

An appeal

- by -

Trattoria Pasta Shoppe 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/257

DATE OF DECISION: December 16, 2003

The Director's Position

In a written submission dated October 14, 2003, dealing with the issue of the Determination being issued against the corporate entity, the Director says as follows:

“With respect to the timing of the formation of the company the Appellant is correct, a company search (attached) shows the business was incorporated on April 29, 2003 and that Argentino DiCecco is the sole director. Prior to incorporation, the employer is Argentino DiCecco operating as Trattoria Pasta Shoppe. For enforcement purposes it is possible to associate Argentino DiCecco operating Trattoria Pasta Shoppe with Trattoria Pasta Shoppe Ltd. and Argentino DiCecco, a director or officer of Trattoria Pasta Shoppe Ltd.

For reasons which will be apparent further on in this Decision, I have not elaborated on the Director's further submissions on this appeal.

THE FACTS

On August 27, 2003 the Director issued a Determination ordering Trattoria Pasta Shoppe Ltd. to pay to the Director \$1,110.58 comprised of wages, overtime, compensation for length of service, vacation pay and accrued interest due to the Employee of \$610.58 and an administrative penalty of \$500.00.

In further reasons for the Determination issued on the same date the Director stated as background to the Determination that Trattoria Pasta Shoppe Ltd. operates a restaurant which falls within the jurisdiction of the *Act*. The Respondent was employed as a server from March 27, 2000 to April 4, 2003 at the rate of pay of \$8.00 per hour. The complainant worked 24 hours per week. The Employer terminated the employment of the complainant.

The complaint was filed May 9, 2003 against the individual Argentino DiCecco (Trattoria Pasta Shoppe). The corporate Appellant was incorporated on April 29, 2003 with Argentino DiCecco as the sole director. The Determination and the reasons for the Determination are silent with respect to any finding that the corporation and Argentino DiCecco carrying on business as Trattoria Pasta Shoppe are associated.

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 such that the Determination should be cancelled or varied.

Section 95 of the *Act* says as follows:

- 95.** *If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and*
 - (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement, or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.*

Dealing with section 20 of the former *Act* and associated corporations (R.S.B.C. 1980, C.10 and now sec.95 under R.S.B.C. 1996, C.113) it has been found that the civil burden of proof on a balance of probabilities is clearly on the Director Respondent to establish that the facts and circumstances bring the Appellants within the provisions of Section 20: *Vencorp Enterprises Corp. v. British Columbia* (Director of Employment Standards), [1999] Civ. LD. 188 (24 September 1998), Vancouver A952134 (B.C.S.C.).

When the Director fails to specifically make a finding that two corporations are associated, the Tribunal cannot make that finding, but rather must send the matter back to the Director for further investigation: *Re 541809 B.C. Ltd.*, [1999] B.C.E.S.T.D. No. 60 (QL), (11 February 1999), BCEST #D047199 (Thornicroft, Adj.).

In the present case the Director failed to specifically make a finding that the corporation and Mr. DiCecco, an individual doing business as Trattoria Pasta Shoppe, were associated. In these circumstances, this Tribunal cannot make that finding and must send the matter back to the Director for further investigation.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated August 27, 2003 and filed under number ER119-962, be referred back to the Director to further investigate the association between Argentino DiCecco doing business as Trattoria Pasta Shoppe and the corporation, Trattoria Pasta Shoppe Ltd.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal