

An appeal

by -

Mega III Pizzeria and Cafe Ltd. carrying on business as Crowbar Restaurant
(“Crowbar”)

- 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.: 2017A/86

DATE OF DECISION: August 21, 2017

DECISION

SUBMISSIONS

William Johnson

on behalf of Mega III Pizzeria and Cafe carrying on business
as Crowbar Restaurant

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Mega III Pizzeria and Cafe carrying on business as Crowbar Restaurant (the “Employer”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on May 19, 2017. In that Determination, the Director found that the Employer had contravened sections 40, 45 and 58 of the *Act* in failing to pay Christopher J. Scott \$11,424.97, representing overtime wages, statutory holiday pay, annual vacation pay and interest. The Director also imposed four administrative penalties in the total amount of \$2,000 for the contraventions of the *Act*, for a total amount owing of \$13,424.97.
2. The Employer appeals the Determination contending that the delegate erred in law. The Employer also contends that evidence has become available that was not available at the time the Determination was being made.
3. This decision is based on the Employer’s submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. The Employer operates a restaurant in Vancouver at which Mr. Scott was employed as a chef from approximately May 15, 2016, until November 30, 2016. On December 1, 2016, Mr. Scott filed a complaint alleging that the Employer contravened the *Act* by failing to pay overtime wages and by taking a portion of a tip pool.
5. The delegate held a hearing into Mr. Scott’s complaint on April 11, 2017. Mr. Johnson, the Employer’s sole director, represented the Employer. Jeremy Pigeon, the Employer’s general manager and part owner of the restaurant, appeared as a witness. Mr. Scott appeared on his own behalf. Scott Korzack, the Employer’s chef and kitchen manager, appeared as Mr. Scott’s witness.
6. Mr. Scott withdrew his claim for gratuities at the start of the hearing. The issue to be determined was whether or not Mr. Scott was a manager and if he was not, his entitlement to overtime wages.
7. Although no employment agreement was presented at the hearing, the parties did not dispute that Mr. Scott was hired to work a 50 hour week.
8. Mr. Scott and Mr. Korzack had previously worked together at a different restaurant prior to working for the Employer. Mr. Korzack testified that he hired Mr. Scott as his assistant, to act as a supervisor in his absence and to cook and run services. Mr. Korzack testified that he hired all the kitchen staff, created the schedules, made pricing decisions, completed inventory and placed food orders. Mr. Korzack testified that Mr. Scott did not have any managerial duties such as food cost management. At Mr. Korzack’s request, Mr. Scott ordered some business cards and marketing material. Mr. Korzack maintained a record of the kitchen staff’s

hours on a spreadsheet which was kept in the kitchen and which was available for all staff to see. Mr. Korzack later transferred the employees' hours of work onto an electronic spreadsheet on his computer. Those records, which were submitted at the hearing, showed that Mr. Scott worked shifts as long as 14 hours in duration and up to 20 consecutive days.

9. Mr. Scott's evidence, which was largely corroborated by Mr. Korzack, is summarized as follows:
 - Mr. Scott's job entailed cooking, cleaning, assisting Mr. Korzack and acting as a shift supervisor on Mr. Korzack's days off.
 - Mr. Scott did not do any scheduling, administrative chores, time sheet management or food costing. He did not hire, fire, or discipline any other employees, or authorize overtime hours, time off or leaves of absences.
 - On Mr. Korzack's days off, Mr. Scott contacted Mr. Korzack by telephone or text to communicate about inventory levels. Mr. Scott placed orders with Mr. Korzack's approval and completed work identified by Mr. Korzack.
 - Mr. Scott rarely took breaks and often ate in the kitchen while working. When the kitchen first opened in June 2016, three people worked in the kitchen each day. As business needs became more apparent to Mr. Korzack, he adjusted staffing levels down to two people per day, with each person receiving two days off each week. Mr. Scott took one extended weekend off in September 2016. For a period of time, Mr. Scott and Mr. Korzack were the only staff in the kitchen and worked every day.
 - At some point during his employment, Mr. Scott raised concerns about the number of hours he was working without any additional pay with Mr. Korzack, who he understood raised those concerns with Mr. Johnson and Mr. Pigeon. Mr. Scott believed that he would be paid for his extra hours of work. Mr. Korzack's evidence was that he spoke to Mr. Johnson and Mr. Pigeon about the number of hours the kitchen staff were working and that they discussed hiring additional staff to reduce the hours the current staff were working.
10. Prior to the hearing, Mr. Johnson informed the delegate that he intended to call Justin Lee and Amar Gill as witnesses and provided a brief summary of their evidence. However, at the hearing, Mr. Johnson indicated that he would only call Mr. Gill. When it was time for Mr. Gill to give his evidence, Mr. Johnson was unable to contact him. Although the delegate offered Mr. Johnson additional time to contact Mr. Gill, Mr. Johnson decided to forgo Mr. Gill's evidence.
11. Crowbar was a new restaurant. Mr. Johnson said that he wanted a strong start up, and hired Mr. Scott and Mr. Korzack to build menus, price items, order supplies and hire staff. Mr. Johnson said that Mr. Korzack chose Mr. Scott to be his co-chef. Mr. Johnson said that, as a manager, Mr. Scott was expected to manage his own time, and he did not interfere. Mr. Johnson said that he observed Mr. Scott receive deliveries, place orders, cook, prepare food, clean, receive orders, direct kitchen staff and manage how food was cooked and plated.
12. Mr. Johnson testified that Mr. Scott placed advertisements for staff, reviewed resumes and was involved in interviewing and evaluating candidates. He did not fire anyone. Although Mr. Scott ordered business cards, he did so at the request of Mr. Pigeon.
13. Mr. Johnson asserted that Mr. Scott ordered and received supplies, but was uncertain what the ordering process was. He believed that Mr. Scott and Mr. Korzack were equally responsible for running the kitchen;

he estimated that Mr. Scott placed 50% of the restaurant's orders. In Mr. Johnson's view, placing orders, receiving orders, directing workflow, hiring staff, directing what needed to be cooked, managing finances and spending money on behalf of the business all constituted managerial tasks. He also indicated that he understood the role of a chef to be managerial because chefs manage kitchens.

14. Mr. Pigeon worked with Mr. Scott almost daily. He observed Mr. Scott direct the flow of work in the kitchen and decided what work was to be done first and how to prepare food.
15. The delegate considered the definition of manager outlined in the *Employment Standard Regulation* (the "Regulation") and determined that Mr. Scott was not a manager. She found that the evidence was that Mr. Scott did not have a significant level of decision-making autonomy. She noted that the majority of Mr. Scott's time was devoted to cooking or preparing food. She also considered the evidence that although Mr. Scott may have solicited and evaluated resumes, he had no authority to hire or fire employees. She also noted that while Mr. Scott may have made some purchases for the business, that duty was not one of his principal tasks. She considered the evidence that Mr. Scott purchased supplies in consultation with Mr. Korzack or at the direction of Mr. Johnson or Mr. Pigeon. The delegate found no evidence that Mr. Scott completed strategic planning, budgeting, project management or evaluation, or that he was accountable for financial outcomes.
16. The delegate decided that, as a whole, Mr. Scott's principal duties related to food preparation and cooking, and concluded that he was not a manager. She determined that he was entitled to overtime and statutory holiday pay.
17. The delegate found that Mr. Scott's wages were based on a 50 hour work week. She noted that Mr. Johnson agreed that the Employer's record of Mr. Scott's hours of work was incorrect, and determined that the Employer had contravened section 28 of the *Act* in failing to maintain payroll records.
18. The delegate noted that Mr. Scott's record of his hours of work, corroborated by Mr. Korzack, was that his working hours were not regular; he began work as early as 08:00 on one occasion and as late as 14:00 on two occasions. The majority of his shifts began at 10:30 or 11:00. His work ended at 17:00 on at least 10 occasions but the majority of his shifts ended between 23:00 and midnight. The delegate determined that although there were some discrepancies in the records, Mr. Korzack's records were sufficiently reliable and used them as the best available evidence.

Argument

19. Mr. Johnson says that he intended to call evidence from Justin Lee and Amar Gill at the hearing but they were unavailable at the time they were to give their evidence. Mr. Johnson says that both Mr. Lee and Mr. Gill worked with Mr. Scott and would have testified that he was in fact a manager. Attached to the appeal submission are written statements from Mr. Gill and Mr. Lee. Mr. Johnson argues that the statements should be considered as new evidence. Mr. Johnson also argues that the delegate did not give sufficient weight to the managerial duties performed by Mr. Scott because neither Mr. Gill nor Mr. Lee was able to testify at the hearing.
20. Also attached to the appeal submission is an unsigned copy of what is purported to be the employment agreement between the Employer and Mr. Scott. Mr. Johnson argues that this document also meets the test for new evidence because, despite efforts to locate the employment agreement prior to the hearing, he was unsuccessful in doing so. That agreement sets out Mr. Scott's responsibilities as follows:

- Make the best possible food
- Order the best possible ingredients
- Train and develop the best possible team
- Develop the best possible menu
- Work and communicate well with all restaurant staff to ensure the best possible restaurant
- Clean up messes you make
- Be happy

21. Mr. Johnson argues that that the evidence before the delegate clearly demonstrated that Mr. Scott had an executive position and was therefore a manager.

ANALYSIS

22. Section 114(1) of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

- (a) the appeal is not within the jurisdiction of the tribunal;
- (b) the appeal was not filed within the applicable time limit;
- (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
- (d) the appeal was made in bad faith or filed for an improper purpose or motive;
- (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
- (f) there is no reasonable prospect the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;
- (h) one or more of the requirements of Section 112(2) have not been met.

23. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

24. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I have concluded that the Employer has not met that burden.

25. In *JC Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an “overly legalistic and technical approach” to the appeal document: “The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned.”

26. As the Employer is self-represented, I have given it wide latitude in addressing the stated grounds of appeal.

New Evidence

27. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
28. The Employer has submitted statements from two individuals who were to appear at the hearing as new evidence. Despite the delegate's statement that Mr. Johnson decided not to call Mr. Lee, and agreed to forego Mr. Gill's evidence when he was unable to contact him, Mr. Johnson now contends that the evidence of those two individuals should be considered.
29. Mr. Lee and Mr. Gill's statements are not new evidence. Prior to the hearing, Mr. Johnson indicated his intention to call Mr. Lee and Mr. Gill to testify. The Determination suggests that Mr. Johnson decided, either before or during the hearing, not to do so. An appeal is not an opportunity for a party to change their mind about decisions made during the adjudication process and, in essence, have a second opportunity to present evidence they ought to have presented before the delegate.
30. In any event, I am not persuaded that the evidence would have led the delegate to a different conclusion on the issue of whether Mr. Scott was a manager. Both Mr. Gill and Mr. Lee were co-workers of Mr. Scott and their opinion of Mr. Scott's status is entirely irrelevant. Furthermore, neither of these individuals was aware of what Mr. Scott's actual responsibilities were, other than observing his actions in the kitchen.
31. Although Mr. Johnson submits as new evidence what he asserts was Mr. Scott's employment agreement, it also was clearly available at the time of the hearing. Although Mr. Johnson says that he was unable to find the document in advance of the hearing, Mr. Scott's evidence was that he did not sign an employment agreement. It is not clear why the Employer would not have ready access to a critical document.
32. However, even if the agreement could not have been located prior to the hearing, I conclude that it would not have led the delegate to a different conclusion on the issue of whether or not Mr. Scott was a manager. It does not establish that Mr. Scott's primary duties were managerial in nature.
33. I find no basis for this ground of appeal.

Error of law

34. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.

Did the delegate err in her conclusion that Mr. Scott was not a manager?

35. The essential facts are not disputed. Mr. Johnson’s submission appears to repeat arguments made before the delegate, none of which I find persuasive.
36. The *Regulation* defines “manager” as:
- (a) *a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or*
 - (b) *a person employed in an executive capacity.*
37. In *Re Amelia Street Bistro* (BC EST # D108/98, Reconsideration denied BC EST # D474/99), the Tribunal considered the definition of manager. Although the definition of manager has changed somewhat since that decision was issued, the analysis remains the same: see *Howe Holdings Ltd.*, BC EST # D131/04.
38. If the employee’s duties do not primarily consist of supervising and directing other employees and the employee is not employed in an executive capacity (actively participating in the control, supervision and management of the business (see *Howe Holdings, supra*), then the individual is not a manager. (see also *Whitehall*, BC EST # D026/10)
39. It is irrelevant to the conclusion that the person is described by the employer as a “manager,” as that would be putting form over substance:

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person. (*Amelia Street Bistro*, BC EST # D479/97)

40. Furthermore, as the Tribunal has noted on many occasions (see particularly *Frontier-Kemper Constructors ULC* (BC EST # D078/12), benefits-conferring legislation is to be interpreted in such a way that exclusions from

statutory protections are narrowly construed. As remedial legislation, the *Act* is to be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. (see, for example, *On Line Film Services Ltd v Director of Employment Standards*, BC EST # D319/97, and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.)

41. The undisputed evidence was that Mr. Scott had no authority over hiring, disciplining or firing staff, setting work schedules, authorizing overtime or time off, training or in any way had any control or supervision of the business. While Mr. Scott may have had significant latitude within the kitchen, including ensuring the quality of the preparation of food, or as Mr. Johnson described it “food execution,” that does not demonstrate that he had power and authority normally exercised by a manager over the Employer’s business. The evidence was that he reported to Mr. Korzack, and what decisions he made with respect to ordering or costing food were done only after he had Mr. Korzack’s approval.
42. I find no basis to interfere with the delegate’s conclusion on this issue. The appeal is dismissed.

ORDER

43. Pursuant to section 115 of the *Act*, I Order that the Determination, dated May 19, 2017, be confirmed in the amount of \$13,424.97, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal