

An appeal

- by -

Tae Soo Woo

- 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

TRIBUNAL MEMBER: C. L. Roberts

FILE No.: 2004A/131

DATE OF DECISION: September 8, 2004

DECISION

SUBMISSIONS

Tae Soo Woo	on his own behalf
Robert D. Krell	on behalf of the Director of Employment Standards
Adrian McKeown, Barrister & Solicitor	on behalf of Olive Hospitality Inc.

OVERVIEW

This is an appeal by Tae Soo Woo, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued June 23, 2004.

Mr. Woo filed a complaint with the Director alleging that Olive Hospitality Inc. ("Olive") withheld his salary for certain pay periods beginning June 7, 2003, contrary to the Act. He also claimed compensation for length of service, alleging that his employment had been substantially altered so as to constitute termination under the Act.

The Director's delegate held a hearing into the complaint on June 14, 2004. The delegate concluded that Mr. Woo was not an employee of the company, and that he was therefore not entitled to wages. The delegate determined that the Act had not been contravened.

Mr. Woo alleges that the delegate erred in law, that the Director failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was made.

The appellant did not seek an oral hearing, and I have determined, based on the submissions of the parties, that the matter can be adjudicated based on their written submissions.

ISSUES

Did the delegate err in law in concluding that Mr. Woo was not an employee under the Act?

Did the delegate observe the principles of natural justice in making the Determination?

Is there new evidence available that was not available at the time the Determination was made that would lead to the Determination being changed?

FACTS

On October 6, 2000, Mr. Woo, Jae Yoon Jung and Michael Hwang co-founded Olive. The company was established for the purpose of expanding a "Popeyes Chicken & Biscuits" franchise in British Columbia. All three individuals were shareholders as well as the directors and officers of the company.

Mr. Woo, Mr. Jung and Mr. Hwang, along with others, later formed additional related companies that operated restaurants in the greater Vancouver area. Mr. Woo was the first (and as found by the delegate, possibly the only) director to take the franchisor's manager training course in Atlanta, Georgia.

Initially, Mr. Woo was Olive's President. He later became Vice President, with Mr. Jung becoming the President. As Vice President, Mr. Woo was responsible for Olive's operations and corporate finance.

On September 30, 2002, Olive's directors passed a resolution indicating that, as of October 1, 2002, all directors working in a restaurant or the head office would receive a salary. Mr. Woo worked for the company and received a salary in accordance with this resolution from February 2003 until approximately June 7, 2003.

On June 10, 2003, Mr. Jung made significant executive changes to the Olive companies that Mr. Woo objected to. Mr. Woo contended that, on that date, he was demoted from Vice – President to account manager, reporting to the new Vice-President. Mr. Woo alleged, and the delegate agreed, that Mr. Jung appeared to have final authority to make most or all corporate decisions after that date. I infer from the material before me that these changes arose, in part, as a result of the financial difficulties the company was experiencing.

Mr. Woo's position was that, as of June 10, 2003, he was only a "nominal director", as he had no power to control the resources of the company. He alleged that he became an employee after that time, and was entitled to claim wages under the Act.

At the hearing, Mr. Woo provided the delegate with a number of letters he had written to Mr. Jung. The delegate accepted the contents of those letters as facts in light of the fact they were not disputed, and set them out verbatim in the Determination.

The first letter, dated June 18, 2003, set out in some detail Mr. Woo's objections to Mr. Jung's management decisions, and indicated that he felt "oppressed" by them. Those objections included moving the physical location of the office, appointing a non-shareholder as Vice-President, making decisions about where directors of some of Olive's related companies were to work, and demoting him to a lower position.

In the second letter, dated September 2, 2003, Mr. Woo resigned as a director from Olive, and all of Olive's related companies, because he could not "assume director's duties for the companies in that I have no authority and power to perform them in the organization".

In an undated letter, but indicated to be some time in mid September, 2003, Mr. Woo set out further objections to Mr. Jung's activities and decisions regarding the company, and expressed reasons why he could no longer work for the company. Those reasons included Mr. Jung's transfer of the title as President to himself without Mr. Woo's consent, his "mismanagement" of the company, threats by Mr. Lee, Mr. Jung's brother in law, to infuse the company with \$200,000 cash or to return his keys and leave, and Mr. Lee's unilateral reassignment of Mr. Woo's duties from account manager to assistant restaurant manager.

Although it is not clear in the Determination, I infer from the documents that Mr. Woo's resignation letter followed the September 2, 2003 "re-assignment" of his duties.

On October 16, 2003, Olive issued Mr. Woo a Record of Employment (ROE) that indicated his employment period ran from February 4, 2002 until September 9, 2003, and that his total insurable earnings were \$19,600 for the reporting period. Further, the ROE indicated that Mr. Woo's salary for the period August 25, 2003 to September 3, 2003 had not been paid.

Olive's position was that Mr Woo resigned from the company, and that, at all times prior to his resignation, he was a director and officer, not an employee. It also contended that a finding that Mr. Woo was an employee would place him in a preferential position in relation to the other working directors.

The delegate found that, although directors of companies could also be employees, the burden was on a person asserting the status of an employee to clearly demonstrate that they were.

The delegate found that Mr. Woo was not an employee prior to June 10, 2003, when he performed work as a President and Vice President. The delegate determined that Mr. Woo's view of his status changed only when Mr. Jung re-assigned accounting and assistant manager's duties to him.

The delegate concluded that there was no evidence of an employment relationship between Mr. Woo and Olive. The delegate determined that Mr. Woo performed work in the capacity of a director and co-venturer in the enterprise, whether that work was high level corporate work or accounting and assistant manager work.

The delegate also considered whether Mr. Woo was one of Olive's controlling minds or whether his directorship merely served to deprive him from the protections normally afforded to employees, and concluded that he was unable to make a determination on that point since Olive's corporate scheme appeared to enable Mr. Jung to make all of the decisions. However, he also found that Mr. Woo's level of influence within the corporation had not changed between the time he was a corporate director and when he was assigned duties carrying diminished responsibilities.

ARGUMENT

Mr. Woo contends that the delegate erred in finding that his level of influence in the corporation did not change. He submits, in essence, that authority was removed from him, and that he was demoted to an "ordinary employee". He submits that the remaining corporate directors can claim their salary at any time once the company's financial situation improves and that he is being deprived of wages for his services.

Mr. Woo also submitted that he has new evidence consisting of a February 3, 2002 members' resolution, and contends that his demotion was contrary to this resolution.

Mr. Woo's submission does not address the second ground of appeal, which is that the delegate failed to observe the principles of natural justice.

The delegate submits that Mr. Woo continues to maintain that he was an employee on the basis of his diminished duties and influence as a corporate director. He submits that the evidence does not support the finding of an employment relationship, and that the Determination should be upheld.

Olive's counsel submits that the Determination should be upheld. It contends that all of the directors who worked in restaurants during the period in question did not receive payment due to lack of funds in an effort to keep the business in operation. Counsel submits that Mr. Woo has simply restated the arguments

he made at the hearing, and that he presents no new evidence. Further, counsel submits that the delegate considered all of the evidence and submissions presented at the hearing, and that Mr. Woo has not demonstrated a denial of natural justice.

Olive's counsel also submitted that the September 8, 2003 re-organization was done to assist the company through a difficult financial situation, and was not a demotion. It submits that Mr. Woo remained a registered director and shareholder and was assigned new duties along with other director/shareholders to keep the company afloat.

ANALYSIS

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; or
- evidence has become available that was not available at the time the determination was being made

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.

Mr. Woo's submission does not address the three grounds of appeal. Rather, it appears to re-argue his case before the delegate.

As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03), although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" and the other grounds identified under the Act, the grounds for an appeal "are often an opaque mystery to someone who is untrained in the law." The Tribunal member expressed the view that the Tribunal should not "mechanically adjudicate an appeal based solely on the particular "box" that an appellant has – often without a full, or even any, understanding – simply checked off."

Given that Mr. Woo's first language is not English and that he has no legal training, I have reviewed his submission with a view to determining whether it discloses any basis for the three grounds of appeal.

I will deal firstly with Mr. Woo's allegation that the delegate failed to observe principles of natural justice.

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker.

Mr. Woo had a hearing before the delegate at which he was entitled to representation. Although Mr. Woo did not engage counsel, there is no evidence he was denied full opportunity to present his case and respond to Olive's submissions. Nothing in the material supports Mr. Woo's allegation that the delegate failed to observe the principles of natural justice. I am, therefore, unable to find this ground of appeal has been substantiated.

Mr. Woo also asserts that he has new evidence that has become available that was not available at the time the hearing was conducted.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

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;

the evidence must be relevant to a material issue arising from the complaint;

the evidence must be credible in the sense that it is reasonably capable of belief; and

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.

The material presented by Mr. Woo was available, with due diligence, at the time the hearing was conducted. The documents referred to are dated February 2003, well before the date of the hearing, and, given that Mr. Woo signed the resolution, it was easily available to him.

With respect to Mr. Woo's final ground of appeal, I conclude that the delegate erred in determining that Mr. Woo was not an employee.

As the Tribunal has noted, while it is unlikely that a controlling mind of the company (such as a director or manager) could also be an employee (*Barry McPhee* BC EST #D183/97), being a corporate director does not prevent a person from being an employee, as that is defined in the Act (*Annable* (BC EST #D342/98, reconsidered BC EST #D559/98).

The onus is on the person asserting the status of employee to show a clearly worded agreement establishing the employer/employee relationship, and the context in which a company director or officer seeks to claim employee rights must be carefully considered. The Tribunal in *Annable* referred to the Ontario statutory scheme and cited the following passage from *D. J.'s Family Centre Ltd.* (1997) 14 O.R. (2d) 615:

Whether the director or officer is, in addition to that capacity, an employee to perform services for the company for remuneration depends on the terms of the agreement made between the company (usually acting through or under the authority of the board of directors) and the individual. By the definition of wages, there must be a contract of employment. Whether the relationship of employer and employee exists depends upon the evidence in the individual case...

The evidence establishes that Olive's directors who were working at a restaurant or the head office were entitled to a salary. According to a company resolution, restaurant managers were entitled to an annual salary of \$36,000 and those directors working over 3 months were entitled to annual salaries of \$30,000. Furthermore, the evidence is that Mr. Woo worked eight hour days in the company's office, and received bi-weekly wages of \$1,385.00 for over one year. In my view, the company resolution along with the fact that Mr. Woo was paid wages from which statutory deductions were taken and the issuance of the ROE, clearly establish an employment relationship between Olive and Mr. Woo. I find that there was an employment contract between Olive and Mr. Woo, in which Mr. Woo was to provide services to Olive for a salary, in addition to his duties as a corporate director during the period in question.

However, the evidence is also that, some time around June 2003, the company encountered financial difficulties. Although the evidence is not complete in this respect, the material suggests that the working directors had agreed they would forgo wages in the event the company encountered financial difficulties, paying themselves wages only when the company again became financially viable. The October 16, 2003 ROE indicates that Mr. Woo's salary for the period August 25, 2003 – September 3, 2003, in the amount of \$1,028.85, had not been paid. I infer from the submissions this was because of the financial circumstances the company found itself in. Although Olive's evidence was that three cheques for the period in question had been issued to Mr. Woo, Mr. Woo alleged that these cheques had been "seized", or retained by the company. I remit this issue back to the delegate for a determination of whether Mr. Woo's wages for the period June 7, 2003 to September 3, 2003 had been paid, since there is no evidence those cheques had been cashed.

Mr. Woo's own evidence suggests that the directors also agreed that director's wages would not be paid in the event of financial difficulties. I have had regard to his Human Resources Development Canada form in which he indicates that "depending on the business accomplishment, sometimes all the directors agreed not to receive their salary including the employee (Mr. Woo)" There is insufficient evidence for me to determine whether the company's finances were such that Mr. Woo was not entitled to his salary, or whether there was a company resolution to that effect.

Although I conclude that Mr. Woo was an employee, the evidence does not establish that Mr. Woo is entitled to compensation for length of service. The evidence is that Mr. Woo resigned as a director on September 2, 2003 because he was upset at the direction the company was taking and what appeared to be the successful efforts of other directors to remove him from a position of authority in the company. Mr. Woo later resigned from his employment in an undated letter, but which appeared to be written some time after September 8, 2003. His reasons for quitting were, in essence, the same reasons he gave for resigning as a director.

However, even if I am wrong in finding that Mr. Woo resigned, Mr. Woo's submission that he was effectively terminated because his job duties were unilaterally changed is not sustainable. Mr. Woo was offered reasonable alternative job duties as an assistant restaurant manager, which he was well qualified for, and for at least the same rate of pay. Section 63 sets out an employer's liability for compensation for length of service. Section 65 of the Act provides that section 63 does not apply to an employee who has been offered and has refused reasonable alternative employment.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated June 23, 2004 be referred back to the delegate to determine Mr. Woo's wage entitlement for the period June 7, 2003 to September 3, 2003.

C. L. Roberts
Member
Employment Standards Tribunal