

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 -

Jacob A. Dillen operating as Mezzaluna House of Gourmet Coffee

(“Dillen”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/072

DATE OF DECISION: June 16,1997

DECISION

OVERVIEW

This is an appeal by Jacob A.Dillen operating as Mezzaluna House of Gourmet Coffee (“Dillen”), under Section 112 of the *Employment Standards Act*, (the “*Act*”), against a Determination which was issued by a delegate of the Director of Employment Standards on January 14,1997. The Determination found that Dillen had contravened Section 17 (Paydays), Section 34 (Minimum Daily Pay) and Section 58 (Vacation Pay) of the *Act* by failing to pay wages for work performed by Lonnie P. Foodikoff (“Foodikoff”). Dillen’s appeal alleges that Foodikoff provided his services as a volunteer and denies that any wages are payable to Foodikoff.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Foodikoff is owed the wage amounts set out in the Determination.

FACTS

A hearing of the appeal was scheduled for April 8,1997 in Kelowna, B.C. Prior to the commencement of the hearing, the parties undertook settlement discussions and advised me that they had reached a verbal agreement in principle to resolve the appeal. The hearing was adjourned on that basis and with an undertaking by the parties that when the agreement was reduced to writing a copy would be forwarded to the Tribunal.

The Tribunal did not receive a copy of a written agreement to resolve the appeal. Rather, Benjamin Dillen (a brother of Jacob A. Dillen), wrote to the Tribunal to advise that he was “...willing to enter into negotiations with Lonnie Foodikoff to work out a suitable solution in this situation within the next 6 months” (sic). In the absence of any further correspondence from the parties, I wrote on June 4,1997 to request them to contact me by telephone on or before June 11,1997. My letter also stated that “ ...in the absence of a signed written agreement in full and final settlement of the above-noted appeal, I will issue an order to decide the appeal.” The parties contacted me by telephone as requested and it became evident that they had not concluded a written agreement to resolve the appeal.

This decision arises from my review and analysis of the documents submitted to the Tribunal.

The Determination shows that the Director’s delegate relied on the hours of work record which was provided to her by Foodikoff because she “...found it to be credible” and

because Dillen informed her that "...there were no records of any sort for Foodikoff." The Director's delegate determined that Foodikoff was entitled to:

Wages Earned (January 25 to February 20,1996)	726.75
Vacation Pay (4% of \$726.75)	<u>29.07</u>
Subtotal	755.82
Interest on \$755.82	<u>43.92</u>
Total Owing	799.74

A Calculation Schedule was attached to the Determination to explain these amounts.

In his appeal, Dillen submits that:

"...Foodikoff's services were strictly voluntary and no contractual agreement was ever made to remunerate him upon services rendered. The investigation has shown that records of scheduling and payroll are non-existent and that Foodikoff's submission of hours worked is based solely upon his own word."

Dillen also submits that the Determination shows that:

"...payment was made in full by Dillen to Foodikoff for services rendered to Dillen and not to the establishment."

The central reason for Dillen's appeal is that Foodikoff was never employed by him in his capacity as proprietor of Mezzaluna House of Gourmet Coffee.

ANALYSIS

In Section 1(1) of the *Act*, the definition of "employee" includes "... a person an employer allows, directly or indirectly, to perform work normally performed by an employee." Similarly, the definition of an "employer" includes a person "... who is or was responsible, directly or indirectly, for the employment of an employee."

In *Helping Hands Agency Ltd.* (BCCA,1995 Vancouver Registry CA018751), our Court of Appeal made the following analysis, at page 6:

"The (*Act*) is remedial legislation. Consistent with s. 8 of the *Interpretation Act*, R.S.B.C. 1979, c. 206, the (*Act*) should be given such fair, large and liberal construction as best insures the attainment of its objects."

The Court of Appeal was guided in its analysis by the Supreme Court of Canada's reasons in *Machtiger v. Hoj Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.). The purposes of the *Act* are set out in Section 2 and include ensuring that "employees... receive at least basic standards of compensation and conditions of

employment.” The purposes also include “ the fair treatment of employees and employers.”

Dillen’s appeal attempts to draw a distinction between himself and “the establishment”, by which I take him to mean Mezzaluna House of Gourmet Coffee. I do not accept that such a distinction can be made.

The Determination described the tasks which Foodikoff carried out as those of a “coffee maker/server.” Such tasks are normally performed by an employee in a coffee house. For that reason, I find that Foodikoff’s tasks bring him within the definition of an employee for purposes of the *Act*.

When I review the reasons for Dillen’s appeal I cannot find any evidence that establishes that Foodikoff was a either a volunteer or a contractor. This is the same conclusion which the Director’s delegate reached in the Determination. As the appellant, Dillen bears the onus of demonstrating, on the balance of probabilities, that there are reasonable grounds to vary or cancel the Determination. For all of these reasons, I find that there are no reasonable grounds on which to vary or cancel the Determination.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal