

**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 -

Kumar's Enterprise Ltd.  
operating as Lee's Famous Recipe Chicken  
("Kumar's")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE No:** 1999/563

**DATE OF HEARING:** November 24, 1999

**DATE OF DECISION:** January 14, 2000



It is agreed that Mahabub was to be what Kumar's called the "manager" of its fried chicken outlet. It is agreed that the employee supervised four and five other employees, prepared work schedules for those employees, that she usually opened the chicken outlet and closed it for the night, and that she contacted a person that she knew through prior employment at LA Chicken and offered her a job at Kumar's. It is also clear that beyond the above Mahabub performed cleaning and cooking and served customers.

The persons employed by Kumar's were trained workers with experience in other restaurants. I find that they required little in the way of direction and supervision given their experience and training.

According to Mahabub, cooking, cleaning and serving customers took up much of her time. I accept that as fact. The employer is not suggesting something to the contrary. It is clear that Mahabub's managerial duties were not time-consuming given that there were few employees and the degree of their training and experience.

Mahabub tells me that she was not allowed to make any major decisions but was required to consult with Charanjit Kumar on all matters of importance, the hiring of the employee included. I am not shown evidence which is clearly to the contrary. What I find is that it was Charanjit Kumar that made all of the important decisions regarding Kumar's chicken outlet. The decisions that Mahabub made were routine.

The only record of hours worked is that which was kept by the employee.

The employer on appeal submits letters from what appear to be two former employees. The letters are strikingly similar in format and they surface on appeal. One person writes to say that Mahabub never worked past 6:00 p.m.. The other person writes to say that while Mahabub could have gone home, she did not do that, and yet worked no overtime.

The Director's delegate did contact Kumar. She did not meet with him because Kumar had a job which prevented that. The delegate did advise Kumar of the Complaint and she did obtain what is Kumar's initial position on matters. Moreover, the Determination deals with the matter of whether or not Mahabub was a manager, even though that was not an issue which was raised by the employer.

## **ANALYSIS**

What I must decide in this case is whether the employer has shown that the Determination ought to be varied, cancelled or referred back to the Director for reason of an error in fact or in law.

That law which is the *Act* at s. 4 is as follows:

- 4** The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

The law which is s. 16 of the *Act* requires the following:

- 16 An employer must pay an employee at least the minimum wage as prescribed in the regulations.

The law which is s. 18 of the *Act* requires the following:

- 18 (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
- (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

When read together, the above sections of the *Act* provide that the employer must pay at least minimum wage. An agreement which provides for pay which is less than the minimum wage simply has no force or effect. The minimum wage is a **minimum** standard, the minimum that an employer may pay an employee for work.

Section 77 of the *Act* requires that the Director or her delegate must make what is a reasonable effort to hear from the employer being investigated in a Complaint.

- 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

The Director need not actually meet with the employer. While not always the best course, it is enough that the Director have a delegate contact the employer by letter or telephone, disclose the nature of the alleged violation which is under investigation, and give that person an opportunity to respond. That was done in this case. Moreover, Kumar's has not shown me that it was in any way prevented from submitting anything of importance in this case. Nothing prevented Kumar from contacting the delegate. The employer could easily have done that by telephone or letter. I am satisfied that Kumar's was provided with an adequate opportunity to respond to the Complaint which is against it. There is not reason in this case to cancel the Determination, nor reason to refer a matter or matters back to the Director, on the grounds that there was a failure to make a reasonable effort to give a person under investigation an opportunity to respond.

Turning to the matter of whether Mahabub was or was not employed as a manager, I note that it is important in that managers are not entitled to overtime wages. A "manager" for the purposes of the *Act* is defined in the *Employment Standards Regulation* as including a person "*whose primary employment duties consists of supervising a directing other employees*" (section 1, the *Regulation*, my emphasis). In deciding whether or not Mahabub was a manager, I adopt the approach taken in *Director of Employment Standards*, (1997) BCEST No. D479/97 (Reconsideration of BCEST No. D170/97). That leading decision calls for consideration of the following objective factors: (1) the power of independent action, autonomy and discretion; (2) the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business; (3) making final judgements about such matters as hiring, firing, authorising overtime, time-off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering work schedules, and training the employees; and (4) that the person's job description included supervising and directing employees. I accept, moreover, that those objective factors must be present in the

person's daily activities, that it is not sufficient that the person merely have the authority to satisfy the criteria, and that a person's title will not in itself indicate that a person is a 'manager'.

The evidence in respect to Mahabub's duties and responsibilities lead me to the conclusion that the delegate is correct in her decision that Mahabub was not a manager under the *Act*. Kumar's has not shown me that Mahabub had the power of truly independent action. As the facts have been presented to me, I have found that it was not Mahabub that made the final decision on important matters but Charanjit Kumar. What Mahabub did is make recommendations. And while it is shown that Mahabub devised work schedules and directed and supervised the work of other employees to an extent, it is not shown that that is what she did in the main. From what I can see of the employment, Mahabub had only minor supervisory duties and that she for the most part cleaned, worked as a chef and served customers.

The Determination relies on a record which was kept by the employee. Kumar's did not keep a record of her work. The employer produces two letters which contradict what is said to be the number of hours worked in the Determination but the letters surface after the Determination and are strikingly similar in format. In the absence of a clear reason to believe that the letters are credible, I give them no weight.

Mahabub has presented me with a clear and consistent explanation of matters and events. That version of matters and events is not clearly contradicted by any evidence which leads me to believe that the facts are other than as Mahabub describes. Her record of hours worked is fully consistent with getting a new restaurant going, the fact that Kumar had other employment, and her supervisory duties. I can see no reason to change the Determination and I, therefore, confirm it.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated August 25, 1999 be confirmed in the amount of \$671.24, and to that amount I add what further interest has now accrued pursuant to Section 88 of the *Act*.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**