Employment Standards TRIBUNAL

An appeal

- by -

Tyrisa Holdings Ltd. operating Invermere Dairy Queen
(the “Appellant”)

- 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: W. Grant Sheard

FILE No.: 2002/474

DATE OF DECISION: November 21, 2002

DECISION

OVERVIEW

This is an appeal based on written submissions by Tyrisa Holdings Ltd. operating Invermere Dairy Queen (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on August 15, 2002 wherein the Director's Delegate (the "Delegate") ruled that the Respondent was an employee, that the Appellant had contravened the *Act* by failing to pay wages due and ordering the Appellant to pay the Respondent $600.70 in wages and vacation pay plus $26.34 in interest for a total due of $627.04.

ISSUE

Was the Respondent an employee of the Appellant?

ARGUMENT

The Appellant's Position

In a written appeal form dated September 4, 2002 and filed with the Tribunal September 10, 2002 along with a two page hand written submission the Appellant seeks cancellation of the Determination. In the written submission the Appellant raises three issues. First, the Appellant says that they were not looking for an employee to do their books and scheduling for their store, but "against our better judgment" turned their ledger and all the books over to the Respondent and a Mr. Mennear (the Respondent's common-law spouse). The Appellant says that at this time they were of the understanding that all work done in the store and outside the store would be donated by the Respondent. Second, the Appellant says that the Respondent's common-law spouse was and still is a director of the Appellant. Thirdly, the Appellant complains that the Delegate who issued the Determination had failed to return original documents to the Appellant.

The Respondent's Position

In a written submission dated September 15, 2002 and filed with the Tribunal September 30, 2002 the Respondent says that she assumed duties at the Appellant's store which included daily deposits, scheduling, cashier, clerk, cook, and cleaning girl-Friday. Regarding the fact that she lived together with Mr. Mennear, who the Appellant says was a director of the company, should have nothing to do with whether she is paid wages as she was hired to do a job, which she did.

The Director's Position

In a written submission dated September 18, 2002 and filed with the Tribunal September 24, 2002 the Delegate reiterates the analysis or position taken in the Determination in that Section 4 of the *Act* provides that an employer and employee cannot agree to terms of employment that provide less than the minimum requirements of the *Act*. The Delegate noted the Appellant's statement that "We were not looking for an employee to do our books and scheduling for the store. As discussed to Mr. Mennear and the claimant, we already had a bookkeeper doing the books and the reports for the restaurant. So against our better

judgment, Mr. Mennear wanted the claimant to help out and would do them for free. So in the third week of July, 2001 our ledger and all the books were turned over to the claimant and Mr. Mennear. That's the last time we saw the books. So Phyllis, my spouse and myself were under total understanding that all work done in the store and outside the store would be donated from the claimant." The Delegate says that this confirmed that work was done by the complainant as she claimed. The Delegate says that this further establishes that the work the claimant did was work normally done by an employee.

The Delegate notes that the definition of an employee in the *Act* includes "a person that the employer allows, directly or indirectly, to perform work normally performed by an employee". The Delegate says that the parties are not in a position to agree that the work done was not to be compensated for in accordance with the *Act* because of the prohibition against such deals set out in Section 4 of the *Act*.

With respect to the Appellant's assertion that the Respondent's common-law husband, Mr. Mennear, was a director of the company, the Delegate says that he conducted corporate searches with the Registrar of Companies on August 13, 2002 and on September 18, 2002 and neither of these searches showed Mr. Mennear as a Director of the Appellant. In any event, he queries the relevance of this issue other than to whether liability should attach to Mr. Mennear as a corporate officer.

With respect to the return of original documents by the Delegate to the Appellant he notes that this now has been done.

THE FACTS

The Appellant operates a restaurant/ice cream bar in Invermere, B.C. The Respondent filed a complaint alleging that she worked for the Appellant from July 27, 2001 to August 26, 2001 as a Front End Person/Bookkeeper at the rate of $10.00 per hour. The Respondent's "significant other", Dan Mennear, had entered into an arrangement to purchase the Appellant business through a gradual acquisition of the shares in the Appellant company. The Respondent worked at the Appellant business following her regular job at another restaurant in the Invermere area. She would help out in a variety of ways, sometimes in the kitchen, sometimes at the counter, and learning to do the bookkeeping and providing scheduling for other employees. In late August 2001 the business arrangement between Mr. Mennear and the principals of the Employer company fell apart and their issues were dealt with in the Supreme Court of British Columbia. That case did not, however, deal with the Respondent's complaint or claim.

The Employer took the position that the Respondent never worked for them as an employee. Rather, the Appellant says that the Respondent sought to assist in the Appellant's operations to learn the business for future assistance to Mr. Mennear and that she said she was not looking to be paid for any of the work.

During the investigation the Respondent provided evidence that she did work for the Appellant doing whatever needed to be done including helping in the kitchen, front end of the restaurant, doing all the banking, running all the errands and picking up supplies. She also gave evidence that she did the schedules for the store's employees and completed the store's ledgers. The Respondent conceded during the investigation that she was not hired in the conventional manner but asserts that she did work for the Appellant and should be paid for it. She claimed $10.00 per hour as a fair rate acknowledging that the rate was never agreed to by the Employer. A number of schedules were produced to the Delegate demonstrating that the Respondent was indeed shown on the work schedule with other employees establishing that she did work at the store with some regularity. In the Determination dated August 15, 2002 the Delegate found that the Respondent was an employee and entitled to coverage under the *Act*.

The Delegate found that the definition of "Employee" in Section 1(b) of the *Act* particularly applied wherein it states that an employee is "A person an employer allows, directly or indirectly, to perform work normally performed by an employee". The Delegate went on to find that even if the Appellant and Respondent had agreed that the Respondent would not be paid for the work performed, Section 4 of the *Act* does not allow for these type of arrangements (that is, for an employee to work for no remuneration). The Delegate went on to find that, as the rate of pay of $10.00 per hour had not been agreed upon between the parties the prevailing minimum wage of $7.60 per hour must apply and calculated wages and vacation pay due of $600.70 plus interest of $26.34 for a total due of $627.04.

ANALYSIS

The onus is on the Appellant to demonstrate an error in the Determination.

Section 1 of the *Act* does provide that the definition of an employee includes under ss. (b) "A person an employer allows, directly or indirectly, to perform work normally performed by an employee".

Further, Section 4 of the *Act* provides as follows:

> *4 The requirements of this Act and the Regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in Section 3(2) or (4), has no effect."*

In *Fenton vs. British Columbia* (Forensic Psychiatric Services Commission) (1991), 82DLR(4th) 27, the BC Court of Appeal ruled that patients in a psychiatric institution engaged in therapeutic work programs were not "employees" under the *Act* because the institution derived no real economic benefit from their work. In the case of *re Forsea Chinese Restaurant Ltd.*, BCEST #D198/96 it was held that, where an employer had made it known that it would not discourage the complainant from volunteering to help other co-workers, together with evidence of the complainants hours of work and her duties determined that she was an employee and entitled to wages, notwithstanding the assertion that she was a volunteer. In the case of *re Eckard*, BCEST #D179/96 this Tribunal found that, in determining whether or not a worker is a "employee" one factor to consider is whether or not the work permitted to be done benefited the employer. In the cases *re Dosanjh* BCEST #D487/97 and *re Smith* (c.o.b. Coastal Canada Consulting Services Ltd.), BCEST #D416/97 it was held by this Tribunal that individuals that were hired on a "trial basis without pay" were found to be employees.

Based on the decisions above I cannot find that the Delegate erred in ruling that, notwithstanding the possible agreement between the parties that the Respondent would not be paid, the Respondent was an employee as she did perform duties which apparently benefited the Appellant.

With respect to the application of Section 4 of the *Act* it was held by this Tribunal in the cases of *re Thursdays Sports Plus Ltd.* (c.o.b. Nautilus Sports Club), BCEST #D146/97 and *re Head Office Financial Group Inc.* BCEST #D085/96, if the relationship between the parties is in fact that of an employer and employee, then the parties cannot agree to waive the provisions of the *Act* and treat the relationship as an independent contract. Further, the intentions of the parties, although they can be taken into consideration in determining the substantive nature of the relationship, are not decisive of this issue.

In this case I cannot find that the Delegate erred in applying Section 4 of the *Act* and determining that the parties could not waive the minimum provisions of the *Act* and that the Appellant was owed minimum wages for the work performed pursuant to Sections 16, 18 and 20 of the *Act*.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated August 15, 2002 and filed under number 087-482, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal