Employment Standards TRIBUNAL

An appeal

- by -

Corey MacKinnon

- 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.: 2007A/35

DATE OF DECISION: June 12, 2007

DECISION

SUBMISSIONS

C. MacKinnon	on his own behalf
Kathleen Demic	on behalf of the Director of Employment Standards
Cathy Hellyer	on behalf of RMD Group (the Employer)

OVERVIEW

1. This is an appeal by Corey MacKinnon, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 5, 2007.

2. Mr. MacKinnon managed the pub and restaurant kitchens at The Pier Marine Pub and Grill ("The Pier") from June 16, 2006 until he quit on September 29, 2006. Mr. MacKinnon filed a complaint alleging that he was owed wages.

3. Following an investigation, the Director's delegate determined that Mr. MacKinnon had received his full entitlement to wages under the *Act*.

4. Mr. MacKinnon contends that the delegate failed to observe the principles of natural justice in making the Determination. He asserts that "most of the points in the Determination letter are either false or contradictions".

5. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practise and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

6. At issue is whether the delegate failed to observe the principles of natural justice in making the Determination. Specifically, did the delegate err in determining that Mr. MacKinnon had been paid all wages owed?

FACTS AND ARGUMENT

7. Shortly after Mr. MacKinnon quit work, The Pier closed its doors. In early October, 2006, regular hourly employees were issued final paycheques for the last week of work. Mr. MacKinnon did not receive a paycheque for the last week of September. He alleged that he was entitled to wages for September 26, 27, 28 and 29, as well as pay for hours worked in excess of 40 hours per week during the entire course of his employment.

8. The delegate reviewed Mr. MacKinnon's calculation of hours worked, staffing schedules, copies of pay stubs of Mr. MacKinnon's period of employment, the record of employment, emails and payroll records.

9. Mr. MacKinnon's rate of pay was based on a 40 hour work week for the months of June through September, with the expectation that he might work longer hours during the summer months. Mr. MacKinnon did not keep track of his hours of work, but contended that, when he did work, he worked from opening to closing. When asked by the delegate, Mr. MacKinnon presented a calculation of his hours of work that suggested he worked between 50 and 100 hours per week.

10. The Pier's General Manager, Mike Matkovich, acknowledged that Mr. MacKinnon worked some long days. However, he disputed Mr. MacKinnon's claim that he was at the restaurant from opening to closing each day he was at work. Mr. Matkovich acknowledged that Mr. MacKinnon did not have a fixed schedule, and had the ability to set his own hours. He also acknowledged that Mr. MacKinnon worked many hours managing the restaurant. Mr. Matkovich submitted that because Mr. MacKinnon was a manager, no further compensation was owed, either in overtime hours or for the month of September.

11. The delegate noted that, even though the parties agreed that Mr. MacKinnon was a manager and thus not entitled to a premium overtime rate, he was nevertheless entitled to be paid for all hours worked.

12. The delegate found that, because Mr. MacKinnon believed he was a manger and paid on a salary basis, he did not maintain a record of his own hours of work. She concluded that his wage rate was $4,700 per month for all hours worked based on the parties' agreement. She determined that Mr. MacKinnon had been paid at least minimum wage for all hours worked. She also concluded that Mr. MacKinnon had been paid his regular rate of pay for all hours that he worked.

13. Mr. MacKinnon contends that he was not paid for the last two weeks he worked in September. He says his last cheque was for the first two weeks of September, rather than the entire month. He also argues that he worked many hours during the last month because there was only one other staff member left at the restaurant besides himself. He said that Mr. Matkovich was well aware of the Pier's staffing problems. Mr. MacKinnon also takes issue with the delegate's calculation of his hours of work.

14. The delegate submitted the record before her at the time the Determination was made. She submits that the evidence supports the conclusion that Mr. MacKinnon was paid his monthly salary for September, and that no further wages are owed for that month.

15. The delegate further submits that Mr. MacKinnon was a manager, being paid an agreed upon monthly salary, and that, although he worked long hours, he was paid his monthly salary in full each month.

16. The employer supports the Determination.

ANALYSIS

17. 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

18. The burden of establishing the grounds for an appeal rests with an Appellant. Mr. MacKinnon 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. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.

19. Mr. MacKinnon's appeal document does not describe how he is of the view he was denied natural justice. His submission focuses on what he believes is an erroneous and unfair conclusion by the delegate, as well as an explanation of why he considers it wrong and unfair.

20. As noted by the Tribunal in a reconsideration of *J.C. Creations* (EST # RD317/03), lay parties do not often understand or appreciate the distinction between the grounds of appeal. The Tribunal will not take an overly legalistic or technical approach to the ticked boxes on the appeal form, and will look at the substance, rather than the form, of the appeal.

21. Although I conclude that Mr. MacKinnon has not demonstrated a failure on the delegate's part to comply with natural justice, I find that the delegate erred in law in both concluding that Mr. MacKinnon was a manager, and in her calculations of his wages.

Natural Justice

22. 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. There is no evidence that Mr. MacKinnon was denied an opportunity to present his case, or to reply to the employer's evidence.

Error of Law

23. 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

24. 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.

25. 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.

26. The delegate concluded that Mr. MacKinnon was a manager because the parties agreed that he was. In my view, it is incumbent on the delegate to examine the nature of the employment relationship to determine whether in fact Mr. MacKinnon fell within the *Act*'s definition of a manager. As the Tribunal has noted on many occasions, how the parties characterize a relationship is only marginally relevant to that determination. The true test is the actual authority exercised by the employee. Furthermore, the burden of establishing that a person is excluded from the protections of the *Act*, or any part of it, lies with the person asserting it. (see *Northland Properties Ltd.* BC EST #D423/98, and *Amelia Street Bistro* BC EST # D479/97).

27. The record demonstrates that, in his complaint form, Mr. MacKinnon identified his job title as "chef". The evidence does not suggest that Mr. MacKinnon agreed that he was a manager, and there was no analysis to determine whether he was, in law.

28. Once Mr. MacKinnon's employment status is determined, the delegate may have a different view of whether he was entitled to additional wages. Although the employer denied that it owed Mr. MacKinnon additional wages because of his "manager" status, it acknowledged that Mr. MacKinnon worked some long days. The delegate must examine the best evidence to determine the number of hours Mr. MacKinnon worked and whether he was paid in accordance with the *Act* for those hours of work.

ORDER

29. I Order, pursuant to Section 115 of the Act, that the Determination, dated March 5, 2007, be referred back to the delegate for a reconsideration of the issue of whether Mr. MacKinnon was a manager, and whether he is entitled to regular and overtime wages.

Carol L. Roberts
Member
Employment Standards Tribunal