Employment Standards TRIBUNAL

An appeal

- by -

Atmosphere Restaurant Ltd.
("Atmosphere")

- 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: Lorne D. Collingwood

FILE No.: 2003A/25

DATE OF DECISION: May 27, 2003

DECISION

OVERVIEW

Atmosphere Restaurant Ltd. ("Atmosphere", "the employer" and "the Appellant") has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 19, 2002. Atmosphere is by that Determination ordered to pay Samantha Roffey, Jeffrey Laurin, Celina Sargent-Torrance and Kwok-Tung Tong wages, $4,548.97 in total, interest included.

The Determination is that even Kwok-Tung Tong was employed by the employer and that Atmosphere failed to pay regular wages, overtime wages, minimum daily pay, statutory holiday pay and vacation pay.

The employer, on appeal, accepts the Determination to the extent that it offers to pay the employees a certain amount of regular wages, statutory holiday pay and vacation pay. It claims, however, that there is evidence which was not previously available to show that Roffey and Laurin are not entitled to be paid as set out in the Determination. The Appellant claims that the matter between the employer and Kwok-Tung Tong has been settled. The appeal in essence however is a claim that the delegate has erred in law in that there are not facts to support the Determination.

I have in this decision decided that I should confirm the Determination. The Appellant was given an adequate opportunity to respond to the complaints. I am not shown that Kwok-Tung Tong is prepared to settle for less than the amount which he is awarded in the Determination or that evidence has become available which was not available at the investigative stage. (On the contrary, I find that the Appellant failed to cooperate with the delegate and that the Appellant is at this point seeking to present evidence which could have and, indeed, should have been submitted to the delegate at the investigative stage.) I also find that the Appellant fails to show that the Determination contains an error such that it should be varied, as the employer suggests, or a matter or matters referred back to the Director.

This case has been decided on the basis of written submissions.

ISSUES

Is this a case where evidence has become available that was not available at the time the Determination was being made?

Should I allow the employer to submit new evidence, evidence which it could have submitted at the investigative stage?

Should the Determination be amended so as to reflect an agreement to settle?

The appeal in essence is a claim that the Determination should be varied or a matter or matters referred back to the Director because there are not facts to support the Determination and hence, there is an error in law.

FACTS

Each and every one of the above noted employees worked for Atmosphere Restaurant.

The employer was advised of the complaints filed by the employees and the employer was given an opportunity to respond. It has not been suggested that the opportunity to respond was in any way inadequate.

The employer was asked to produce payroll records and a Demand for Employer Records was sent to the employer. The employer did not produce payroll records which the employer is be law required to keep (section 28 of the *Act*). It produced an incomplete set of records and much of that set of records is illegible.

Samantha Roffey acted as a kind of manager for the employer and she kept a record of work for the employer, daily time sheets. Roffey had kept copies of the employer's time sheets and this information was turned over to the delegate. The time sheets show days worked and the start and finish times of restaurant employees, Kwok-Tung Tong excepted. These time sheets were sent to Atmosphere and the employer failed to dispute the accuracy of the records.

Kwok-Tung Tong produced a record of his work. The employer was shown this set of work records. Again there was no response.

The Determination is based on the record of work which was submitted by the employees.

I have examined the records which were produced by the employer and those which were produced by Roffey and found that, to the extent that the employer's record is readable, it appears to be entirely consistent with Roffey's set of time sheets. I find, moreover, that the employer did in fact pay the employees, Kwok-Tung Tong excepted, on the basis of the Roffey's time sheets.

The employer, on appeal, claims that it has evidence to submit which was not previously available. Atmosphere, in filing its appeal, claimed that time sheets have been recovered that were not previously available. It also claims that there are witnesses to confirm that Roffey and Jeffery Laurin did not work as set out in the Determination. The employer has not, however, submitted any of the time sheets of which it speaks, nor does it provide the Tribunal with any reason to believe that it has evidence which was not previously available (the evidence of the witnesses included).

The appeal is less than clear but the position of the employer is understood to be that the time sheets that have been produced by Roffey are correct so far as they go, but incomplete in that they fail to show breaks taken by Roffey and Jeffery Laurin in the middle of the workday. According to the employer, these two employees could come and go as they pleased, just so long as the restaurant was not busy, and they did not work continuously, from the point that they started work to the point that they were finished for the day. In this vein, the employer is seeking to introduce the evidence of witnesses (customers) who are said to know that Roffery and Laurin were not at work for the entire length of their workday. The employer fails to show, however, that the witnesses were not available at the investigative stage.

The employer, on appeal, raises a new issue and it is seeking to introduce new evidence in respect to that issue: Evidence which is designed to show that Roffey and Laurin were managers as the term "manager" is used in the *Employment Standards Regulation*.

The Appellant claims that matters between it and Kwok-Tung Tong have been settled. I am advised by the delegate, however, that while Kwok-Tung Tong offered to settle his complaint, the employer did not pay him as agreed and so the Determination was issued. I am not shown that Mr. Tong is at this point prepared to settle for less than the amount which he is awarded in the Determination, namely, $390.46 plus interest.

ARGUMENT AND ANALYSIS

The burden is on the Appellant to show that the Determination should be varied or cancelled or a matter or matters referred back to the Director [see *World Project Management Inc*., BCEST No. D134/97 (Reconsideration of BCEST No. D325/96)]. The Tribunal does not re-investigate complaints and an appeal is not an opportunity to re-argue positions taken at the investigative stage.

The Appellant argues that the Determination should be varied for reason of an agreement reached with Kwok-Tung Tong. It has, however, failed to show me that Mr. Tong is prepared to settle for anything less than the amount awarded by the Determination. Absent any evidence of the agreement of which the Appellant alleges, there is no reason to vary the Determination.

The employer has in this case claimed that there is new evidence to consider, evidence which was not previously available. The employer has not shown me that there is evidence which was not previously available. I am not shown that the Appellant could not produce its witnesses at the investigative stage. The Appellant speaks of time sheets which were not previously available but I am not shown that Atmosphere has time sheets as alleged, never mind that it could not have produced the time sheets at the investigative stage.

As I see it, this is a case where an employer, faced with an order to pay a significant amount of wages, hopes to submit evidence which could have and indeed, should have, been submitted to the delegate. The Tribunal has said (See *Tri-West Tractor Ltd.*, BCEST No. D268/96 and *Kaiser Stables Ltd.*, BCEST No. D058/97.) that it will not normally allow an employer to present new evidence at the appeal stage if the evidence could have been presented at the investigative stage . The Tribunal in the *Tri-West* decision had this to say:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. … The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

In *Kaiser Stables*, the concerted efforts of a delegate to have an employer participate in the investigation of a Complaint were ignored by the employer. The employer then appealed the delegate's Determination and sought to introduce new evidence on appeal. That evidence was ruled inadmissible. The Adjudicator in that decision states, "the Tribunal will not to allow an employer to completely ignore the Director's investigation and then appeal its conclusions".

Decisions like *Tri-West* and *Kaiser Stables* preserve the fairness and integrity of the *Act*'s decision-making process. If it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.

In this case the employer paid employees on the basis of the time sheets which Roffey kept for the employer. It did not, at the investigative stage, claim that Roffey and Laurin did not work those hours, nor did it argue that the employees are managers as the term "manager" is defined in the *Employment Standards Regulation*. I am satisfied that the employer in this case should not be allowed to submit any evidence at the appeal stage that is to do with the matter of hours worked or whether the employees are or are not managers. That said, I should add that the employer has given me no reason to believe that Roffey and Laurin may in fact be managers. It is, moreover, quite unlikely that any customer, even a frequent customer, would have much of any idea, never mind remember, why an employee was not at work on given day, whether the employee was or was not on call, and what hours and days were worked.

The employer in this case failed to produce records which are required by the *Act*. The delegate has relied on records submitted by employees as a delegate may do. I am not shown that there is anything obviously wrong with the Determination. The employer complains that Roffey and Laurin took breaks from work but even the employer admits that the employees were expected to be at work whenever the restaurant was busy.

The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 19, 2002 be confirmed in the amount of $4,548.97 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal