BC EST #D299/97

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 -

Fred Kaiser operating as Tell's Inn Restaurant
("Kaiser")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	97/210
DATE OF HEARING:	June 27, 1997
DATE OF DECISION:	July 2, 1997

DECISION

APPEARANCES

Fred Kaiser Wilma Kaiser	Fred Kaiser operating as Tell's Inn Restaurant
Kellie Planedin	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Fred Kaiser operating as Tell's Inn Restaurant ("Kaiser") from a Determination of a delegate of the Director of Employment Standards (the "Director") dated March 14, 1997. In the Determination the Director concluded Kaiser had contravened Sections 18(1), 40(1)(a) and (b) and 63(2)(a) of the *Act* in respect of the employment and termination of employment of Kellie Planedin ("Planedin") and ordered Kaiser to pay to an amount of $812.66. Kaiser says the Determination is wrong because he was not the employer at the relevant time and is not responsible for the contraventions.

ISSUE TO BE DECIDED

The issue is whether Kaiser was the employer, or is otherwise responsible for the contraventions, at the time they arose.

FACTS

Planedin was employed at Tell's Inn Restaurant on May 1, 1995. She was laid off on December 28, 1995 and not recalled. At the time she was laid off she was in the position of Front End Manager of the restaurant and was working the equivalent of full-time hours (she averaged in excess of 40 hours a week over the last 8 weeks of employment).

At the time Planedin was first employed, the restaurant was owned and operated by Willy Kisely ("Kisely"). Kaiser and his wife were frequent patrons of the restaurant. In the latter part of 1995 Kaiser noted the restaurant was "going downhill." In November, Kaiser and his wife talked with Kisely. By this time Kisely appears to have removed himself from direct operational involvement in the restaurant, leaving much of the day to day management to the employees at the restaurant. Kisely acknowledged to Kaiser the restaurant was suffering financially and he was giving some thought to selling it. Kaiser and his wife indicated to Kisely they thought they could turn the fortunes of the restaurant around and convinced Kisely to allow them to take over the management of the restaurant.

On November 20, 1995, Kaiser and his wife and Kisely signed an "Operating Agreement". In the agreement Kaiser and his wife are referred to as the "Operators". Under the terms of the agreement Kaiser and his wife were to take control of the operation of the restaurant as of December 1, 1995. After that date the Operators would be responsible for all operating expenses, including rent on the premises, wages, insurance and supplies. The Operators were limited in the amount of capital expenditures that could be made, restricted from entering into any long term agreements without consent from Kisely and prohibited from pledging, or otherwise "endangering," any of the assets of the business. They were relieved from paying any rental on the equipment in the restaurant for the first six months. Finally, they were given first right of refusal to purchase the restaurant.

In one place the agreement is referred to as a "management lease agreement."

Kaiser and his wife took over the restaurant on December 1, 1995, as contemplated by the agreement. They both became directly involved. Mrs. Kaiser assumed much of the front end management responsibilities. Through December Planedin's job responsibilities and her hours began to be diminished. She worked some overtime. The business of the restaurant continued to be slow and occasionally Planedin was sent home. On one day she was sent home prior to completing four hours of her scheduled shift.

On December 28 Planedin was scheduled to work a split shift. Between the scheduled shifts, Kaiser asked her to if she would accept a reduction in her hours to part time work, essentially cutting her hours of work in half, and she said no. Kaiser laid her off. Planedin was never asked to return to her job nor was she offered any reasonable alternative employment by Kaiser.

The decision to lay Planedin off was made by Kaiser without consultation with or approval from Kisely.

ANALYSIS

The *Act* defines employer to include *"a person who has or had control or direction of an employee"*. The terms "*control*" and *"direction"* include the authority to hire, fire, lay-off and recall, to assign and reassign work, to schedule hours of work, including overtime, and to direct the manner in which the work will be performed. In December, 1995 the person exercising that control and direction as it applied to the employment of Planedin was Kaiser. During December, Planedin was not paid some overtime she worked and was not paid minimum daily hours for one day she was sent home early. Kaiser had operational control of the restaurant in this period.

Also, Kaiser made and acted upon the decision to lay Planedin off and had the authority to recall her to her job or provide reasonable alternative employment. He did neither and she was deemed terminated by application of subsection 63(5) of the *Act*.

Kaiser was the employer at the relevant time. As such he was responsible for ensuring the minimum standards of the *Act* were applied to Paledin while she was employed at the restaurant and was responsible for paying length of service compensation upon her termination. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act* I order the Determination dated March 14, 1997 be confirmed.

Dave Stevenson
Adjudicator
Employment Standards Tribunal