



An appeal

- by -

Francois Lambert operating as Soprano's International Oyster Bar & Grill
(“Lambert”)

- 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: David B. Stevenson

FILE No.: 2004A/157

DATE OF DECISION: November 30, 2004



DECISION

SUBMISSIONS

David L. Stratmoen	on behalf of Francois Lambert
David A. Paul, Q.C.	on behalf of Steven Paul
Cal Mitten	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Francois Lambert operating as Soprano’s International Oyster Bar & Grill. (“Lambert”) of a Determination that was issued on August 6, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Lambert had contravened Part 3, Sections 17 and 18, and Part 7, Section 58 of the *Act* in respect of the employment of Steven Paul (“Paul”) and ordered Lambert to pay Paul an amount of \$27,308.80, an amount which included wages and interest.

The Director also imposed an administrative penalty on Lambert under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$1000.00.

Lambert says the Director erred in law in deciding Paul was not a partner in Soprano’s International Oyster Bar & Grill and erred in law and failed to observe principles of natural justice in making the Determination by totally accepting Paul’s evidence as to the number of hours he had worked over a six month period.

Lambert has indicated his belief that an oral hearing is necessary, stating that issues of the credibility of the parties require the Tribunal to hear and see the parties give evidence in support of their respective positions. The Tribunal has reviewed the appeal, the Determination and the materials on record and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal are whether Lambert has shown the Director erred in finding Paul was entitled to wages in the amount ordered. Included within this issue is a question of the status of Paul under the *Act* and the correctness of the wage calculation done by the Director.

THE FACTS

The appeal does not suggest there is any significant dispute on the facts, notwithstanding the basis for the request by Lambert for an oral hearing.

In May 2003, Lambert asked Paul to join him in a restaurant business venture. Paul agreed. Based on material provided to the Director by Lambert during the investigation, Paul was to take over all management duties and have responsibility for the day-to-day business operations of the restaurant. Initially, Paul was put on a salary of \$1500.00 a month. In July 2003, Lambert, on behalf of Soprano’s



International Oyster Bar & Grill, entered into a wage subsidy agreement in which it is stated that Paul's wage was \$15.00 an hour. In that agreement, Paul is identified as Manager.

One of the issues considered by the Director in the Determination was the status of Paul under the *Act*, which the director characterized as the issue of "partner versus employee". It was the position of Lambert that Paul was a "partner" in the business venture. Paul indicated that although he had tried on several occasions to come to terms on a partnership agreement, no agreement was ever reached. The Director found that Paul was intent on becoming a partner in the business, but there was no evidence confirming a partnership agreement was entered into. The Determination refers to information provided by Sharon Morrison, the former bookkeeper for Soprano's International Oyster Bar & Grill, that Paul was supposed to become a partner, but that it never happened.

In concluding Paul was not a partner in the business, the Director cited the absence of a partnership agreement, the absence of signing authority for Paul for the business bank account and the fact financial control of the business was exclusively with Lambert. The Determination also refers to the improbability that Lambert would have entered into a wage subsidy agreement for Paul if he was a partner in the business and the absence of any reference to Paul in the documents prepared when the company name was registered.

The Director considered the question of Paul's hours, stating in the Determination:

In regards to the Complainant's hours, his are the only records that I have. There is no way to know how much he slept and no such record was kept. He claims his hours are a fair assessment of his work time and I have no evidence to dispute that. Therefore, his hours are accepted.

Paul had indicated in his complaint that he had worked 1717 hours in the last six months of his employment. The record indicates that Paul claimed he actually worked, on average, 80 hours a week but was claiming wages based on working an average of 70 hours a week in the last six months.

The Determination states that Lambert supplied no payroll records or evidence that any wages were paid to Paul. A T-4 was submitted by Lambert which suggested Paul had received \$7500.00, but it was not accepted by the Director in the absence of other evidence showing those amounts were actually paid to and received by Paul.

There was reference in the Determination to Paul having paid an amount of \$6,783.06 into the business and having been reimbursed \$4,928.00. The Director noted that Paul had been advised, and accepted, that the Director had no authority to deal with expense claims.

ARGUMENT AND ANALYSIS

The burden is on Lambert as the appellant, to persuade the Tribunal that the Director committed some error in making the Determination and that the Tribunal should intervene to correct that error. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*



- (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.*

Counsel for Lambert argues that the Director erred in law in finding Paul was not a partner in the business venture. He says the Director placed too much emphasis on the absence of a written agreement at the expense of other evidence, such as the “investment” of \$3000.00 by Paul in the business, public representations identifying Paul as an “owner” of the business, that of all the persons working at the restaurant, only Lambert and Paul had no record of time worked kept for them, that Paul’s sleeping at work was not consistent with appropriate conduct for an employee and that the amount of time Paul spent at the business was more consistent with the time an “owner” would spend at the business than an employee. Counsel argues there is no legal requirement for a written agreement before a partnership is established.

On the matter of the hours worked, counsel says they are grossly inflated and that the Director failed to give proper consideration to the evidence of Sharon Morrison, that Paul “slept a lot” when he was at the restaurant. He also argues that the Director failed to make any adjustments to the hours claimed for sleeping or for mealtimes and other breaks.

Counsel for Lambert says the failure of the Director to take into account payments that Paul “may have received from the restaurant during the six months in question”, such as payments for car repairs, his ex-wife’s alimony and for rent, is not only wrong, but offends principles of natural justice.

In reply to the appeal, counsel for Paul argues the decision on Paul’s status under the *Act* was rationally grounded in the provisions of the *Act* defining who is, or is not, an employee, the objects and purposes of the *Act* and the facts. He says that even if Paul was a partner, it was clear on the evidence that he was also an employee and there was no reason for excluding him from the basic protections in the *Act*.

Counsel says the decision of the Director on the hours worked by Paul was supported on the evidence and no error has been shown. He says Lambert has not shown the Director failed to observe principles of natural justice in making the Determination.

The Director has filed the record without commenting on the merits of the appeal. No issue respecting the sufficiency of the record has been raised.

Some additional comments on the request by Lambert for an oral hearing on this appeal are warranted. As indicated above, the request is based on the assertion that there is an issue of credibility. The Determination, however, gives no indication there was any issue of credibility.

The facts accepted by the Director relating to the nature of the relationship between Lambert and Paul were substantially agreed as between Lambert and Paul. The submissions of counsel for Lambert in this appeal do not challenge any particular finding of fact on this question, only whether the findings, *at law*, justify the conclusion reached.



On the question of the facts upon which the wage calculation was based, once again the appeal does not demonstrate that credibility was an issue in the complaint process. The findings made by the Director on this matter were largely based on evidence which was uncontradicted. The nature of the appeal in this area goes to whether the claim was “grossly inflated”, whether the Director should have deducted payments allegedly made on behalf of Paul for car payments, alimony and rent and whether the Director adjusted the claim for sleeping and for mealtimes and other breaks.

On the first point, the Determination notes that Paul said his claim was a fair assessment of his work time and that the Director had “no evidence to dispute that”. On the second point, while there is only an oblique reference in the Determination, in my view the Director properly ignored those amounts as there was no basis for finding those amounts were paid as “wages”. Section 21 of the *Act* would prohibit the amounts from being deducted, or “set-off”, against wages found owing. On the third point, the record indicates Paul had “adjusted” his claim of hours worked from an average of 80 hours a week to an average of 70 hours a week. There is nothing in the Determination or the material on record that Lambert ever argued, or provided evidence, on whether the hours claimed should be further adjusted for mealtimes and other breaks. The Determination indicates the Director considered the matter of Paul sleeping but had no evidence concerning how that might affect his claim of hours worked. Even in this appeal, counsel for Lambert has not suggested what adjustment should be made to Paul’s claim on this basis.

Fundamentally, however, the appeal as it relates to the wage calculation done by the Director challenges findings of fact. As I will address later, there are limitations on the authority of the Tribunal to consider appeals that challenge findings of fact.

Returning to the grounds of appeal raised by Lambert, I will first consider whether the Director erred in law in finding that Paul was an employee of the business under the *Act*, and not a partner. I am not convinced any such error has been made. If some other conclusion was, as a matter of law, dictated by the evidence presented to the Director, suffice to say the burden is on Lambert and it has not been demonstrated in this appeal.

This ground of appeal is dismissed.

Even if the Director erred in finding Paul was not in a partnership with Lambert, that would have no effect, in the circumstances, on the finding that he was an employee under the *Act*. As counsel for Paul has noted in his submission, the Tribunal has stated, in *TDB Forestry Services Ltd.*, BC EST #D288/00:

The *Act* contains no provision or clear statement for the exclusion of persons who are shareholders, or who might be considered or characterized as “owner-managers” and “partners” in an entrepreneurial enterprise, from the definition of “employee” in the *Act*.

The Tribunal has discussed in several decisions the rationale for excluding persons who might otherwise meet the definition of employee in the *Act* from access to its protections (see, for example, *Barry McPhee*, BC EST #D183/97, *Sam Bell*, BC EST #D268/96 and *Andy Wong*, BC EST #D648/01). That rationale has no application in this case.

On the question of the wage calculation done by the Director, I note at the outset that the conclusion of the Director about how many hours Paul worked is predominantly a finding of fact which Lambert says is wrong. The *Act* does not list error of fact as a ground of appeal. The appeal must be confined to those grounds listed in subsection 112(1), above.



The Tribunal has accepted that in some circumstances errors on findings or conclusions of fact can amount to error of law. In that context, however, Lambert must show either there was no evidence to support the findings of fact made or that a view of the facts was taken by the Director that could not reasonably be entertained based on the evidence that was before the Director (see *Gemex Developments Corp. -and- Assessor of Area #12 - Coquitlam*, [1998] B.C.J. No. 2275 (BCCA)). More specifically, in the context of the Director calculating the amount of wages that may be owing, the Tribunal has consistently confirmed the Director has considerable latitude in deciding what information will be received and relied on. If the wage calculation is sought to be challenged, the burden on the appellant is to show either a manifest unfairness in the way that conclusion was reached – primarily a natural justice question – or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made (see *Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

In this appeal, Lambert has not met the burden on him.

In deciding the wage claim, the Director accepted the evidence of Paul that his record of hours worked was a “fair assessment” of his work time. The Director considered the evidence that Paul “slept a lot”, but apparently had no evidentiary basis for finding it affected Paul’s evidence. While it might be argued the Director could have been more comprehensive in analyzing the evidence in this area, it can safely be said from a reading of the Determination and the record that the decision of the Director to accept that Paul had worked 1717 hours was supported by some evidence. The Determination also clearly states there was no contrary evidence. There is no indication, in the appeal or otherwise, that the wage calculation was reached in a way that was manifestly unfair to Lambert. He was provided with ample opportunity to respond to the specifics of the claim made by Paul.

While counsel for Lambert asserts the number of hours Paul claimed as time worked was “grossly inflated”, that assertion is not supported by anything in the appeal or the record and represents nothing more than a disagreement with the decision of the Director. Nothing in the record or in the appeal shows the Director’s view of the facts was one which could not reasonably be entertained on all of the evidence submitted.

No reviewable error has been shown.

This ground of appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations, dated August 6, 2004, be confirmed in the amounts shown, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal