Employment Standards TRIBUNAL

An appeal

- by -

558534 B.C. Ltd. operating as Midorak Restaurant
("Midorak")

- 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: C.L. Roberts

FILE No.: 2005A/158

DATE OF DECISION: October 20, 2005

DECISION

SUBMISSIONS

Sungkoon Lee and Randel Ball	on behalf of Midorak Restaurant
Erwin Schultz	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by 558534 B.C. Ltd. operating as Midorak Restaurant ("Midorak"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued July 29, 2005.

2. Giovanni Ferrarelli filed a complaint with the Director of Employment Standards contending that he was owed regular wages, overtime wages, statutory holiday pay and vacation pay. At issue before the delegate was whether Mr. Ferrarelli was an employee, if so, whether he was a manager, and whether he was entitled to any additional wages.

3. The delegate held a hearing into Mr. Ferrarelli's complaint on May 5, 2005. Midorak was represented by Mr. Lee, and by Mr. Bell, its accountant. Mr. Ferrarelli appeared on his own behalf. Following the hearing, the delegate determined that Mr. Ferrarelli was an employee. The delegate also concluded that Mr. Ferrarelli was a manager, as defined by the Act, and thus not entitled to any additional overtime and statutory holiday pay.

4. The delegate found that Midorak had contravened sections 16, 28 and 58 of the *Employment Standards Act* in failing to maintain employment records, and failing to pay Mr. Ferrarelli vacation pay and minimum wages. The delegate ordered Midorak to pay $2,323.05 in respect of the outstanding amounts, including interest. The delegate also imposed a $1,500 penalty for Midorak's contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations.*

5. Midorak contends that the delegate failed to observe the principles of natural justice in making the Determination. Although Midorak does not appeal against the delegate's determination that Mr. Ferrarelli was an employee, it disputes the amount owing to him.

6. Midorak did not seek an oral hearing, and I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUE

7. Whether the delegate failed to observe the principles of natural justice in concluding that Mr. Ferrarelli was entitled to wages in the amount determined.

THE FACTS AND ARGUMENT

8. Midorak is a Korean food restaurant. In the spring of 2004, the owner, Mr. Lee, met with Mr. Ferrarelli, who had previously operated his own restaurant, about the possibility of adding Italian food to the menu. Although the precise nature of the agreement was in dispute before the delegate, the evidence was that Midorak closed on May 4, 2004, and re-opened ten days later under the name "Midorak Italian Ferelli's" restaurant. Mr. Lee paid for all of the alterations, including signage, menus, tablecloths and uniforms. The business and liquor licence remained in the name of the numbered company. Mr. Ferrarelli worked at Midorak's from April 14, 2004 until November 27, 2004, at which time he quit. His duties included hiring, firing and scheduling staff, preparing lunch and dinner meals, and preparing menus.

9. During this period, Mr. Ferrarelli was paid $200 per week, and on November 8, 2004, received an additional payment of $800. Mr. Ferrarelli's name was not on the employee payroll, and appeared on two timesheets presented at the hearing only on Mondays, when he worked as a server during the lunch period.

10. Mr. Ferrarelli lived in a suite above the restaurant. On November 8, 2004, he gave Mr. Lee a document acknowledging receipt of $1,670 "which includes rental & tip per month from 15th April – 7th December 2004 as agreed with Sung Koon Lee".

11. After Mr. Ferrarelli quit on November 27, 2004, the restaurant closed for 10 days and reopened again as a Korean food restaurant.

12. At the hearing of the complaint, Mr. Ferrarelli testified that he worked six days per week at Midorak and a minimum of sixty hours per week. He worked alone in the kitchen for the first five months, then hired an assistant. He began work at 9:00 a.m., took a break between 3:00 and 4:00 p.m., and worked until the restaurant closed, anywhere between 9:30 and 11:00 p.m., occasionally staying as late as 1:00 a.m. He testified that he did not record his hours on the time sheet because he "worked all the time". The parties disagreed about whether Mr. Ferrarelli was asked and refused to be put on the payroll, whether he was asked and refused to provide his social insurance number, as well as the value on the upstairs room.

13. The delegate found Mr. Ferrarelli to be an employee, which, as noted, is a finding that is not under appeal. Neither Mr. Ferrarelli nor Midorak maintained any records of the hours Mr. Ferrarelli worked. The delegate determined that Midorak had contravened section 28 of the *Act* in failing to maintain records. The delegate assessed the reliability of Mr. Ferrarelli's oral evidence, noting that the restaurant was open over 50 hours per week. The delegate noted that there was no evidence Mr. Ferrarelli was not at work each day the restaurant was open, and took into consideration that he was the only employee in the kitchen for most of the period of his employment. The delegate concluded that Mr. Ferrarelli's claim that he worked sixty hours per week was supportable. The delegate found no agreement between the parties on Mr. Ferrarelli's rate of pay, and determined that he was entitled to the minimum wage of $8.00 per hour. The delegate deducted the $800 payment made in November, as well as the $1,670 Mr. Ferrarelli acknowledged receiving.

14. Midorak contends that the delegate failed to consider the hours that the restaurant was open each week, or the days the restaurant was closed for summer holidays, repairs and maintenance as well as other reasons. Midorak says this evidence was presented at the hearing, although "not in a concise manner".

15. Mr. Ball submits that, at the hearing,

> …we were defending the position that Mr. Ferrarelli was not an employee, but was in fact a partner in the restaurant operation. Our whole defense at that time was directed to his issue. We were not told, nor was it explained to us that we also had to defend any possible outcome of [the delegate's] decision. We feel that [the delegate] was asked to determine whether or not Mr. Ferrarelli was an employee or not. We were not asked to determine our own guilt and admit that we should have paid him accordingly.
>
> Since the Director of Employment Standards has determined that Mr. Ferrarelli was an employee, I think it is only fair that we be allowed to present evidence as to how much he worked, how much he has already been paid etc. Previous presentation of this evidence would have been contrary to our defense on the first charge. [reproduced as written]

16. Midorak also submitted an "analysis" of payroll records of cooks and secondary cooks employed prior to and after Mr. Ferrarelli. It says that this analysis substantiates its argument that Mr. Ferrarelli's claim that he worked 60 hours per week is unreasonable. It contends that Mr. Ferrarelli worked, at most, 39 hours per week.

ANALYSIS AND DECISION

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. Midorak must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice.

19. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.

20. Midorak knew the case against it. Mr. Ferrarelli presented it with a self help kit outlining his claim for wages. The delegate issued a demand for employer records, including payroll records. The delegate held a hearing into Mr. Ferrarelli's complaint, and provided Midorak with information not only on the claim itself, but how to prepare for the hearing. Midorak was represented by its owner and its accountant. They heard Mr. Ferrarelli's evidence regarding his hours of work. There is no evidence Midorak was denied an opportunity to ask Mr. Ferrarelli questions on his evidence, or to present a full response to the claim. Although Mr. Ball contends that, having found Mr. Ferrarelli to be an employee, the delegate should now allow Midorak an opportunity to present evidence to show how much he worked, there is no evidence it was denied that opportunity at first instance. An appeal is not an opportunity to re-argue a case that has been advanced, or ought to have been advanced, before the delegate. It is unfortunate that most, or perhaps all, of Midorak's submissions at the hearing were directed towards the issue of whether Mr. Ferrarelli was an employee. However, it did hear, and apparently respond, to Mr. Ferrarelli's evidence

about his hours of work. I note that in its submissions, Midorak says that the information about his hours of work was in fact presented at the hearing, although "not in a concise manner".

21. Midorak does not say why its "analysis" of hours worked was not presented at the hearing. The Tribunal will not accept new evidence on appeal that was available at the time of the hearing (*Tri-West* Tractor, BC EST #D268/96). However, even had this information been before the delegate, I am not prepared to conclude that the Determination would have been other than it is. What hours other cooks might have worked is not evidence of what Mr. Ferrarelli's actual hours of work were.

22. The delegate weighed all of the evidence presented regarding Mr. Ferrarelli's hours of work, including Mr. Ferrarelli's oral evidence, and arrived at a reasoned decision. I find no basis to interfere with this conclusion.

23. The appeal is dismissed

ORDER

24. I Order, pursuant to Section 115 of the Act, that the Determination, dated July 29, 2005, be confirmed in the amount of $3,823.05, plus whatever interest might have accrued since the date of issuance.

C.L. Roberts
Member
Employment Standards Tribunal