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 -

Raj Rani sharma operating
Mona Pizza

(the "Employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/372

DATE OF HEARING: August 23, 2000

DATE OF DECISION: September 21, 2000

DECISION

APPEARANCES/SUBMISSIONS

Mr. Vijay Sharma	on behalf of the Employer
Mr. Antonio Renaud	on behalf of the himself

ANALYSIS

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on May 8, 2000 which found that Antonio Renaud was entitled to $2,640.30 on account regular wages, overtime wages, vacation pay and statutory holiday pay. The Employer argues that the Determination is wrong. The Employer takes issue with the delegate's findings with respect to Renaud's entitlement. The Employer agues among other things that Renaud was paid cash advances and stole money from the business. The Determination states, among other things, that the Employer failed to respond to the delegate's letters and demands for documents.

As I indicated at the hearing, I see two broad issues before me in this appeal:

1. Did the Employer fail to cooperate with the delegate's investigation such that it is barred from now arguing the merits of the Determination?

2. If not, has the Employer shown that the Determination is wrong with respect to the merits?

I turn to the first issue. The Determination states that the Employer acknowledged that Renaud worked for it and that it would comply with a demand for records. The Employer did not comply with the demand and the delegate based his decision on the records supplied by the complainant Renaud. The Employer did not dispute that the delegate sent such a demand by certified mail. The Employer acknowledges that it received the demand and that it was sent to its place of business. However, it says that incorrectly named the Employer "Vijay Sharma operating as Mona Pizza" and not "Raj Rani Sharma operating as ...". Vijay Sharma, who was the manager, and who represented the Employer at the hearing, agreed that he "went over" the demand. He indicated, however, that he was preoccupied with a number of matters, the building of a house, he had a child etc. He feels that he never had a chance to respond. The Determination also states that the delegate made several telephone calls reminding it of the importance of the records for the investigation. At the hearing, Vijay Sharma acknowledged that he spoke with the delegate.

In my view, the Employer failed to cooperate with the delegate's investigation. The demand for records was sent to the Employer's business address. The Employer received the demand. The Employer agrees that it "went over" the demand. The Employer had telephone conversations with the delegate. The fact that the demand was addressed to Vijay Sharma is, in my opinion, of no consequence as he was the manager of the operation. I do not accept that he did not have the

authority to deal with "court stuff" on behalf of the Employer. In the circumstances, I agree with my colleagues in *Kaiser Stables*, BC EST #D058/97, that the Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. The explanation offered by Vijay Sharma that he was tied up with personal concerns is not sufficient. As well, the submission from the delegate, and Renaud's testimony, indicated that Vijay Sharma is, in fact, the son of Raj Sharma. In short, the issues raised by the Employer-the hours worked by Renaud etc.–could have been addressed during the investigation. In my view, the Employer refused to participate in the investigation and I will not allow the Employer to raise these issues at this stage. As such, the appeal must fail.

Even if I am wrong with respect to the above, I am of the view that the Employer, nevertheless, did not offer sufficient evidence that the Determination is wrong. The Employer's evidence was that Renaud agreed to work for $800 per month and that his hours were 5:00 p.m. to 9:00 p.m. Monday to Saturday. There was no documentary evidence before me to support this. In fact, from Vijay Sharma's statements at the hearing, it appeared to be his understanding (which is manifestly incorrect) that because Renaud was on salary, there was no need to keep track of hours. The Employer also stated that Renaud only worked for it in January 1999. In any event, Renaud's evidence was different. He explained that his hours were from 4:00 p.m. to midnight, Monday to Saturday, and 4:00 p.m. to 10:00 p.m., Sundays. He explained that he worked for Mona Pizza from December 28, 1999. He also testified that he worked for a related business in November, assisting with the renovation of that business. Given the burden on the appellant Employer to show that the Determination is wrong, I find that the appeal must fail.

The Employer raised a number of other things, which I want to address. The Employer asserted that Renaud stole money from it and that he received cash advances. Renaud disputed this. One of the Employer's witnesses, Wilma Black, testified that Vijay Sharma gave Renaud $100 dollars with the words "here's an advance for dinner". She also testified that he was the most likely person to have taken two "loonies" from a jar in the back of the operation. She further testified that Renaud subsequently used two loonies and borrowed three dollars from Ashoc Sharma to buy cigarettes. She explained that she did not take the money and that she thought it unlikely that Vijay Sharma or Ashoc Sharma would have taken the money because they put the money in the jar for their "God" every day to bless their business with "good luck". She did not see Renaud take money. Ashoc Sharma explained that a $20 bill had disappeared when Renaud was alone in shop with Sharma's daughter who, according to Sharma, said that he had opened the till even if there had been no customers in the business. The daughter did not testify. I do not accept that there is any evidence that Renaud stole money from the business. The Employer's evidence on this point is mere speculation.

The Employer claims that Renaud received some $800 in cash as advances. With respect to advances, these were generally denied by Renaud. In the circumstances, I do not accept that Renaud received advances on his wages that ought to be deducted from the amount awarded in the Determination. There is simply, in my opinion, not sufficient evidence to establish what amounts were paid and when.

In the result, the appeal fails.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated May 8, 2000, be confirmed together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal