Employment Standards TRIBUNAL

An appeal

- by -

Woodfire Restaurant Ltd.
(the “Appellant”)

- 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

ADJUDICATOR: W. Grant Sheard

FILE No.: 2003A/13

DATE OF DECISION: April 8, 2003

DECISION

OVERVIEW

This is an appeal based on written submissions by the Employer, Woodfire Restaurant Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on December 6, 2002 wherein a Delegate of the Director (the "Delegate") ruled that the Respondent was an employee, that the *Act* had been contravened, and that the Respondent was owed regular wages including vacation pay plus interest for a total due of $2,169.91.

ISSUES

1. Did the Director fail to observe the principals of natural justice in making the Determination?

2. Was the Respondent a manager during the first period of employment (December 1 to 31, 2000) such that a salary rather than hourly rate was due?

3. Was the Respondent an independent contractor rather than an employee for the period January 1 to April 1, 2001 such that a contractual rate rather than hourly rate was due?

4. Were wages due to the Respondent?

ARGUMENT

The Appellant's Position

In an appeal form dated January 4, 2003 and filed with the Tribunal January 13, 2003 the Appellant asserts that the Director failed to observe the principals of natural justice in making the Determination and seeks cancellation of the Determination. In a further written submission dated January 6, 2003 filed along with the appeal form the Appellant says that, to introduce the Respondent into the catering business they hired her as a manager for their catering department, not as a server as the Delegate had found, but working under a catering manager for the first month. The Appellant says that the Respondent had a business called Lucky J Ventures which she wanted to use to run a catering business. After her first month she was removed from payroll and for the next several months the Appellant repeatedly asked the Respondent for her business license and, by April 1, 2001, when the Appellant no longer believed that the Respondent's business was ever going to happen, they put her back on payroll with a salary which she received until she quit on September 7, 2001. The Appellant goes on to summarize the hours which the Respondent worked and concludes saying as follows:

> "Betty's hours for 2001 plus time, overtime and double-time in December 2000 calculated at minimum wage, which was $7.60 per hour, the gross is $13,854.80 minimum wage. Betty was paid from Woodfire Restaurant a total of $16,473.88 for wages and vacation pay."

In a further written submission dated February 15, 2003 the Appellant says that on one occasion their secretary filled out a blank cheque which they had kept in their safe for the Respondent's benefit as a

gratuity "which caused much anger on our side". The Appellant says that the Respondent was not entitled to receive gratuities as a manager and that, "until the last day when Betty left the company she never had her own business".

Inferentially, the Appellant takes the position that the Respondent was paid in full.

The Respondent's Position

In a written submission dated January 26, 2003 and filed February 5, 2003 the Respondent Employee says that she was hired on December 1, 2000 to train as a manager and she did so throughout that month working a total of 241 hours at minimum wage with no overtime paid. She says that after that date all employees were taken off the payroll at the end of December and given Records of Employment. She says that she was then convinced by the Appellant to start her own business to operate the catering for the Appellant. After working in this fashion for a few months she found that she could not make a go of it and she and the other employees returned to the regular payroll for the Appellant. She then goes on to summarize the hours that she worked from January 1, 2001 until she quit on September 7, 2001. She notes that she recorded her hours (on a copy of her calendar which was filed) and that she was not paid anything for the last days of her employment from September 1 to September 7, 2001.

Inferentially, the Respondent takes the position that the appeal should be dismissed and the Determination upheld.

The Director's Position

In a written submission dated January 31, 2003 and filed that same day with the Tribunal the Director's Delegate (a different Delegate from the one who issued the Determination) says that the burden of proof rests with the Employer to establish that the Employee was a manager for the first period of employment from December 1 to December 31, 2000. She says that the Appellant asserts that the Employee was a manager during this time period but acknowledges that the Employee worked alongside the existing manager learning the job. Further, the Delegate says that the Employer has not provided any evidence to support the conclusion that the Employee had the authority to make decisions relating to the operation of the business during this time which would be indicative of her being a manager. Therefore, the Delegate says that the Employee is owed wages for overtime during this initial period.

Regarding the period of January 1, 2001 to March 31, 2001 when it was suggested that the Employee would operate her own catering business the Delegate notes that there was a finding in the Determination that the Respondent was an Employee and notes that the Appellant has not disputed this finding. However, the Delegate who rendered the Determination was unable to determine what if any wages were owed to the Respondent for that time period.

With respect to the period of April 1, 2001 to September 7, 2001 the Director notes that the Respondent was paid a monthly salary of $1,500.00 plus 4% annual vacation pay for which the Respondent received wages of $7,800.00 of which $7,500.00 was her salary and $300.00 was for annual vacation pay. The payroll records processed by Ceridian confirmed this information. It is noted that these records also indicate that the Respondent was paid a salary of $750.00 twice-monthly for 87 hours of work in each pay period such that a regular wage rate for this period was $8.62 per hour. The Director says that the Appellant has not disputed the number of hours worked by the Employee as reflected by the calendar which the Employee provided. The Employee's records of daily hours indicate that she worked a total of

1,064 hours during the period April 1, 2001 to September 7, 2001 which is also reflected in the Appellant's appeal submission. The Director says that, based on the Respondent's regular wage rate of $8.62 per hour she was entitled to receive wages in the amount of $9,171.68 plus 4% annual vacation pay calculated thereon in the amount of $366.87 for total wages earned of $9,538.55. She says that there is no dispute that the Respondent received wages totaling $7,800.00 during this period leaving an outstanding balance of $1,738.55.

The Director notes that the Appellant asserted that the Respondent received wages in the form of cheques paid to her (copies of which were provided during the course of the investigation) and that, if these payments are taken into consideration, the Respondent received wages in excess of minimum wage for all hours worked such that no wages are owed. The Director notes that the Employee says that these cheques were payments for gratuities, not wages. The Delegate accepted this assertion in the Determination issued and noted that one of the cheques stated on it that it was for "Grat. Payroll". The Director notes that Section 1 of the *Act* defines wages as not including gratuities such that payments for gratuities cannot be considered in relation to the calculation of wages. The Director submits that outstanding wages were owed for the hours worked by the Employee at the rate of $8.62 per hour.

THE FACTS

The Appellant operates a restaurant and small conference center. The Respondent commenced working for the Appellant on December 1, 2000 and was appointed Catering and Conference Manager effective January 1, 2001 and continued in that capacity to September 7, 2001 when she quit.

During the first month of the Respondent's employment she trained along side the existing manager learning the duties for that position. From January 1, 2001 to April 1, 2001 the Respondent took over the operation and management of the Appellant's catering business as "Lucky J Diversified Ventures" though this was not an entity which was ever incorporated or for which a business license was taken out. The Appellant asserted that this was done at the behest of the Respondent while the Respondent asserted that this was done at the urging of the Appellant. In any event, both parties agree that by April 1, 2001 this arrangement was not panning out and the Appellant was placed back on regular payroll. From April 1, 2001 until September 7, 2001 the Respondent received a salary of $1,500.00 per month plus $60.00 per month for vacation pay. There was no evidence during the investigation or on the appeal of any wages or salary paid to the Respondent for her employment from September 1 to September 7, 2001. The payroll records and the Respondent's record of hours worked reveal that the Respondent was paid $7,800.00 for the period April 1, 2001 to September 7, 2001 with an average of 87 hours worked per pay period. In the Determination issued, the Delegate calculated that based on the total number of hours worked during this period, the Respondent received an hourly rate of $8.62 and with a total of 1065 hours worked, resulted in wages due of $9,180.30 plus vacation pay due of $367.21 for a total due of $9,547.51. The Delegate then found that the difference between that amount and the amount paid of $7,800.00 leaving $1,747.51 due for this particular period. I find however, that the Delegate who issued the Determination made a calculation error. The total hours worked during the period April 1, 2002 to September 7, 2001 should be 1064 hours, as set out in the current Delegate's submission dated January 31, 2003 and not 1065 hours.

The Delegate found that the Respondent agrees that she was a manager. Indeed, in the Respondent's complaint form filed she said of the details of her complaint, "not being compensated for the hours worked, necessary to perform the usual duties of manager of the conference center."

ANALYSIS

1. Did the Director fail to observe the principles of natural justice in making the Determination?

Although the Appellant asserts that the Director failed to observe the principles of natural justice in the appeal form filed, the Appellant does not make any submission specific to this assertion. Natural justice may require or consist of many things, but at a bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant and make a submission to the adjudicating body with respect to what it ought to find (see *re Rudowski*, [2000] BCESTD #476 (QL), (9 November 2000), BCEST #D485/00 (Love, Adj.); reconsideration of BCEST #D316/00.). In this case there is no evidence offered that the parties were not given an opportunity to present their evidence, question that evidence or make a submission to the Delegate or any other failure to adhere to the principles of natural justice. Therefore, I find that the Appellant has failed to meet the onus upon it to demonstrate on a balance of probabilities that the Delegate failed to meet the principles of natural justice in investigating and arriving at the Determination.

2. Was the Respondent a manager during the first period of employment (December 1 to 31, 2000)?

Section 1 of the Regulation defines manager as "a) A person whose principal responsibilities consist of supervising or directing or both supervising and directing, human or other resources, or b) A person employed in an executive capacity." Section 34(1)(f) of the *Regulation* provides that part 4 of the *Act* (relating to hours of work and overtime requirements) does not apply to a manager. Similarly, Section 36 of the *Regulation* provides that part 5 of the *Act* (regarding statutory holiday pay requirements) does not apply to a manager. Section 1 of the *Act* defines an employee as including, under subparagraph (c) "A person being trained by an employer for the employer's business".

In this case it is clear that the Respondent was being trained during the month of December, 2000 and, accordingly, was an employee during this time entitled to an hourly minimum wage and overtime. It appears from the Delegate's Determination under the heading of "Calculation Summary" that he found that the Respondent was due wages in the amount of $308.49 for this. However, from my review of the Respondent's record which shows she worked 241 hours, I am not satisfied that the delegate properly calculated daily and weekly overtime. I am referring the calculation back to the current Delegate to establish if the Respondent is owed $308.49 for this period or a different amount.

3. Was the Respondent an independent contractor rather than an employee for the period January 1 to April 1, 2001 such that a contractual rate rather than an hourly rate was due?

For the period January 1, 2001 and afterwards the Delegate found that there was no evidence that the Respondent was in law other than an employee throughout her entire period with Woodfire. Clearly he rejects the suggestion that the Respondent was an independent contractor rather than an employee for the period January 1, 2001 to April 1, 2001. However, he notes in his findings of facts that the Respondent agrees that she was a manager.

In *Employment Standards in British Columbia Annotated Legislation and Commentary*, The Continuing Legal Education Society of British Columbia, Allison, G. C. 2002 it is said in respect of determining whether a relationship is one of employment or independent contractor as follows:

> "The issue of whether a relationship is one of a contract of service (that is employment) or a contract for services (that is independent contract) has traditionally turned on the degree of control that the party for whom the work is being done exercises over the activities of the party conducting the actual work. The courts have weighed four factors in assessing the nature and degree of control inherent in the relationship:
>
> (1) the masters power of selection of the servant;
>
> (2) the payment of wages;
>
> (3) control over the method of work; and
>
> (4) the masters right of suspension or dismissal.
>
> The language chosen by the legislature in Section 1 indicates that the definition of "employer " and "employee" is to be given a liberal interpretation *re Castlegar Taxi* (1988) Ltd., (1991), 84 DLR (4th) 145, 58 BCLR (2nd) 341 38 CCEL 260 (SC)."

In this case there does not appear to have been any evidence before the Delegate and there is none offered on appeal suggesting that the Respondent controlled the selection of employees, determination of wages, control over the method of work or right of suspension or dismissal of employees. Accordingly, I cannot find that the Delegate erred in Determining that the Respondent was an Employee rather than an independent contractor during the period January 1, 2001 to April 1, 2001.

4. Were wages due to the Employee?

It is apparent from the evidence that nothing was paid to the Respondent for the period worked from September 1 to September 7, 2001. However, the Delegate calculates an hourly wage of $8.62 due for all hours of employment from April 1, 2001 to September 7, 2001. It was found as a fact by the Delegate that the Respondent agrees that she was a manager and in her complaint form filed she provided details of her complaint as "not being compensated for the hours worked, necessary to perform the usual duties of manager of the conference centre."

The evidence submitted to the Delegate and on appeal indicated that the Respondent received a salary of $1,500.00 per month plus $60.00 for vacation pay for a total $1,560.00 per month and that she was paid this amount ($7,800.00 for the months April to August 2001 inclusive).

As referred to above, Regulations 34 and 36 provide that managers are excluded from part 4 and part 5 of the *Act* to hours of work and overtime requirements and statutory holiday pay.

Accordingly, I find that the Respondent was exempt from part 4 of the *Act* regarding hours of work and overtime. Nonetheless, the Respondent is still entitled to be paid straight time wages for all hours worked beyond her average 87 hours of work per pay-period at $8.62 per hour. This amount calculated to be owing the Respondent is $1,738.55 as set out in the current Delegate's submission of January 31, 2003. Accordingly I vary this part of the Determination.

For the period January 1 to March 31, 2001 the Delegate determined that there was insufficient evidence to determine what, if any, wages were owed to the Respondent during this period she was held out as an independent contractor though she was in fact an employee. As a result the Delegate did not determine what wages were owed to Ms. Jackson for this period. In the current Delegate's submission she notes that, on this appeal, the Employer has now provided records of the payments to the Respondent during this period (attached to the Employer's appeal submission and summary at appendix B) and that the Respondent has also provided records of the daily number of hours worked during this period in appendix A. The Delegate submitted that the Tribunal may be able to calculate wages owed for this period under the *Act*. I find that the matter ought to be remitted to the Delegate to calculate along with the calculations which will have to be done as referred to above.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated December 6, 2002 be varied and referred back to the Delegate as set out above.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal