

An appeal

- by -

Il Paradiso Ristorante Italiano  
(Il Paradiso)

- 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:** April D. Katz

**FILE No.:** 2002/611

**DATE OF DECISION:** February 6, 2003

## DECISION

### OVERVIEW

Jason McPhail (“McPhail”), a cook with Il Paradiso Ristoriante Italiano (1997) Ltd. (“Il Paradiso”) filed a complaint with the Director of Employment Standards (“Director”) that he was not properly paid for statutory holidays and overtime. Il Paradiso argued that McPhail was a manager and was not owed the overtime claimed. The Director’s delegate found that McPhail was not a manager and ordered Il Paradiso to pay \$901.32 to McPhail. Il Paradiso is appealing the finding that McPhail was not a manager under the *Employment Standards Act* (“Act”).

### ISSUE

Did the Director err in finding that McPhail was not a manager within the meaning of the *Act*.

### ARGUMENTS

Il Paradiso argues that cooks in the industry are known to be managers and are compensated as managers. “A chef has many responsibilities and is considered a manager and is remunerated appropriately for that job.”

The Director’s Delegate chose to rely on the Determination.

### FACTS

The facts are not in dispute. McPhail was paid \$11 per hour as a cook from February 10, 2002 to April 16, 2002 when his rate was raised to \$12 per hour until May 26, 2002 when his employment ended. McPhail had certain responsibilities for running the kitchen including stocking the line, making sure that everything was properly prepped and ready to go. He did not hire and fire employees or schedule their work hours. He directed the tasks of the dishwashers to keep them busy. He prepared the special daily menu items. He prepared a list of supplies needed. When the restaurant was open he did the cooking.

### LAW AND ANALYSIS

The onus is on an appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director’s analysis of the applicable law.

## Manager

The Determination found that McPhail was not a manager as defined in B.C. Regulation 396/95.

Section 1(1) of the B.C. Regulation 396/95 to the *Act* defines "manager":

1.(1) In this Regulation:

"manager" means

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity.

Il Paradiso argued that McPhail was a manager. Il Paradiso stated that McPhail influenced the decisions on ending the employment of other staff and carried responsibility for the operation of the kitchen.

McPhail did not hire staff, set their rates of pay, or the schedule of work hours.

The Director found that McPhail's main tasks were preparing food, cooking and preparing menus. His primary duties were not supervising or directing other employees. He found no evidence that McPhail worked in an 'executive capacity'. The Delegate based this conclusion on a number of factors.

The Determination raises all the points raised in this appeal and draws on previous decisions of this Tribunal to conclude that there is insufficient evidence to support the conclusion that McPhail was a manager.

The definition of manager was considered by the Tribunal in *429485 B.C. Limited operating Amelia Street Bistro* [1997] BCEST #D479/97. The three person panel discussed a number of previous cases and concluded as follows.

"The task of determining if a person is a manager must address the definition of manager in the Regulation. . . .

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person."

Some of the tasks identified in this description are aspects of work done by McPhail, but they are not his primary functions. Most of the tasks of supervising and decision making are not part of McPhail's work.

**CONCLUSION**

I do not find sufficient evidence that the Director erred in concluding that McPhail was not a manager within the meaning of the *Act*. Il Paradiso's appeal is dismissed.

**ORDER**

Pursuant to section 115 of the Act, the Determination dated November 13, 2002 is confirmed. Il Paradiso must pay any additional interest due from the date of the Determination under Section 88 of the Act.

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**April D. Katz**  
**Adjudicator**  
**Employment Standards Tribunal**