

An appeal

- by -

Rocky Iida and Francine Melger operating as Ohtako  
(the "Appellant")

- 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:** Ib S. Petersen

**FILE No.:** 2003/026

**DATE OF DECISION:** June 19, 2003

## DECISION

### SUBMISSIONS:

Mr. Tsunehisa Iida (“Iida”)	on behalf of himself
None	on behalf of Nagano Trading Inc. (“Nagano”)
Ms. Jackie Chow (“Chow”)	on behalf of herself
Mr. Jim Ross	on behalf of the Director

### OVERVIEW

This decision arises out of a referral back to the Director which, in turn, was the result of an appeal by Mr. Tsunehisa (“Rocky”) Iida and Ms. Franchine Melger, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination of the Director issued on November 22, 2002.

Chow worked at Ohtako, a restaurant, from April 25 to June 1, 2002 as a cashier. The business apparently ceased to operate at that time and Chow remains unpaid for the last pay period. The Delegate considered that she was entitled to the amount set out above. The Determination concluded that Chow was owed \$816.82 by Tsunehisa Iida operating as Ohtako; Francine Melger operating as Ohtako; and Nagano Trading Inc. operating as Ohtako.

When the Determination came before me, the key issue was the identity of the Employer. I concluded that the Determination was--on its face--fundamentally flawed and could not be allowed to stand. The Delegate did not properly identify the employer.

With respect to the appeal as a whole, I made the following orders:

Pursuant to Section 115 of the Act, I order that

1. the Determination dated November 22, 2002, be cancelled with respect to the conclusion that Melger was an employer;
2. the question of the identity of the true employer is referred back to the Director; and
3. unless other persons are found to be Chow’s employer, individually or as associated businesses, the amount owed to Chow is confirmed.

### REFERRAL BACK

In the report, dated April 24, 2003, the Delegate concludes:

“The employee maintains her position. Rocky Iida maintains his position. I return to my Determination of November 22, 2002. There were witness statements on page three. On page 4 I found that real and artificial persons operated the partnership of Ohtako. For whatever reason, Rocky Iida had himself removed from the limited liability of an officer/director and continued to function at least as an officer/director subject to liability for employee wages. When removed from the limited liability of an officer/director Rocky Iida operated in a manner that is consistent with being an owner of Ohtako. The Decision to refer back excluded Melger from the employer

partnership. Based on the previous information outlined in the November 22, 2002 Determination and the position from the refer back, the true employer is Rocky Iida operating as Ohtako; Nagano Trading Inc. operating as Ohtako.”

From the referral back, is apparent to me is that the Delegate has not done what he was ordered to do, namely determine the true employer. The report seems to confuse various forms of business organizations. If the conclusion is that Mr. Iida (or someone else) was the owner at the material times (a proprietorship), the basis for that determination should be clearly set out in the Determination. Similarly, if the conclusion is that the business was operated by a partnership (a form of business organization providing for joint and several liability between the partners), or operated a corporate entity (providing for limited liability), the basis for those conclusions should be set out.

In Re *Kenneth Crispin Richardson et al.*, BC EST # D120/99 my colleague noted:

A business may be operated as a proprietorship, a partnership, a limited partnership (the latter two governed by the Partnership Act) or a corporation (under the Company Act) but a single business enterprise cannot be more than one of these legal entities at the same time. These various forms of business organizations are mutually exclusive.

The report suggests that the employer were two entities: “Rocky Iida operating as Ohtako; Nagano Trading Inc. operating as Ohtako.”

I find it difficult to accept that the determination of the identity of the employer, in the circumstances of the case at hand, is not a relatively straightforward matter. Nagano Trading Inc. and Mr. Iida, by themselves or in combination, are obvious candidates. As suggested in my initial decision, there remains the possibility that the business was operated by two or more entities, as a “common employer”--a concept that is different from the partnership.

The determination of the identity of the employer, and, thus, who is to pay the wages, is a fundamental issue (even if there is not a large amount of money at stake). It is also important from the standpoint that the order has to be enforceable against some entity or person.

I have, with some reluctance, decided to refer the matter of the identity of the employer back to the Director again; this time, however, on the conditions that the referral back be undertaken by another delegate and that it be done expeditiously.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination, dated November 22, 2002, be referred back to the Director for determination of the identity of the true employer.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**