

**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 -

Cerhec Holdings Ltd. operating as  
Codfather's Fish & Chips and  
Codfather's Fish and Chips Ltd.  
("Codfather" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 97/906

**DECISION DATE:** March 26, 1998

**DECISION**

**SUBMISSIONS**

Mr. Walter Ceron on behalf of the Employer  
Ms. Judy McKay on behalf of the Director

**OVERVIEW**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on November 13, 1997 which determined as follows:

- Cerhec Holdings Ltd. operating Codfather’s Fish & Chips and Codfather’s Fish & Chips Ltd. are associated employers for the purposes of the *Act* (Section 95);
- certain employees were not paid overtime wages for work exceeding 8 hours in a day and 40 hours in a week (Section 40);
- Lisa Langan, Kate Forrester, Jordan Taylor and Curtis Dool were not managers as defined in Section 1 of the *Regulation* and not excluded from the overtime provisions of the *Act* (Section 34(1));
- Susan Tipple did not wish the Director to pursue an investigation on her behalf and Derek Kraszewski did not respond to the request from the Director’s delegate. In the result, there is no finding with respect to whether they are managers;
- certain employees were not paid minimum daily pay (Section 34(2));
- Kala Forrester was a student during part of her employment with the Employer until her graduation in June 1996. Nicole Makortoff, Jennifer VanderEnde and Pat Wyness were not students for the purposes of minimum daily pay in the *Act* (Section 34(3));
- Paula Hangasmaa, Amanda Hadley, Jordon Hamson, Kris Langemann, Lewis Chekaluk and Angie Brown were students for the purposes of minimum daily pay in the *Act* (Section 34(3));
- minimum daily pay was not an issue for Tara Hangasmaa and Julie Nutland;

- Daniel Bell was not a student because the Employer was not able provide any address or telephone number for the employee;
- Carla Holland did not wish the Director to investigate on her behalf;
- the Employer did not pay statutory holiday pay to employees who had the day off, pay employees who worked on statutory holidays at the appropriate overtime rate, or give employees who worked on statutory holidays another working day off with pay (Sections 44, 45 and 46);
- the Employer breached Section 9(1) of the Act by employing Amanda Hadley who was under age 15 and did not have a permit; and
- required the Employer to pay to the Director in trust on behalf of employees who could not be located: Dan Bell, Shane Pace, Bev Loggin, Stacey Knelson, Julie Wells and Carlton Hickey (Section 19(1)).

The audit conducted by the Director's delegate covered the period May 22, 1995 to June 29, 1997. The Determination ordered the Employer to pay a total of \$14,200.86 based on the conclusions set out above.

## **ANALYSIS**

The Employer does not address the issues raised by the above findings of the Director's delegate in any substantial, specific or meaningful manner. The Employer states, in a general way, and without any specific or detailed information concerning any individual employee, that the overtime calculations are not correct because of the coffee/cigarette/lunch breaks taken by the employees. The "daily working calendar" only stated start and completion of shift. For example, the Employer argues, "in an 8 hour shift there would be a 'smoke'/'meal' break every 20-30 minutes". The Employer claims to be unaware of the "labour board rules". However, as noted in the submission by the Director's delegate, the calculations are based on the Employer's records. The payroll records show hours worked per pay period and they are based on the hours set out in the "daily working calendar". In my view, the Employer relied on these records, in a manner consistent with the findings of the Director's delegate, in calculating the employees' wages and the Employer is now, in effect, arguing that the records stand for something completely different. Moreover, and this is not disputed by the Employer, the Director's delegate sent her report, including her calculations, to the Employer for a response. The Employer did not respond.

The only issue seriously contested by the Employer is the management status of Lisa Langan. The Employer's submissions indicate that she did have some management responsibilities, that she trained and supervised employees, and that she represented to others that she was the manager.

The job description, submitted by the Employer, and taken at face value, indicates that she did scheduling, handling “cash” and “deposits”, “making products”, “motivating staff” and cutting fish. She also had a key. The Employer does not dispute the submission by the Director’s delegate that Mr. Ceron and his wife did all the hiring, firing and disciplining of employees. The Employer’s submissions with respect to other employees, in the form of a letter from a previous employee, Ms. Tipple, who characterizes herself as a manager, states, among others, that Kate Forrester was being trained to take over her position. Dool, Taylor and Forrester were assistant managers.

Section 1(1) of the *Regulation of the Act* defines, *inter alia*, “manager”:

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.

The issue of whether a person is a manager has been addressed in a number of decisions of the Tribunal. In *T & C Ventures Ltd.*, BC EST #D152, the Tribunal stated:

“The issue is whether or not Taylor’s primary employment duties consisted of supervising or directing other employees.”

In *Amelia Street Bistro*, BC EST # D479/97, reconsideration of BC EST #D170/574, the reconsideration panel noted, at page 5:

“... We agree that the amount of time an employee spends on supervising and directing other employees is an important factor in determining whether the employees falls within the definition of manager .... We do not, however, agree that this factor is determinative or that it is the only factor to be considered. The application of such an interpretation could lead to inconsistent or absurd results.

The task of determining if a person is a manager must address the definition of manager in the *Regulation*. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business....

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment And the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.

We also accept that in determining whether a person is a manager the remedial nature of the *Act* and the purposes of the *Act* are proper considerations.

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 judgements 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 to a manager... 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 manager. It is not sufficient simply to say that a person has that authority. It must be shown to have been exercised by that person."

In my view, the Employer has failed to address in any serious manner whether, and the extent to which, the persons alleged to be managers had as their primary employment duties the supervision of employees. In fact, even on a favourable reading of the Employer's submission, it is not apparent that their primary employment duties was the supervision of employees. In the result, I do not accept that Ms. Langan was a manager as defined in the *Regulation*. I base that conclusion on a "total characterization" of her duties and responsibilities. Similarly, and for the same reason, I do

not accept that the other persons referred to are managers for the purposes of the *Act*. As such they are entitled to overtime wages.

The Employer does not argue that Ms. Langan was employed in an “executive capacity” and I need not, therefore, deal with that issue.

The Employer suggest that it was not aware of the requirements of the *Act* and *Regulations*. In my view that is immaterial. Even if the Employer, was not aware of the requirements of the *Act* and *Regulations*, ignorance of the law is not a valid defence. Moreover, as noted by the Director’s delegate, the Employer has an extensive history of dealings with the Employment Standards Branch. The Director’s delegate refers to several previous determinations. I place no weight on the earlier determinations, except to the extent that the Employer’s previous dealings with the Employment Standards Branch do not support the explanation that the Employer was not aware of the requirements of the *Act* and the *Regulations*.

**ORDER**

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated November 13, 1997 be confirmed and the amount of the Determination be paid out to the employees together with such interest as may have accrued, in accordance with Section 88, since the date of issuance.

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**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**