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 -

Big Olive Taverna Ltd

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April Katz

FILE No.: 2000/522

DATE OF DECISION: October 19, 2000

DECISION

OVERVIEW

The Employer, Big Olive Taverna Ltd. ("Taverna"), is appealing Determination ER #:099-251 in which the Director's Delegate found that the Employer owed Jason Kolodychuk ("Kolodychuk") $855.95 for wages for hours worked, overtime, statutory holiday pay and vacation pay under the *Employment Standards Act* (the "*Act*"). The Employer and the Employee disagree about the hours worked by the Employee. The Director's Delegate found the Employee's evidence to be more credible and made the Determination based on his evidence. The Employer disagrees with the Delegate's findings of fact and final Determination.

This decision is based on written submissions from the Employer and the Director's Delegate.

ISSUES

Did the Director error in finding the Employer liable for the hours worked and not paid contrary to the requirements of the *Act*?

FACTS

Taverna employed Kolodychuk as cook trainee from November 8, 1999 to January 17, 2000. Kolodychuk filed a complaint on January 31, 2000 stating that he worked from 11AM to 6PM on Mondays, Wednesdays and Thursdays, from 11AM to 11PM on Tuesdays, from 11AM to 8PM on Fridays and from 2PM to 8PM on Saturdays. He claimed 8 hours of overtime a week. He claimed that he was expected to remain on the premises during his meal breaks and that he normally had about a 20 minute break. He claimed he was not paid for New Year's Day or Christmas Day, statutory holidays.

K. Parasad, Taverna's Certified General accountant, represented Taverna throughout the investigation and for this Appeal. He submitted all the evidence in reply to the Director's Delegate's letters of inquiry and Notices to produce evidence. Mr. Parasad submitted a statement of the gross pay and net pay with statutory deductions for Kolodychuk's employment. When asked for the time sheets, Mr. Parasad produced a statement that Kolodychuk worked 6 days per week. He stated that Kolodychuk started each shift at 11:30AM and that the meal break consisted of 1 hour each day except for Tuesdays. Tuesday's shift was for 9.5 hours and included 2 one hour breaks. Mr. Parsad stated that Kolodychuk worked for 5.5 hours for 5 days except Tuesdays when he worked 9.5 hours.

A former employee of the Taverna spoke to the Delegate and confirmed the hours of work stated by Kolodychuk.

After repeated requests for sign in sheets the Delegate was informed that the Employer did not keep time sheets. There was no evidence from the Employer of when or if the meal breaks were scheduled. Based on this evidence the Delegate allocated ½ hour breaks in each day except Tuesdays when two ½ hour breaks were allocated.

The Delegate found that Kolodychuk's evidence was more credible. The evidence from the Employer that Kolodychuk came to work at 11:30 on Saturdays was particularly incredible to the Delegate. The Determination supported the complaint.

THE LAW

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled.

The disputed facts leave the decision maker no alternative but to make a credibility finding. The Court of Appeal of British Columbia set out criteria for making a credibility finding in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-8 that has been used by the Tribunal on several occasions. The criteria are set out below.

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth...."

The Delegate who interviewed the witnesses is in the best position to assess credibility. Credibility must be assessed in light of all the surrounding circumstances and likelihood of the witness being able to observe what was happening.

ANALYSIS

The onus of proving the claim that Determination is in error is on the appellant.

This Appeal states the following.

1) "REASON FOR THIS APPEAL:

   - Error in findings of fact:

e.g. Work hours – submitted by Big Olive Taverna Ltd.

Witnesses – will verify the hours as stated by Big Olive Taverna Ltd. is correct.

2) Facts in dispute – hours actually worked against hours hours as stated by Kolodychuk.

3) Remedy dismissal"

The new evidence attached to this appeal are 5 standard forms set out as follows and signed and dated.

I _____ do hereby state that to the best of my knowledge, that Jason Kolodychuk came to Big Olive Taverna -

Each day _____

Began working at _____

Had Lunch break of _____

Had dinner break of _____

_____
Signed

_____
Witness

Date: _____

The five statements are each signed and dated July 26, 2000. In the blank 'Each day' each has stated '11:20'. In the blank following 'Blank' each has written '11:30'. In the lunch blank each has written '1 hour' and one person added 'each day'. In the dinner blank each has written '1 hour' and one person added 'each day when worked late'. The late days were Tuesdays, Fridays and Saturdays presumably.

The Tribunal will not disturb a finding in the Determination unless there is **new** evidence that was **not available** at the time of the investigation. The statements attached to the appeal are presumably from staff who worked with the Kolodychuk. All of these people were presumably available at the time the investigation, but did not come forward to give their evidence. The Employer has not, therefore, provided any new evidence that was not available at the time of the investigation. I do not, therefore, consider the attachments to be new evidence that I must consider.

If I did consider the evidence it would carry little weight because I do not know who the people are who signed the documents and what their relationship is to the Employer or

the Employee. The statements appear to have been created by the Employer with power over the employees who may have signed the statements under pressure or risk of job loss. The employees were under the direction of the employer in this situation and were not free to express their own views of the evidence. If someone disagreed presumably his or her statement was not included with the appeal.

I do not consider the evidence credible with respect to Saturdays' shifts as the Employee would not come in at 11:20AM for a 2PM shift. If I needed to assess this evidence I share the Delegate's doubts about its credibility.

The employer was contacted on February 1, 2000 by telephone and the accountant responded on February 8, 2000 by forwarding the payroll register. On March 16, 2000 the employer was asked for daily hours worked and the employer's accountant responded on March 16, 2000. The accountant was contacted on March 21, 2000 and asked for start and finishing times for the Employee, length of breaks. On March 23, 2000 the accountant provided with the statement referred to above. On March 24, 2000 the Delegate contacted the accountant to explain why the statement was inadequate to address the issues. The Employer asked for the request in writing and the request was sent the same day in writing with a deadline of March 31, 2000. The Employer directed the Delegate to the Employee for the specific information.

A Demand for Records was issued on May 4, 2000 and the Employer was asked to provide all pertinent evidence by May 23, 2000. The same document as was received earlier was forwarded to the Delegate on May 17, 2000. The new statement added was that the employee had one and two hour breaks because the restaurant was slow from 2PM to 7PM. There was no other new evidence.

In assessing whether there are concerns about compliance with the *Act* the Adjudicator must look at all of the circumstances presented in the evidence provided on the Appeal. Kolodychuk's reasons for going to work at 11AM were to start the food preparation such as the rice. The restaurant opened at 11:30 and the food needed to be ready. Kolodychuk was driven by his grandfather who offered to confirm that he had his grandson at work by 11AM. The fact that the Employer stated that he arrived at 11:30 on Saturdays when his shift started at 2PM suggests that the Employer did not keep track of the actual hours worked and was not concerned about the time put in by the Employee.

There is nothing in the documentation filed by the Appellants to suggest that the Determination is in error. The Appellant has not satisfied the burden of proof placed on it. Based on the evidence before me, I cannot find any basis on which to disturb the Determination. Big Olive Taverna Ltd.'s appeal is denied.

ORDER

Pursuant to section 114 (1)(a) the appeal is dismissed. Pursuant to section 115 of the Act, Determination ER: 099-251 dated July 6, 2000 is confirmed.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal