

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Caba Mexican Restaurants Ltd.

(“Caba”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/564

DATE OF HEARING: December 12th, 1996

DATE OF DECISION: December 27th, 1996

DECISION

APPEARANCES

C. Samantha Gale for Caba Mexican Restaurants Ltd.

Wayne Mackie for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Caba Mexican Restaurants Ltd. (“Caba”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 003886 issued by the Director of Employment Standards (the “Director”) on September 5th, 1996. The Director determined that Caba owed its former employee, Carlos Campos (“Campos”), the sum of \$5,810.13 on account of unpaid overtime, vacation and termination pay pursuant to sections 40, 58 and 63, respectively, of the Act.

An appeal hearing in this matter was held at Langley, B.C. on December 12th, 1996 at which time I heard testimony from Mr. Augustin Alcantara, Sr. and Augustin Alcantara, Jr. on behalf of Caba. Mr. Campos did not attend the appeal hearing as he presently resides in Mexico although I did receive and consider a written submission dated December 5th, 1996 from Mr. Campos. The Director elected not to call any evidence although Mr. Mackie, on behalf of the Director, did make a final submission as did Ms. Gale on behalf of Caba.

The Director held that Campos was employed as a restaurant manager with Caba from February 1st, 1996 until May 25th, 1996. During most of this time, the restaurant was, in fact, not open for business. Campos alleged, and the Director accepted, that Campos was retained to get the business “up and running” and once it opened (the restaurant actually opened for business in early May 1996 under the name “Burros en Langley”), to serve as the manager of the restaurant.

At the hearing, Ms. Gale, on behalf of Caba, raised the issue of whether or not Campos was entitled to advance a claim under the Act as he was not an employee. In support of her submission, Ms. Gale provided, both at the hearing and subsequent thereto, several documents that were not available to the Director at the

time of issuance of the Determination. If I hold that Campos was not an “employee” under the Act, then the question of Campos’ entitlement to unpaid wages would be moot (at least insofar as Campos’ complaint under the Act is concerned). Accordingly, I will now address this jurisdictional issue.

THE JURISDICTIONAL ISSUE

Was Campos an “employee” for purposes of the Act (and therefore entitled to file a complaint under the Act)?

ANALYSIS

The Director found that Campos was hired to assist Caba to develop a Mexican food restaurant in the Langley area. Initially, Campos’ duties were to assist in finding a suitable location, designing the restaurant, hiring staff and, upon opening, to serve as the restaurant’s manager. The Director held that Campos was retained as and from February 1st, 1996 at a monthly salary of \$1,500.

Caba produced two documents, both of which were prepared by Campos, relating to his association with the Alcantara family and Caba. Both documents are unsigned but do evidence the intention of the parties in terms their proposed business relationship.

The first document, dated March 1996, is a single-page and sets out a proposed agreement whereby Campos would serve as the “General Manager” of the restaurant as and from the date of opening at a “salary to be determined”. Further, the proposed agreement sets out a 50%-50% profit sharing arrangement between Campos and Caba and a provision for the transfer of one-half of the voting shares of Caba to Campos within two years after the date of opening of the restaurant.

The second document, dated April 15th, 1996 is considerably more detailed. This proposed agreement runs some nine pages and is entitled “Management and Option Agreement”. In this latter document, which was to be executed by Caba, Campos and various members of the Alcantara family, Campos reserved to himself an option to purchase 50% of the issued shares of Caba for \$45,000 such option to be exercised between May 1st and June 30th, 1998. This agreement also sets out a provision whereby Campos would be engaged as the manager of Caba’s “restaurant

operations” as and from June 1st, 1996 at a salary of \$1,500 per month plus 50% of Caba’s post-tax net profits.

In response to these two documents, Mr. Alcantara, Sr. prepared a three-page document dated “April 1996” which he provided to his solicitor. This unsigned three-page document set out the general terms that were to be incorporated into a more formal agreement which Alcantara’s solicitor, Ms. Gale, was instructed to prepare. Mr. Alcantara’s draft, similar in many respects to the drafts prepared by Campos, provided for a \$1,500 monthly salary for Campos “from the opening of the restaurant”, payment to Campos of 50% of the post-tax net restaurant profits, and an option to purchase one-half of the issued shares of Caba within two years.

In my view, the parties, that is Campos and the Alcantaras, were negotiating a partnership agreement, not an employment agreement. It appears to be the case that this partnership has gone awry, but, in my view, that does not change the fact that these parties intended to create a partnership relationship, not an employment relationship.

A “partnership” is defined in section 2 of the *Partnership Act*, R.S.B.C. 1979, c. 312 as follows:

2. (1) Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

In my view, the documents make it abundantly clear that the parties intended to establish a joint enterprise, namely, the Burros restaurant, and that they would share the profits of the enterprise immediately, and within two years, would be equal shareholders in the restaurant holding company. I am satisfied that all of the necessary elements for a legal partnership between Campos and the Alcantara family have been established in this case.

Whatever work Campos did during the period February 1st to May 25th, 1996 (and there is a dispute between the parties regarding this very matter), was undertaken not as an employee but as a partner of the Alcantaras. Although the parties had not formalized the terms and conditions of the partnership between them, I am nevertheless satisfied that some form of partnership was in place during the period spanned by the Determination. This would explain, for example, the evidence that Campos referred to himself to various tradespeople as an “owner” of the restaurant.

An “employee”, as defined in section 1 of the Act, must perform services on behalf of an “employer”; a person cannot be both an employee and a partner with respect to the very same business venture.

It does not follow from my conclusion that Campos was a partner, rather than an employee, that he has no monetary claim against Caba and/or the Alcantaras. Campos may well have a meritorious claim against the Alcantaras and/or Caba under the *Partnership Act*, or for breach of contract, or possibly for compensation on a *quantum meruit* basis, but Campos does not have any entitlement under the *Employment Standards Act* because he did not perform any work for Caba in the capacity of an employee.

Accordingly, I have no jurisdiction in this matter and neither did the Director [see s. 76(2)(b) of the Act]. Therefore, I am granting Ms. Gale’s motion to cancel the Determination on the ground that Campos’ complaint is outside the jurisdiction of the Act.

In light of this decision, I do not have the statutory authority to consider the merits of Campos’ claim for unpaid wages and, accordingly, I pass no judgment on that matter.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003886 be cancelled.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal