

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Kwang-Min Choi
("Choi")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/124

DATE OF DECISION: May 9, 1996

DECISION

OVERVIEW

This is an appeal by Choi pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 001021 issued by the Director of Employment Standards ("Director") on February 5, 1996. In this appeal Choi claims that the Director erred in determining that he was a manager and therefore not entitled to overtime wages and statutory holiday pay.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the Act states:

If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint under this *Act*.

I have completed my review of the written submissions made by Choi, J&S Management Ltd. ("J&S") and the information provided by the Director.

FACTS

Choi was employed by J&S Management Ltd. operating Petro Canada Station (Chetwynd) ("J&S") as assistant manager from April 1, 1995 to October 8, 1995.

Choi received a salary of \$3750.00 per month (\$45,000.00 per annum)

The Director investigated Choi's complaint and, subsequently, determination # CDET 001021 was issued.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Choi was a manager as defined by the Employment Standards Regulation ("Regulation").

ARGUMENTS

Choi argues that:

- he had the authority to hire and fire, although before he fired anyone he would seek approval from J&S
- he reviewed applications from prospective employees
- he scheduled employees

- he prepared the “float” for each shift
- he prepared lists of needed supplies and gave to it J&S to order
- he also performed the same tasks as the other employees of the gas station
- he worked 14 to 16 hours each day
- the owner of J&S was never at the work place as he also managed a motel in the community
- the owner of J&S did all the paperwork associated with payroll, invoices, fuel orders etc.
- as he did not do any of the “paperwork” related to the business, he was therefore not a manager

J&S argues that:

- Choi was a manager in all respects
- Choi worked the hours necessary as required by the business
- the owner of J&S was not on the work site therefore Choi was in charge
- Choi set the hours for himself and the other employees
- Choi had the authority to hire and fire employees
- Choi had access to confidential business information
- Choi was responsible for the opening and closing of the business on a daily basis
- Choi’s wages reflected his responsibilities as a manager

The Director contends that:

- Choi’s job function was more like that of a manager than an employee
- Choi received wages commensurate with his responsibilities as a manager
- the owner of J&S was not at the work site thereby Choi was the person “in charge”
- Choi hired and fired employees
- Choi evaluated performance of employees
- Choi reviewed applications from prospective employees
- Choi scheduled the employees
- Choi directed and controlled the employees
- Choi opened and closed the business each day
- Choi was a manager

ANALYSIS

The determination of whether an employee is a “manager” or not must be considered in light of the definition of “manager” found in the Regulation. Section 1 of the Regulation defines manager as:

“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;”

Choi’s evidence was that he had the authority to hire and fire employees although he first sought approval of the owner before firing anyone. He further stated that he prepared employee work schedules, prepared lists for ordering stock, reviewed applications from prospective employees, performed the same work as the employees as required and opened / closed the business each day. He further states that the owner of J&S was never on the work site as he managed a motel in the community as well.

There was no record submitted of the hours claimed to have been worked by Choi and, this lack of daily records would seem to indicate that Choi recognized that the long hours worked were a part of his job as a manager and that there was no need to record his own hours on a daily basis.

While it is often impossible in a small business operation such as this to clearly separate the work performed by the manager and that performed by the employees, it then becomes necessary to consider the work performed by the complainant in the context of the total operation of the business.

Based on the evidence provided by the parties, I conclude that Choi was a “person employed in an executive capacity” and is therefore a “manager” as defined by the Regulations and subsequently not entitled to either overtime wages or statutory holiday pay.

ORDER

Pursuant to Section 115 of Act, I order that Determination No. CDET 001021 be confirmed.

Hans Suhr
Adjudicator
Employment Standards Tribunal

May 9, 1996
Date

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