

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C.38

- by -

Harbour International Foods Ltd.
operating Brothers Restaurant

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Jerry W. Brown

FILE No.: 96/120

HEARING DATE: May 16, 1996

DATE OF DECISION: June 17, 1996

DECISION

APPEARANCES

George Lee, President/Shareholder	Of Harbour International Foods Ltd.
James Lee, Comptroller	Of Harbour International Foods Ltd.
C.L. (Chris) Finding	For The Director
Pamela Allan	On Her Own Behalf

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 000852 issued by the Director of Employment Standards (the "Director") through its Delegate on January 22, 1996.

The Director determined that Harbour International Foods Ltd. operating Brothers Restaurant ("Brothers") was in breach of the *Act* and that the complainant, Pamela Allan ("Allan"), would receive compensation in the amount of \$1,435.35. Brothers claims that Allan is not entitled to any overtime compensation because she was a management employee and was therefore excluded from part 4 provisions of the *Act*, pursuant to section 34(1)(f) of the Regulations.

In the alternative, Brothers claims that if Allan is deemed not to be a manager and is therefore entitled to overtime, then the overtime calculation made by the Director's Delegate is incorrect.

FACTS

Allan commenced employment on or about August 8, 1994. Her employment terminated on or about December 14, 1994. When Allan was hired she was the only person working in Brothers' office. A job description provided by Brothers makes no specific reference to supervisory or management duties. The job description did not mention any benefits. Brothers kept no record of hours of work for Allan. She had normal, constant contact with James Lee, the part-time Comptroller. She had casual contact, during the course of her employment, with George Lee, President and Shareholder, who was the person that had hired her.

A casual worker was hired to perform some general accounting and auditing functions and to assist Allan.

Section 35 of the *Act* states:

Section 35: Maximum hours of work

35. An employer must pay overtime wages in accordance with section 40 if the employer requires or, directly or indirectly, allows an employee to work
- (a) over 8 hours a day or 40 hours a week, or
 - (b) if the employee is on a flexible work schedule adopted under section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.

ISSUES TO BE DECIDED

1. Was Allan employed in a management or executive capacity?
2. If Allan was not a manager or executive of Brothers, was she owed the overtime as calculated by the Director's Delegate?

ANALYSIS

Brothers contends that the Director's Delegate erred in his Determination in having found that Allan was not a manager and that Allan was therefore entitled to overtime pursuant to the *Act*.

The following decision has been reached having heard Brothers' witnesses, George Lee and James Lee, and having heard Allan, as well as submissions by the Director's Delegate, and having reviewed the documents and materials submitted by the parties upon filing the appeal.

I will deal with the issues separately.

Issue #1: Was Allan employed in a management or executive capacity?

Brothers contends that Allan was not entitled to overtime wages by virtue of section 34(1)(f) of the Employment Standards Regulations because she was a "manager". Being a manager would disentitle her to overtime wages. Brothers points to the fact that the job description submitted as evidence listed her as office manager/accountant.

According to the Regulations, a "manager" is described as "a person whose **primary** [my emphasis] employment duties consist of supervising and directing other employees", or "a person employed in an executive capacity".

Brothers provided a job description as evidence. While they contend that the job description identifies Allan as office manager/accountant, and that she is therefore management, I find that the job title is not determinative. Allan's evidence indicated that she was the only employee in the office for the main duration of her employment. The only exception to her being the sole office employee was when casual labour was brought in to assist with some of the more general accounting duties. Brothers' witness James Lee, part-time Comptroller, acknowledges he had little day to day contact with Allan. His assessment of her day to day duties is therefore limited.

James Lee, the part-time Comptroller for Brothers, contends that Allan made the decision to hire and then in fact did hire and fire that casual worker. Allan contends that she was directed to hire and fire the casual employee and she at no time had the ability to make a decision about whether or not to bring in additional staff.

I find Allan's version of the events, particularly with reference to the job description, more persuasive. I find that while she had a significant amount of responsibility with respect to accounting matters, she was not a "manager" as defined in the *Act*. She was not involved in disciplining or evaluating the performance of employees. She was not involved in budgeting (other than as directed by her employers), and she did not schedule employees or direct the work of other employees.

With respect to her acting in an executive capacity, she was not active in participation of the control, supervision and administration of business affairs other than as directed by the partners or Jim Lee in his position as part-time Comptroller.

Given the above, I am unable to find that the Director's Delegate erred in the determination that Allan was not a manager and therefore entitled to overtime pay, and I deny the appeal with respect to this issue.

Issue #2: If Allan was not a manager or executive of Brothers, was she owed the overtime as calculated by the Director's Delegate?

The *Act* requires employers to keep accurate records for employees' hours worked. In this case, Brothers was required to keep records and did not present accurate records. The Director's Delegate indicated that he relied on contemporaneously made records provided by Allan. I have not heard any evidence which persuades me that the Director's Delegate's decision to rely on Allan's records was incorrect, nor am I persuaded that the calculations provided by the Director's Delegate should be altered.

I confirm the Determination as to calculation and amount.

ORDER

In summary, I order under Section 115 of the *Act*, that this appeal be dismissed and that Determination No. CDET 000852 be confirmed and that Allan is entitled to compensation by Brothers in the amount of \$1,435.35.

JERRY W. BROWN
Adjudicator
Employment Standards Tribunal

EKB:99394