Employment Standards TRIBUNAL

An appeal

\- by -

KNW Holdings Ltd.
(the “Employer”)

\- 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: Ib S. Petersen

FILE No.: 2002/299

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal by the Employer, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on May 7, 2002. The Determination concluded that Ms. Plasman, Ms. Chapko and Ms. Fortin (collectively the "Employees") were owed $9,853.31.

The background is as follows. The Employer operated a restaurant business, Hearty Boy Restaurant. Ms. Plasman and Ms. Chapko worked as cook/cashier/waitress from March 1996 to June 22, 2001 and from October 1992 to July 15, 2001, respectively. Ms. Fortin worked as cashier/waitress from October 1998 to July 15, 2001. The Employees filed complaints with the Employment Standards Branch that they were owed final payment of wages, vacation pay and compensation for length of service.

As well, the Determination explains that while the business was owned by the Employer, KNW Holdings Ltd., it was managed by a series of operators/managers, the last being Mr. Clark Hazard. Apparently, the principal of KNW Holdings, Mr. Wayne MacDonald, was not actively involved the operation. Mr. Hazard withdrew his services on July 15, 2001, and the following day, the property managers proceeded with rent distress action.

The Employer's accountant provided some information to the Delegate showing that some wages were owing. The Employees provided a statement of unpaid hours of work to the Delegate together with their respective rates of pay. The Delegate noted in the Determination that the Employer's information was helpful but incomplete:

> "... There appears to have been no consideration in the calculation for overtime wages, compensation for length of service or annual vacation pay.
>
> A calculation showing wages owing each complainant was provided to the employer and no response was received. It can only be assumed, therefore, that KNW Holdings Ltd. is not disputing these calculations.
>
> I accept the information provided by the complainants regarding their length of employment, rates of pay, and hours worked as no evidence to the contrary was provided by the employer."

The Delegate concluded that the Employer had contravened Sections 18(1), 40(1), 58(1) and 63 of the *Act* and, as mentioned above, awarded the three Employees a total of $9,853.31.

ARGUMENT

In its appeal, the Employer makes the following points:

1. The Employer paid vacation pay together with wages (and attaches pay stubs).
2. The Employer was a partnership with Haa Kinoshita.
3. The Employees were given 60 days notice of termination.

The Delegate argues, first, that the Employer did not provide information that vacation pay was paid together with wages in each pay period, despite being requested to do so on several occasions, and says that the information could have been provided during the investigation. Second, the Delegate says nothing flows from the argument that the business was carried on in partnership with another entity or person because Section 95 provides for joint and several liability. Third, the Delegate points out that notice must be in writing and that there is no evidence to support that allegation (see Section 63(1)(a)).

The Employees take issue with a number of the material facts alluded to by the Employer.

FACTS AND ANALYSIS

The Employer appeals the Determination. As the Appellant, it has the burden to persuade me that the Determination is wrong. As it will be apparent from the reasons set out below, I am not persuaded that it has discharged that burden.

The resolution of this matter centres around whether or not the Employer participated in the Delegate's investigation. From my review of the file it appears that a Demand for Employer Records was issued on July 24, 2001 to the registered and records office of the Employer. The Demand was served via registered mail. A letter, attaching the Demand, was, as well, sent to the directors and officers requesting the records and extending the deadline for providing the records from July 31, 2001 to October 11, 2001. The letter warned that if complete records were not received by that date the Delegate would accept the Employees' "estimate" and issue a Determination against the Employer and its director/officers.

On October 16, 2001, after the deadline, the Employer's accountant replied, indicating that certain amounts may be owing but that Mr. Hazard had suggested that the Employees had been taken care of. It does not appear that the accountants provided the payroll records demanded by the Delegate. On October 24, 2001, the Delegate forwarded the calculations of amounts owed to the accountant together with a request for payment of the amount ultimately set out in the Determination.

However, it would appear that the Employer had at least one more opportunity to deal with the claims. In April 2002, a new Delegate, assigned to the file due to staff changes at the Employment Standards Branch, wrote to the Employer (by registered mail) indicating that a demand for payment was made but that no response had been received. The letter indicated that payment of the amount would resolve the matter and went on:

> "... Alternatively, should you wish to dispute the calculation of the outstanding amounts or your liability, please advise me of your position. May I please have your reply by April 25, 2002. Failure to respond will result in the issuance of a formal determination ..."

In my view there is no merit to the grounds of appeal raised by the Employer.

First, the Employer had ample opportunity to participate in the investigation and failed to avail itself of those opportunities. Nor is there even an explanation of the failure to participate. A party cannot, in my view, fail to participate--"lie in the weeds," as it were--and then take issue with the result of the investigation. The issues raised by the Employer, and the documents related to the appeal, could have been properly addressed at the investigation stage. There is no evidence that the Employer provided 60 days written notice to the Employees. I note that there is some dispute by the Employees as to the material

facts. In my view, this resolves the issues as to outstanding wages, vacation pay and compensation for length of service.

Second, even if the business was carried out as a partnership-- and I note that there is little beyond bald assertions to that effect, either in the appeal or in the sparse correspondence from the Employer during the investigation--this could also have been addressed in the investigation through, for example, Section 95. There is dispute between the parties with respect to the material fact. As mentioned by the Delegate, Section 95 provides for joint and several liability. In effect, therefore, the Director could still enforce the claim against the Employer.

The Employer's appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 7, 2002, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal