

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Adele Karame operating as #5 Alive Pizza
("Karame")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/32

DATE OF HEARING: June 30, 1997

DATE OF DECISION: July 10, 1997

DECISION

APPEARANCES

for the appellant:	Adele Karame
for the individual:	on his own behalf

OVERVIEW

This matter involves an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Adele Karame operating as #5 Alive Pizza (“Karame”) from a Determination, No. CDET 004931, dated December 9, 1996, of a delegate of the Director of Employment Standards (the “Director”) 1997. The Director concluded Karame had contravened Sections 18(2), 27(1), 28, 58(1) and 58(3) of the *Act* in respect of the employment of Kirk Tony Painter (“Painter”) and another employee and ordered payment of the amount of \$800.81. This appeal is filed only in respect of that portion of the Determination respecting the employment of Painter, which is in the amount of \$634.71. Karame says the Determination is wrong because Painter was not an employee, but rather an independent contractor, during the period of time covered by the Determination, April 29, 1996 to May 8, 1996.

ISSUE TO BE DECIDED

The issue is whether Painter was an employee or an independent contractor.

FACTS

Karame owned and operated a small pizzeria. In early 1996 he decided, for personal reasons, to dispose of the business. He advertised generally for someone interested in leasing the premises and taking over the business. Painter answered the advertisement. On April 6, 1996, he agreed with Karame to the terms upon which he would take over the premises and assume control of the business. The agreement required the payment of certain amounts of money by Painter on specified dates. Painter could not raise the money and the agreement was brought to an end. During the negotiations Painter told Karame he planned to open the premises for breakfast and lunch.

When Painter told Karame he could not complete the agreement, he also told Karame if he needed a cook, he was interested. He gave Karame a number where he could be reached. In the latter part of April Karame needed a cook for the pizzeria. He contacted Painter and asked if he was interested in working for him. Painter said he was and went

to work for him in the pizzeria. During the first shift Karame asked Painter if he would be interested in opening the premises for breakfast and lunch. Painter said he would. There was some discussion about how Painter would be compensated for this experiment, including giving Painter 50% of the profits, but no understanding was reached.

Karame paid for all the supplies, unlocked the premises each morning for Painter and controlled the float, the cash and the receipts. Painter worked the breakfast and lunch hours by himself and then assisted Karame in the pizzeria in the evening.

The experiment was a disaster. There was no business. When Painter raised the question of what he was going to be paid, Karame balked. Painter walked.

ANALYSIS

It is clear on any test that Painter was an employee of Karame. Painter had no control, no ownership of any part of the premises or the business, no chance of profit from the business and no risk of loss. The success or failure of the experiment fell entirely to Karame. The business for which Painter toiled was Karame's business, even though the original idea for opening for breakfast and lunch came from Painter. It does seem clear that Painter was hopeful the experiment might prove successful and he could share in a percentage of the profits, but the evidence confirmed two things in that respect: first, Karame had control of determining how, and whether, any profit would be made; and second, Painter had told Karame at the outset that he was not working for nothing, leaving the inference that even if there was no profit he expected to be paid for his work.

The appeal is denied.

ORDER

Pursuant to Section 115 of the *Act* the Determination, No. CDET 004931, dated December 9, 1996, is confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal