

**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 -

Restauronics Services Ltd.

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Jerry W. Brown

**FILE NO.:** 96/159

**HEARING DATE:** May 13, 17, 1996

**DATE OF DECISION:** June 20, 1996

**DECISION**

**APPEARANCES**

Ian MacDonald	For Restauronics Services Ltd.
Lesley A. Christensen	For The Director
Susan Darlene Hjerpe and Brita Andrea Moosmann	On Behalf of Susan Hjerpe

**OVERVIEW**

This is an appeal brought by Restauronics Services Ltd. ("Restauronics") pursuant to Section 112 of the *Employment Standards Act* (the "Act"), from Determination No. CDET 001342 issued by the Director of Employment Standards (the "Director") through its Delegate on February 28, 1996.

The Director determined that Restauronics owed Hjerpe \$2,632.20 representing unpaid overtime and vacation pay.

Restauronics' position is that Hjerpe was a manager at all times during her employment and that, therefore, the overtime provisions of the *Act* do not apply. Hjerpe contends that she was not a manager and that therefore the overtime provisions in the *Act* do apply and she is entitled to overtime pay.

(Restauronics asked to reschedule the second day of this hearing because one of their witnesses was unavailable. I ruled that we would continue as the witness could have appeared at the first day of hearings but failed to do so and that the witness would, according to Restauronics, give substantially the same evidence as one of their earlier witnesses.)

**FACTS**

Hjerpe commenced work with Restauronics on June 6, 1995 and her last day of work was September 5, 1995. A complaint was filed October 20, 1995.

Keith Kerr ("Kerr"), District Sales Manager, for Restauronics, confirmed Hjerpe's employment in a letter dated June 6, 1995. Kerr was Hjerpe's immediate supervisor for her entire employment period, except the last three weeks, during which she worked for Darrell Walton. The letter indicated that her starting salary would be based on \$12.50 per hour, paid at a rate of \$1,000 bi-weekly or \$26,000 annually. This was to be increased after 90 days to \$14 per hour or \$1,120 bi-weekly. It also included provisions for a probationary period. The letter states that after her probationary period, she would be the Unit Manager at one of Restauronics' operations located at Hughes Aircraft of Canada Ltd. ("Hughes").

The Hughes operation was open to the public from 7am - 2:30pm. Hjerpe's hours of work were set for 6am - 2:30pm. Hjerpe worked either alone or with one other co-worker. Hjerpe was hired to partake in the establishing and opening of Restauronics' new unit at Hughes and then to continue operation of Restauronics' food services at Hughes. As well, Hjerpe and her staff were responsible for stocking and operation of coffee satellite sites around the Hughes facility. These satellite coffee operations required someone to leave the main facility and to check and restock the coffee satellites.

Restauronics has no record of overtime hours worked for Hjerpe.

### **ISSUES TO BE DECIDED**

1. Was Hjerpe a manager or employed in an executive capacity, thereby excluding her from the overtime provisions of the *Act*?
2. If she was not a manager, was the Director's calculation of overtime owed correct?

### **ANALYSIS**

Issue #1: Was Hjerpe a manager or employed in an executive capacity, thereby excluding her from the overtime provisions of the *Act*?

Restauronics submitted a benefit booklet for salaried employees. Kerr, their witness, indicated that this was an indication that Hjerpe was a management employee because she received these benefits. Kerr was unable to point to any reference in the booklet which would indicate that the benefit package was exclusively for management employees.

Kerr alleges that Hjerpe was responsible for hiring, firing, and disciplining employees. Kerr acknowledges that Hjerpe did not fire anyone but goes on to state that she was involved in the decision-making process and sometimes made the final decision to terminate an employee. He also acknowledged that when someone was hired he placed the ad and that he had the authority to reverse a decision at any time. Kerr could not explain why Hjerpe was not required to report her hours on a regular basis and indicated he had no recollection of any conversation wherein he instructed her not to record her hours. When Kerr was asked why hiring and firing was not on Hjerpe's written job description, he indicated that he had told her personally that these were to be part of her "administrative" duties. When asked if supervising staff was an administrative duty and why it was not in her written job description, he indicated that making sure that "operating standards" were in place was the equivalent of supervising staff.

In the Director's Determination it was found that Hjerpe's duties were not primarily that of a manager as set out in the Act.

**"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;

At issue is whether or not Hjerpe's primary employment duties consisted of supervising and directing other employees. In the materials presented by Restauronics and hearing evidence given by their management staff, I am not persuaded that Hjerpe's primary employment duties consisted of supervising and directing other employees. In a normal working day, Hjerpe mainly performed the roles of chef and food handler/server. She may have had some peripheral administrative duties given in her job description and she would certainly have brought experience as a chef with respect to monitoring other staff, however, I find that this in itself did not put her in a position as a "manager". Further, none of the evidence I heard or reviewed persuades me that Hjerpe was employed in an "executive" capacity.

Hjerpe did acknowledge that on the first day at Hughes she did monitor and advise some of the lesser skilled workers with respect to how to perform their functions. However, in my view, this monitoring and advising function arose more out of her experience as a chef than as a requirement of a management person.

Perhaps it was Restauronics' intention to create a management position for the Unit Manager, but none of the duties of hiring and firing, disciplining, evaluating the performance of employees, or

directing the work of other employees, with the exception of monitoring employees, fell in Hjerpe's domain.

With respect to the executive capacity argument put forth by Restauronics, the only true discretionary authority Hjerpe had was the decision to determine what menu to prepare for that day. The true discretionary authority rested with Restauronics' management staff.

Issue #2: If she was not a manager, was the Director's calculation of overtime owed correct?

Restauronics provided evidence in the form of their witnesses testimony to the effect that Hjerpe's accounting of her hours, both in times of duration and responsibilities, was incorrect. A co-worker employed by Restauronics as well as her District Manager gave evidence as to Hjerpe's work day and duties. However, none of these witnesses were there for any full day that Hjerpe worked and Restauronics management was rarely there for long periods of time. In fact, Hjerpe's two supervisors, Kerr and Walton, provided two different versions of the hours that a Unit Manager ought to allocate to their various duties.

Restauronics led evidence to the effect that Hjerpe's hours were inflated as she was not performing her duties properly or was doing personal business when she was away from the main site. The description that Hjerpe gave of performing banking duties and handling the satellite coffee operations was more logical and acceptable than the evidence put forth by Restauronics. I find no reason to believe that Hjerpe was inflating her hours. In fact, some of the documents presented by Restauronics through Walton were prepared for this appeal and were not prepared contemporaneously with the employment of Hjerpe. Walton could not explain the differences between his and Kerr's rendition of what a reasonable time allocation for Hjerpe's job would be, other than they were estimates based on the abilities of various Restauronics' managers.

Walton's estimates were for a total of 8 hours and Hjerpe's comparison was for an average of 11½ hours. Given the evidence of the co-worker and management and the apparent conflicting evidence, I prefer Hjerpe's assessments of her duties, the time it took to complete these duties as well as her description of the actual performance of those duties.

A determination of whether to pay overtime is not based on the abilities of the employee performing the overtime, rather it is to be based on whether or not the overtime was actually worked. In this case, I find that the overtime was worked as set out in Hjerpe's records.

There was also no complaint by Hjerpe that Restauronics was not paying her overtime, but this does not exempt Restauronics from the requirements of the Act.

Given that the fact that Restauronics had no records of overtime for Hjerpe, I find that her contemporaneously kept records were the only ones available to the Director's Delegate.

Having found on the balance of probabilities that Hjerpe's assessment of the time she worked, supported by her records of overtime, was correct, I find no reason to vary the Director's Determination as to amount or the method of calculation.

**ORDER**

In summary, I order under Section 115 of the Act, that Determination No. CDET 001342 be confirmed and that Restauronics is to pay Hjerpe for overtime wages in the amount of \$2,632.20.

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**Jerry W. Brown**  
**Adjudicator**  
**Employment Standards Tribunal**

EKB:99527