumstances of this case, I find that the Determination cannot stand and must be cancelled against the Appellant, Chefi's Bistro Ltd.
29. Section 97 of the Act states:
- "97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition."
30. In order for section 97 to apply there must be evidence that "all or part of a business or a substantial part of the entire assets of a business" had been disposed of.
31. Based upon the Delegate's Determination and the Record, I can find no evidence whatever that demonstrates that such a disposition occurred in this case. The "evidence" against the corporate Appellant, Chefi's Bistro Ltd., is limited to the fact that an entity by that name was incorporated in June of 2006 and that one of its Directors (Jennifer Lynn Farrell) was also one of the registered named proprietors of Chefi's Seaside Bistro.
32. There is no evidence of any purchase, transfer or disposition of any of the business or assets of Chefi's Seaside Bistro to Chefi's Bistro Ltd. There is no evidence that the corporate entity ever conducted the business of the restaurant or employed the Complainant, Mr. Prentice.
33. It appears to me that the Delegate made assumptions based upon the similarity of the names of the proprietorship and the company, and the common name of Jennifer Lynn Farrell as a Proprietor/Director,

as being sufficient to trigger the deeming provisions of section 97. Neither of these facts is helpful in determining whether or not there was a disposition of any business or assets between the two entities.

34. Moreover, all correspondence from the Director was addressed to the proprietorship and not the company. The company never received any notice of any complaint against it, demand for records or notice of any hearing.

THE APPELLANT'S POSITION

35. In its Appeal form dated March 12, 2007, Gwen Farrell on behalf of Chefi's Bistro Ltd., notes that:

- 1) "the Appellant never operated an active business, bank account, employed any persons or contracted unrelated parties. It has generated zero dollars revenue. It has never been an employer or could it reasonably have been construed as such."
- 2) the Appellant was incorporated to develop future ventures which did not occur. There originally had been a notional intention to acquire the restaurant Chefi's Seaside Bistro operated solely by Jennifer Farrell at 4371 Gallant Avenue, North Vancouver. This did not occur because the North Vancouver Fire Department ordered costly building and equipment improvements or to cease operating. The business could not afford the improvements so it ceased operating. The notion that Chefi's Bistro Ltd. would acquire the restaurant was abandoned.
- 3) the employees of the restaurant knew they were employed by the proprietorship of Jennifer Farrell who exercised sole authority over the restaurant. At no time were employees issued documents or payments by Chefi's Bistro Ltd.
- 4) the financial affairs of Jennifer Farrell are now being administered by a Trustee.

36. In the result, the Appellant requests that the Determination and findings against Chefi's Bistro Ltd. and its Director, Gwendolyn E. Farrell be cancelled or referred back to the Director. It argues that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

POSITION OF THE COMPLAINANT RESPONDENT

37. The Complainant does not address any of the points raised by the Appellant, Chefi's Bistro Ltd., concerning the distinction between the Appellant and the proprietorship and stated: "I only know that Jennifer Farrell was the owner and boss of this restaurant. I did not know any legalities or accounting of this business and how it was being operated". He states he was responding to the appeal of "Jennifer Farrell" apparently not noting that the Appeal had, in fact, been filed by Gwen Farrell on behalf of Chefi's Bistro Ltd.

38. In a subsequent letter of April 2, 2007, Mr. Prentice reiterates the bulk of his March 27, 2007 response but still attributes the appeal to Jennifer Farrell as opposed to that of the Appellant through its Director, Gwen Farrell.

39. His final response of April 23, 2007, does not address the distinction between the proprietorship operated by Jennifer Farrell as opposed to the Appellant company, Chefi's Bistro Ltd.

POSITION OF THE DELEGATE

40. In her response, the Delegate seems, in my respectful view, to continue to proceed on the simple basis that, because the Appellant was incorporated, the requirements of section 97 had been met and that it could be deemed a successor to the proprietorship, Chefi's Seaside Bistro. She also noted that Jennifer and Gwen Farrell were the Directors of the new company. She correctly notes that, "Section 97 of the Act states that when a business is transferred or sold without ceasing operation, the employees who continue to work become employees of the new employer".
41. What the Delegate failed to consider was the lack of any evidence that any portion of the business or assets of Chefi's Seaside Bistro had, in fact, been transferred or sold to the Appellant, Chefi's Bistro Ltd. Such a disposition is a condition precedent to triggering the deeming provisions of section 97.

ANALYSIS

42. The incorporation of a company having a similar name (even one having a director who was also the operator of a sole proprietorship) is not sufficient evidence that any business or assets have been transferred between the two.
43. Moreover, based upon the record, it appears that the Delegate did not learn of the incorporation of the Appellant until she obtained a corporate search in January 2007, a month and a half after the hearing of November 2006.
44. It is clear that none of the pre-hearing correspondence was directed to the Appellant, Chefi's Bistro Ltd. nor were any mailings made to its registered and records office.
45. All correspondence and demands were addressed to the proprietorship, Chefi's Seaside Bistro, in its name, at its restaurant location, directed, *inter alia*, to Jennifer Farrell as its proprietor.
46. Nothing was addressed to, nor any demand made of, the Appellant, Chefi's Bistro Ltd., or Jennifer Farrell in her capacity as a director of that company.
47. Converting the complaint process from that of one being against Chefi's Seaside Bistro to a Determination against Chefi's Bistro Ltd. does not comply with section 77 of the Act. The Appellant, Chefi's Bistro Ltd., was not given any opportunity to respond to the complaint nor was there ever a demand made of it for any records. To amend the style of cause by adding a party and then issue a Determination against it, without notice, long after the hearing, and to find that the company failed to respond to a demand it never received does not meet a minimum standard of adherence to principles of natural justice and is wrong in law.

REMEDY AND ORDER

48. As stated earlier, there does not immediately appear to be a basis upon which one could have successfully disputed a Delegate's finding of wages being due to Mr. Prentice by his then employer, which was the proprietorship, Chefi's Seaside Bistro, operated by Jennifer Farrell. As well, it seems that the proprietorship contravened both section 18 and section 46 of the Regulations. However, there is now no Determination against the proprietorship, or Jennifer Farrell, as the Delegate has issued her

Determinations against the company, Chefi's Bistro Ltd. I have found that that Determination must be cancelled.

49. In the result, there is no Determination against the apparently appropriate party and there is a Determination against the wrong party.

50. The powers of this Tribunal upon an appeal are set out in section 115 of the Act that provides:

“115. After considering whether the grounds for appeal have been met, the tribunal may, by order,

(a) confirm, vary or cancel the determination under appeal, or

(b) refer the matter back to the director.”.

51. In this case, I find that the Appellant must succeed and order, pursuant to section 115, that the Determination of March 2, 2007 be cancelled. I make this finding without prejudice to any further investigation that the Director may wish to conduct in light of this Decision and, if appropriate, the issuance of a new Determination.

Philip J. MacAulay
Member
Employment Standards Tribunal