

An appeal

- by -

Tiny-Dee Operations Ltd. operating as  
Whiteline Restaurant and Hideaway Cove Seafood Restaurant

- 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:** David B. Stevenson

**FILE No.:** 2001/198

**DATE OF HEARING:** August 21, 2001

**DATE OF DECISION:** September 6, 2001

## DECISION

### APPEARANCES:

on behalf of the Appellant	Trevis Leduc
on behalf of the individuals	No one appearing

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Tiny-Dee Operations Ltd. operating as Whiteline Restaurant and Hideaway Cove Seafood Restaurant (“Tiny-Dee”) of a Determination that was issued on February 14, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded Tiny-Dee had contravened Part 3, Sections 17(1) and 18(2), and Part 7, Section 58(3) of the *Act* in respect of the employment of Robert Lavigne and Katrina Lavigne (“the complainants”) and ordered the Tiny-Dee to cease contravening and to comply with the *Act* and to pay an amount of \$5,712.46.

Tiny-Dee has appealed the decision on two grounds. The first relates to an assertion by Trevis Leduc, acting on behalf of Tiny-Dee, that Robert Lavigne had agreed to be a partner in the business. The second relates to whether Denise Crenna, who was listed in the Determination as a Director/Officer, had revoked her consent to act as a Director of Tiny-Dee and had transferred her shares in the company as of June 1, 1999.

The second matter has been addressed by another panel of the Tribunal in the context of an appeal from a Director/Officer Determination issued by the Director (see *Re Denise Crenna, a Director/Officer of Tiny-Dee Operations Ltd. operating as Whiteline Restaurant and Hideaway Cove Seafood Restaurant*, BC EST #D389/01)

### ISSUE

The issue in this appeal is whether Tiny-Dee has shown that Robert Lavigne was a partner in the business and the Director erred in issuing a Determination for wages owing to him.

### THE FACTS

The Determination made the following findings of fact:

1. The complainants were employed as employees by Tiny-Dee Operations Ltd. operating as Whiteline Restaurant and Hideaway Cove Seafood Restaurant from May, 1999 to September 5, 1999.

2. The complainants were not paid from July 1, 1999 forward.
3. Robert Lavigne's monthly salary was \$1,500.
4. Katrina Lavigne's salary was \$1,300.

The Determination noted that Tiny-Dee had stated that Robert Lavigne had agreed to be a partner in the business and share in the profits when the business was built up, but was unable to provide any documentary evidence to support that position.

At the hearing, Mr. Leduc acknowledged he was unable, and continued to be unable, to provide any documentary support for the assertion there was a partnership. In his evidence, he briefly described the circumstances that led to the position taken by Tiny-Dee during the investigation. Those circumstances involved a brief discussion in August, 1999 between Mr. Leduc, Robert Lavigne and a potential investor in the business. Apparently, nothing materialized from those discussions. Mr. Leduc believes there was something put in writing, but can find no record of it in any of his business documents. As well, he has lost track of the potential investor and was consequently unable to attempt to procure a copy of such document from him.

## **ARGUMENT AND ANALYSIS**

Tiny-Dee, as the appellant, has the burden in this appeal of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

This appeal turns on whether Tiny-Dee can convince me that Mr. Lavigne was a business partner and should not be considered an employee for the purposes of the *Act*. They have not been able to do that. As well, the timing of the alleged partnership agreement, the ambiguity of the circumstances in which Mr. Leduc says the partnership was created, the inability of Mr. Leduc to describe what the terms of the partnership were, even in a general sense, the absence of any documents, or conduct, supporting the existence of a partnership and the simple fact of Robert Lavigne walking away from business on September 5, 1999 all militate against a finding that there was any partnership arrangement involving Robert Lavigne.

In any event, even if Robert Lavigne did become a partner in the business, there is nothing in the facts that would suggest he could not be treated as an employee of the business for the purpose of the *Act*.

### **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determinations dated February 14, 2001 be confirmed in the amount of \$5,712.46, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**