Employment Standards TRIBUNAL

An appeal

- by -

Woodfire Restaurant Ltd.
(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: W. Grant Sheard

FILE No.: 2003A/177

DATE OF DECISION: September 3, 2003

DECISION

OVERVIEW

This is an appeal based on written submissions by Woodfire Restaurants Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Memorandum issued by the Director of Employment Standards (the "Director") on June 19, 2003 varying an earlier Determination issued by the Director December 6, 2002 which, after an earlier appeal, was directed back to the Delegate for further calculations. In the Memorandum of June 19, 2003 the Delegate varied the original Order by increasing the wages owed to the Respondent to $3,930.01 plus interest of $217.74 for total wages owing of $4,147.75 (increasing the amount found due in the original Determination of $2,169.91 for regular wages, vacation pay and interest). (It is to be noted that the Delegate states in the Memorandum that the interest figure is $217.47, but in the "Interest Calculation" attached to the Memorandum that amount is correctly stated as $217.74.)

ISSUE

Are the Delegate's calculations regarding wages and interest due correct?

ARGUMENT

The Appellant's Position

In a written letter dated July 12, 2003 Hans and Ruth Schroth reiterate many of the points they made in their original appeal. They say that in the first month of her employment the Respondent was hired as a manager. After that first month they say that for the next several months she was an independent contractor operating through her business name "Lucky J Ventures". Further, they say that all cheques paid to the Respondent were for work done, not for gratuities. The Appellant says that the Respondent's statements during the original investigation and appeal to the effect that every cheque payable over the sum of $500.00 and $750.00 were for gratuities are simply false. The Appellant's summarize the payments which were made to the Respondent and note she received total gross pay of $18,247.47 as reflected in the T4 slips for the years 2000 and 2001. The Appellants say that it is their sincere belief that the Respondent has been paid every cent due to her.

In a further written submission dated July 2003, Kathleen Aylward, on behalf of the Appellant also asserts that the Respondent was paid total gross wages for the relevant time period of $18,247.47 as reflected in the T4 slips issued to her. Ms. Aylward says that there is no evidence that two cheques issued to the Respondent were for gratuities and says that it is not possible one person could have made the amount paid in these cheques for gratuities. Ms. Aylward further says that the Respondent could not have paid to two other employees of the Appellant out of cheques issued to her as the Respondent was never licensed to run her own business and never obtained a Revenue Canada remittal number.

The Respondent's Position

The Respondent did not file any further submissions on this appeal.

The Director's Position

In a Memorandum dated June 19, 2003 the Director's Delegate notes that after the Decision of April 8, 2003 referring the matter back to her for further calculation of wages as determined in the initial Determination of December 6, 2002 she contacted both parties for further information and made further findings and calculations accordingly.

The Respondent gave evidence that out of cheque issued to her dated January 17, 2001 she paid two of the Appellant's employees $487.97 for wages on behalf of the Appellant. Copies of the cheques paid to these employees were supplied by the Respondent. The Respondent gave evidence that all cheques issued to her in the amounts of $500.00 and $750.00 were for wages and that two other cheques she received in the amounts of $698.11 and $314.34 were for gratuities.

The Delegate notes that she met with Ruth Schroth who represented the Appellant and then discussed these matters with her on the telephone on five separate occasions and then met with Ms. Aylward, another representative of the Appellant on two further occasions. In all of these meetings the Delegate says that the Appellant indicated that it would provide payroll records to support its assertion that the two employees that the Respondent paid had in fact been paid by the Appellant such that there would be no reason for the Respondent to have paid them. The Appellant also indicated it would provide calculations to support its assertion that the cheques issued in the amounts of $698.11 and $314.34 were for wages as opposed to gratuities. The Appellant failed to provide this further information.

The Delegate found, in part, as follows:

> "Based on the overtime requirement pursuant to Section 40 of the *Act*, Ms. Jackson was entitled to receive wages in the amount of $2,321.80 including 4% annual vacation pay (per the attached calculation). Accordingly, as Section 1 of the *Act* defines wages to exclude gratuities, Ms. Jackson therefore appears to be owed outstanding wages in the amount of $412.99 for the period December 1, 2000 to December 31, 2000."

The Delegate went on to find that, for the period January 1, 2001 to March 31, 2001 when it was determined that the Respondent was an employee and manager, she was entitled to receive at least minimum wage for all hours worked and calculated that she was therefore entitled to $5,623.70 including 4% annual vacation pay. The Delegate stated that, despite being given several opportunities, the Employer did not provide any evidence to support the conclusion that either of the employees which the Respondent said she had paid on behalf of the Employer had been paid by the Appellant for the period January 1 to 15, 2001. The Delegate said that she was, therefore, satisfied that the Respondent did pay wages to these employees in the amount of $487.99 and that these wages can be recovered as the Respondent was required to pay them as the Employer's business costs being allowable deductions under Section 21 of the *Act.* The Delegate stated that she found that she preferred the Respondent's evidence in respect of the cheques in the amounts of $698.11 and $314.34 as being for gratuities, not wages. Accordingly, the Delegate attached calculation of wages due to the Respondent after allowance for payments made to her by the Appellant and varied the Determination of December 6, 2002 to wages owed to the Respondent of $3,930.01 plus interest in the amount of $217.47 (which should have read $217.74) for total wages owed of $4,147.75.

THE FACTS

The Appellant operates a restaurant and small conference center. The Respondent commenced working for the Appellant on December 1, 2000 and was appointed catering and conference manager effective January 1, 2001 and continued in that capacity to September 2001 when she quit.

In a Determination initially issued December 6, 2002 the Delegate ruled that the Respondent was an employee and that she was owed regular wages including vacation pay plus interest of $2,169.91.

In the original appeal filed pursuant to that Determination the Appellant asserted that the Respondent was a manager during her first period of employment from December 1 to 31, 2000 such that a salary only was due rather than an hourly rate. Further, the Appellant then asserted that the Respondent was an independent contractor for the period January 1 to April 1, 2001 such that a contractual rate was due rather than an hourly rate.

In my original Decision in the matter dated April 8, 2003 I found that the Delegate had erred in the calculation due to the Respondent for her first month of employment and referred the matter back for recalculation on the figure due for that time period. Further, I found that, although I agreed with the finding that the Respondent was a manager rather than an independent contractor for the period January 1 to April 1, 2001, she was nonetheless entitled to be paid a minimum wage for all hours worked. Lastly, as the Delegate had been unable to determine if any wages were due for the period January 1 to March 31, 2001, but the Employer had by the time of that appeal provided records of payments made, I referred the matter back to the Delegate for further calculation of any wages due during that period as well.

After the matter was referred back to the Delegate the Delegate contacted both the Appellant and the Respondent and received further information and submissions from them. The Appellant did not, however, provide any further evidence to demonstrate that two employees of the Appellant had been paid wages by the Appellant such that there was no need for them to have been paid by the respondent as the Respondent asserted, or that two cheques payable to the Respondent in the sums of $698.11 and $314.34 were for wages rather than for gratuities as the Respondent asserted. The Delegate preferred the Respondent's evidence that these payments were for gratuities.

The Delegate provided detailed calculations of the wages paid and due to the Respondent finding that she was owed wages in the amount of $3,930.01 plus interest in the amount of $217.74 (according to the "Interest Calculation" form attached to the Memorandum) totaling wages owed of $4,147.75.

ANALYSIS

In an appeal under the *Act*, the burden rests with the Appellant, in this case the Employer, to show that there is an error in the Determination (or in this case the Memorandum varying the Determination) such that the Determination should be cancelled or varied.

In this case I find that the submissions made by the Appellant are simply a restatement of the arguments or submissions made in the original appeal. Nothing further has been provided to displace the original findings with respect to the Respondent not being a manager for her first month of employment, being an employee manager rather than an independent contractor for the period January 1 to March 31, 2001, or that two cheques issued were for gratuities, not wages as defined by the *Act*. In the original Determination it was noted that one of these cheques was marked by the Employer as being for gratuities.

The Respondent gave evidence that is in fact what these payments were for and the Delegate accepted her evidence in this regard. As noted by the Delegate, the fact that gratuities must be included in income reported on T4 slips for income tax purposes does not change the fact that they are not included in the definition of wages in the *Act*. The Appellant has failed to provide any evidence demonstrating an error in the findings made by the Delegate in the Memorandum of June 19, 2003 varying the original Determination dated December 6, 2002. Accordingly, the Appellant has failed to meet the onus upon it.

ORDER

Pursuant to section 115 of the Act, I order that the Memorandum in this matter, dated June 19, 2003 varying the original Determination of December 6, 2002 providing that the Respondent is entitled to $3,930.01 plus interest in the amount of $217.74 for total wages owed of $4,147.75 be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal