Employment Standards TRIBUNAL

An appeal

- by -

Alan Thompson and Cynthia Thompson operating as Victory Restaurant
("Victory" or "Employer")

- 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: Paul E. Love

FILE No.: 2003A/74

DATE OF DECISION: June 3, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Alan Thompson and Cynthia Thompson doing business as Victory Restaurant ("Victory" or "Employer"), from a Determination dated February 4, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate conducted an evidentiary hearing, and found that the employee, Shane Parker was entitled to be paid by the Employer the sum of $661.01, which included claims for overtime and interest. The Employer filed a notice of appeal, which did not identify a grounds for appeal, and did not provide any meaningful submission in support of its assertion that the Determination ought to be cancelled or varied. The notice of appeal did not challenge in any material way the findings or conclusions set out in the Determination. I therefore dismissed the appeal, and confirmed the Determination.

ISSUE:

Did the Employer identify any error in the Determination, warranting a review by the Tribunal?

FACTS

I decided this case after considering the notice of appeal filed by the Employer, the written submissions of the Employer, and Employee and the record of the hearing provided by the Delegate. The Delegate conducted an evidentiary hearing of this matter on December 16, 2002, and oral evidence and documents were filed by the parties. The Delegate issued the Determination and written reasons on February 4, 2003.

The Delegate found that Shane Parker worked from June 28, 2001 to August 22, 2002, as a cook. His rate of pay was $10.00 per hour. Mr. Parker commenced working before the restaurant opened on July 1, 2002. He helped with the opening of the restaurant, including setting up the kitchen, developing the menu and ordering supplies.

At the hearing the Delegate considered three sets of records of hours worked: records kept by Parker, records kept by the Employer, and amended records issued by the Employer's accountant. The Delegate found both the Employer and the Employee to be credible. The Delegate accepted both the records of the Employer and the Employee, but rejected the records issued by the Employer's accountant. The Delegate determined that the amended payslips given Parker after termination were not "ongoing contemporaneous records". The Delegate noted that the Employer:

> did not provide any other evidence supporting the claim Parker padded his hours other than stating she deducted hours as she saw fit. No evidence before me suggest Parker was told the exact reason the deductions were made nor did he have a response to his questions about less hours on his payslips.
>
> Thompson as the employer had control and direction of Parker including the hours he worked and in what manner they were worked. It is not disputed Parker was given some autonomy in organizing his work as well as submitting his hours. I cannot, on the evidence supplied, see where Thompson has made a clear case that Parker was padding his hours. There certainly was a

> suspicion that it was happening but if I accepted this then I would have to accept statements from Parker that he did not. On balance I have based my decision on a comparison of the records supplied excluding the amended payslips and have applied the minimum provisions of the Act.

The Delegate found that the sum of $648.00 was owing by the Employer to the Employee which appears to consist primarily of overtime, or hours worked in excess of 8 hours per day, with interest of $13.01, for a total of $661.01. A detailed calculation of the hours worked, with a comparison to the hours for which the employee was paid, is attached to the Determination.

Employer's Argument:

The Employer provided an appeal form which did not indicate any grounds of appeal. The Employer asks that the Tribunal

> Re-Look at how much time he spent out of our working day out of the restaurant visiting behind our restaurant/going to get smokes/lunch/breakfast/taking smoke breaks/taking breaks. [...]
>
> I still feel that Shane shouldn't be paid so much money because he took advantage of us being new to the business and did a lot of his private business on our time.

I note that this is the sole extent of the appeal submission filed by the Employer.

Employee's Argument:

The Employee noted that the Employer was "just re-stating her arguments from the adjudication hearing and has no evidence to substantiate her statements as they are false."

Delegate's Argument:

The Delegate provided the record that was before him. The Delegate made no submissions in this case as to the conclusion that I should arrive at on this appeal.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to demonstrate an error such that I should vary or cancel the Determination. I note that the Delegate provided a reasoned decision, after hearing the evidence which was available.

The Employer did not identify its grounds for appeal on the appeal form filed with the Tribunal. The appeal form requires that the appellant state its grounds for appeal. From a reading of the entire form, however, it appears that the Employer takes issue with the fact finding of the Delegate. Without identifying a grounds for appeal, it appears that the Employer has alleged an error of fact. I note that error in fact finding is not one of the permitted grounds for appeal set out in section 112(1) of the *Act*. The *Act* provides for an appeal on grounds that:

> (a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

In my view, the failure to state the grounds for an appeal is not necessarily fatal to an appeal, because the appellant may raise the grounds by identifying the remedy sought. I am also cognizant that I am dealing in this case with parties who are not represented by counsel, and may not appreciate the legal niceties in the distinction between errors of fact, law, jurisdiction and natural justice. I also note that in certain situations where fact finding has been particularly egregious, such that there is no factual basis for a finding, an appellant may be in a position to demonstrate an error of law. It is my view that the failure to identify the grounds for the appeal is not fatal to the appeal, provided it is apparent from a review of the entire appeal form and submission, that the appellant alleges a form of error that is within the jurisdiction of the Tribunal.

In this case, however, the Employer's submission is so bereft of detail, that it is apparent that it raises no issue of error. The Employer has identified no evidence or argument which challenges the material points in the Determination, in any meaningful fashion. The Employer does not identify any errors in the Determination, in any meaningful way, so that I can proceed to a consideration of error in the Determination. I note that while the Employer feels "taken advantage of" by the Employee, it is for the Employer to direct and control its work force, during the course of that relationship. I fully agree with the approach taken by the Delegate in this case, to give weight to the contemporaneous records of the parties, rather than the records created after the end of the employment relationship by the employer's accountant. I do not propose to canvass all the evidence that was before the Delegate and re-weigh that evidence. I therefore dismiss the appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated February 4, 2003 is confirmed, together with interest in accordance with section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal