

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 -

429458 BC Limited Operating Amelia Street Bistro
("Amelia Street Bistro")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Niki Buchan

FILE NO.: 97/11

DATE OF HEARING: February 27, 1998

DATE OF DECISION: April 16, 1998

DECISION

APPEARANCES

Bruce Matheson
Gerry Omstead
Walter Telemans

For Amelia Street Bistro
For the Director
For himself via telephone
conference

OVERVIEW

This decision arises following Employment Standards Tribunal Decision, BC EST #D479/97 (“Reconsideration Decision”), which is a reconsideration of BC EST #D170/97 (“Original Decision”). The Original Decision was made after an appeal by 429458 BC Limited Operating Amelia Street Bistro (“Amelia Street Bistro”) of a Determination issued by a delegate of the Director, dated December 3, 1996, which had concluded that Amelia Street Bistro had contravened the hours of work and overtime requirements of the *Employment Standards Act* (the “*Act*”) in respect of the employment of Walter Telemans (“Telemans”) and ordered it to cease contravening the *Act* and to pay an amount of \$6,645.49. On the evidence before me in that appeal, I determined that Telemans was a manager and was excluded from the hours of work and overtime requirements of the *Act*. I ordered that the Determination be cancelled.

The Director applied for a recommendation of the Original Decision requesting a setting aside of the decision and confirmation of the Determination. The Employment Standards Tribunal (“Tribunal”) agreed with the Director stating: “...the Adjudicator did not correctly interpret and apply the definition of manager in the context in which it was being considered, which is whether Telemans’ primary employment duties consisted of supervision and directing other employees.”

Pursuant to paragraph 116(1)(b) of the *Act* the Tribunal referred the matter back to the original panel. In its Order the Tribunal states at page 7:

“The original panel should be guided by the analysis we have set out and should consider such matters as whether the majority of the call on Telemans’ time was related to supervising and directing employees, whether he had exercised any of the power and authority typical of a manager, that is, did he in fact have final judgment and discretion in respect of those matters listed above and, if so, to what degree, and whether the primary reason for his employment was to supervise and direct other employees or, as suggested by the decision, to perform the duties of a chef.”

The Tribunal ordered a further hearing and arranged a teleconference in order that Walter Telemans (“Telemans”) could take part in the proceedings. He did not

attend at the original hearing. He indicated that he has received and read the above noted Decisions. There were no new documents presented at the hearing. Telemans presented affirmed evidence via telephone conference.

ISSUES TO BE DECIDED

Whether Telemans' primary employment duties brought him within paragraph 1(1)(a) of the definition of "manager" in the *Employment Standards Regulations* (the "Regulation") to the *Act*?

FACTS

In the Original Decision the following facts are set out:

"Telemans was hired December 31, 1994 as the Chef at Amelia Street Bistro, a lunch and dinner restaurant. The agreement was a verbal one. He was employed until March 30, 1996 when he quit. Telemans states in his Complaint that 'When I quit, the reason was a significant cut in salary as opposed to an agreement on my overtime.'

He was paid a monthly salary. The job was to oversee the whole operation of the restaurant as well as the cooking and related activities required of a chef. He set up the kitchen to meet his requirements by rearranging the space and changing the refrigeration. For the first three months, he worked 7 days per week then 6 days per week for one month, and then 5 days per week until February 3, 1996. At time, his work was reduced to 4 days per week because there was a lack of business at the restaurant.

Among his duties Telemans:

1. designed new menus;
2. kept the inventory and performed food cost duties;
3. ordered supplies and dealt with suppliers
4. supervised staff including hiring, firing, scheduling and training;
5. maintained computer records but did not do the payroll;
6. dealt with customers and the public; and
7. performed cooking and kitchen duties with clean up as required.

Although no one held a title of manager, Telemans was the person whom the employees considered in charge. He was considered the manager.

At a staff meeting in the summer of 1995 the employer requested Telemans to keep a record of his hours. Telemans refused to record his hours therefore the employer has no record of hours worked by him. Since he did not record his hours, he did not have documented hours to present to the

investigator at the time of the Complaint. The investigator used the times the restaurant was open to determine the hours worked.

Telemans admits in the information he submitted with his Complaint that it was his choice to do overtime since he wanted the restaurant to work.

Vacation pay of 4% was paid by Amelia Street Bistro on scheduled pay days even though there was no agreement with Telemans to pay in this manner as required by the ‘Act’. He did receive 4% vacation pay on his salary.”

Evidence from Telemans at his hearing provided further information resulting in the following findings:

- Amelia Street Bistro has a seating capacity for approximately 70 people.
- At the time Telemans was hired, there was a manager at the restaurant who left approximately 3 months later and was not replaced.
- Initially, Telemans was the only chef at the restaurant. After 3 months, he recruited another cook who was hired to assist with the dinner time period. Later another cook was hired to assist during the lunch period.
- There was a large turnover of staff. Generally, the staff consisted of 3 waiters, 2 cooks, 4 kitchen part-timers and/or 2-3 dishwashers plus Telemans.
- Telemans spent approximately 80% of his time cooking. He also designed the menus and instructed other cooks about the menus. He instructed the part-timers and dishwashers to make salads and set up desserts. The duties of supervision and training were not onerous in that usually the cooks could perform the duties after he taught them the new recipes. It took little time to show staff how to do the salads and dish washing.
- Telemans did play an active role in hiring, scheduling and laying off staff. He recruited at least one cook, called staff in to work and sent them home when business was slow. Bruce Matheson, the owner, attended hiring interviews, set the days and hours of business and instructed Telemans to lay off staff when business was slow.
- The major management duties that Telemans performed were setting up procedures in the kitchen, inventory and purchasing supplies and maintaining computer records. In these duties he acted in an independent manner.
- Telemans was the only employee who worked overtime. He refused to record his hours of work because he was insulted when asked to do so.

ANALYSIS

Since there was no evidence presented at the first hearing that indicated the extent of Telemans' supervision and direction duties or the amount of time he spent on such duties it was necessary to elicit evidence on these matters in order to comply with the directions from the Tribunal.

In order to determine whether Telemans is a manager one must address the definition of "manager" in Section 1(1) of the *Regulation to the Act*:

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.

There is no issue that Telemans was employed in an executive capacity, therefore, the question is whether his primary employment duties consisted of supervising and directing other employees. The Reconsideration Decision cites a number of previous Tribunal decisions that addressed this part of the definition. See *Anducci's Pasta Bar Ltd.* (BC EST No.D380/96); *Sambuca Restaurant Ltd.* (BC EST No. D322/97); *T&C Ventures Ltd. Operating as Town and Country Motor Hotel* (BC EST No.D152/96); *Restauronics Services Ltd.* (BC EST No.D131/96); and *Trev-Cher Enterprises (1992) Ltd. Operating Fynnigan's Pub* (BC EST No.D098/96). The focus of the analysis in these cases is on the primary employment duties. The Reconsideration panels' analysis of these Decisions can be found at BC EST No.D479/97 at pp.5 and 6.

Guided by that analysis and directions from the Tribunal, I must consider:

- whether the majority of Telemans' time was related to supervising and directing employees;
- whether he had and exercised any of the power and authority typical of a manager; and
- whether the primary reason for his employment was to supervise and direct other employees or to perform the duties as chef.

Amelia Street Bistro argues that Telemans was a manager, therefore, he is not entitled to the overtime requirements of the *Act*. Bruce Matheson gave evidence at the original hearing that Telemans was hired as a chef with all the duties listed in the facts from that hearing, as set out above. He maintains that Telemans was in complete control in the management of the restaurant. He states that even though he was consulted about hiring and firing, it was Telemans who made the decisions.

The Director's delegate argues that the evidence presented during these proceedings indicates that Telemans was not a manager in that 90-95% of the work he performed should be considered the work of an employee not that of a manager. He did not have the independence to make final decisions. He may have recommended, but he did not hire or fire. Further, Telemans' primary duties were not to supervise and direct other employees. He also points out that the *Act* requires that records be kept of employee hours. Even if Telemans refused to keep a record of his hours, the onus is on the employer to keep those records.

I have reviewed all of the submissions, evidence and arguments from both hearings and considered the Tribunals' analysis and directions. I find that Telemans was originally hired as a chef with a number of kitchen management duties. Throughout his employment he did management duties with respect to the operation of the kitchen in that he designed new menus, kept the inventory and performed food cost duties, ordered supplies and dealt with suppliers. He also maintained computer records. These duties are important ones for a small business, especially at a restaurant where there is no one else present to perform such duties. In these areas he did exercise independent power and authority typical of a manager. They are not, however the duties which address the definition of "manager" in the *Regulation*. See *Anducci's Pasta Bar Ltd. (supra)*.

Telemans did take a major and active part in hiring, firing and some scheduling of employees. He recruited at least one cook and he set work schedules for staff. He also called employees in to work and sent staff home when business was slow. It is not clear that he had the ultimate authority in these areas as suggested by Bruce Matheson who did not deny that he was consulted about when and who to hire, that he attended at hiring meetings and/or that he set the operating hours for the restaurant.

As the chef, Telemans did supervise and direct other employees in their duties, but the most reliable evidence is that only a small amount of his time was allocated to this supervision and direction. He instructed the other cooks on the menus that he created but he claims that they could proceed on their own after they learned the recipes. He instructed other kitchen staff how to set up salads and desserts. Of course, he was also responsible for maintaining an orderly clean kitchen. While it is difficult to quantify the amount of time spent on each of these areas of responsibility and instruction or supervision, it is apparent that the majority of his work involved the duties as the chef. He spent 80% of his time cooking duties.

After considering all of the evidence, guidelines and arguments, I find that Telemans' duties were not those that set out by the definition of "manager" in the *Regulation*.

In summary, I find that Telemans' primary employment duties were not those that fit with the definition of "manager" in the *Regulation*. Having come to this conclusion I vary the original order and confirm the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Original Decision BC EST No. D170/97 to be varied and that the Determination in this matter, dated December 3, 1996 be confirmed in the amount of \$6,645.49 payable to Walter Telemans together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Niki Buchan
Adjudicator
Employment Standards Tribunal