

An appeal

- by -

Daniel Vincent Emms and Stephen James Kuffler carrying on business as Grizzly
Mountain Grill
(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: Sheldon M. Seigel

FILE No.: 2009A/085

DATE OF DECISION: August 12, 2009

DECISION

SUBMISSIONS

Daniel Emms	on behalf of the Employer
Kyle McNaueal	on his own behalf
Ed Wall	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by the Employer, of a Determination that was issued on May 15, 2009, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that the Employer had contravened sections 18 and 27 of the *Act*, in respect of the employment of Kyle McNaueal (the “Employee”), and ordered the Employer to pay to the Employee the amount of \$8, 172.95. This amount included wages and accrued interest under s.88 of the *Act*.
2. The Director also imposed administrative penalties on the Employer under Section 29(1) of the *Employment Standards Regulation* (“Regulation”) in the amount of \$1,000.00 relating to the contraventions of the *Act*.
3. The Employer submits that the Director erred in law in making the Determination and seeks a cancellation of the Determination.

ISSUE

4. The issue in this appeal is whether the Director erred in law in making the Determination.

ARGUMENT AND ANALYSIS

5. The Appellant devotes a full half of his grounds for appeal to a detailed description of the Employee’s duties as Kitchen Manager, and offers three witnesses “that can attest to Kyle’s job as Kitchen Manager.” Absent any context, a careful review of these submissions leads one to the conclusion that the Appellant is arguing that the Employee was a manager within the definition under the *Act*. In the context of this appeal, that conclusion is odd, as the Director found the Employee to be a manager under the *Act*. Therefore the Appellant’s ground seems to be in support of the Determination in that regard.
6. Whether or not the Appellant seeks to attack the Determination on the basis of the finding that the Employee was a manager under the *Act*, I find no evidence that would suggest that the Director erred in law with respect to that finding. The Director heard relevant evidence from both parties with respect to the duties of the Employee, considered the contract of employment and other relevant evidence of the Employee’s duties and authorities. There is no suggestion that the Director considered any inappropriate evidence. The Director made a finding that the Employee was a manager, and he supported that finding with adequate reasons to allow a reader to understand what evidence led the Director to that conclusion.

7. Reference to further witnesses as recommended by the Appellant is not warranted, as there is no suggestion that the Director had insufficient evidence to make a decision with respect to the status of the Employee as a manager, and the Appellant provided no submissions as to why these witnesses (if required) were not presented at the hearing leading to the Determination.
8. The second half of the Appellant's grounds for appeal is similarly perplexing. The Appellant seems to be arguing; as the Employee was a salaried manager he would not be entitled to any overtime pay, that the Employee did not work very many hours, and that the Employee did not do a very good job. The Director found that the contract of employment was for a salary based on an hourly rate of \$16 per hour and that the Employee actually received less than the amount of the employment contract for the duration of his employment. The Determination makes no finding of entitlement to overtime pay (quite the contrary, it says the Employee is not entitled to overtime pay), and there was no live issue before the Director with respect to whether or not the Employee fulfilled his managerial duties. Accordingly, none of these apparent issues are appropriate issues for appeal.
9. The Director found that the employment relationship was based on a salaried managerial position, and the salary was based on an hourly rate calculation. The latter finding was supported by evidence of time vs. income on early pay stubs, and the progression of the Employee's status through various jobs in the establishment leading up to his promotion to Kitchen Manager. The Determination is clear as to its finding that the Employer owed wages to the Employee, and the reasoning behind both that finding and the calculation of the wages owing is adequately reasoned. I can see no suggestion of procedural or substantive irregularity that could be interpreted as an error of law.

ORDER

10. Pursuant to section 115 of the *Act*, I order the Determination dated May 15, 2009, be confirmed in the amount of \$9,172.95.

Sheldon M. Seigel
Member
Employment Standards Tribunal