

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 -

429485 B.C. 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: April 14, 1997

DATE OF DECISION: April 29, 1997

DECISION

APPEARANCES

Bruce Matheson
Gerry Omstead
Melody Haggis

for Amelia Street Bistro
for the Director
Witness

OVERVIEW

This is an appeal by 429485 B.C. Limited operating Amelia Street Bistro (“Amelia Street Bistro”) of Determination File No. 053125, dated December 3, 1996 that determines an amount in the sum of \$6,645.49 is payable to Walter Telemans (“Telemans”) for outstanding wages. In particular, the outstanding wages are for unpaid overtime hours worked and vacation pay on those hours. The Determination also finds that Amelia Street Bistro paid vacation pay on scheduled pay days without an agreement of the employee in contravention of the *Employment Standards Act* (the “Act”).

Amelia Street Bistro argues that Telemans was a manager and is not entitled to overtime pay. Bruce Matheson (“Matheson”) states he was not aware that payment of overtime on scheduled paydays was in contravention of the *Act*.

ISSUE TO BE DECIDED

Whether Telemans was a manager for the purposes of S. 34(1)(f) of the *Employment Standards Regulations* and therefore not entitled to receive overtime pay?

FACTS

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 that 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.

ANALYSIS

Amelia Street Bistro argues that Telemans was a manager therefore he is not entitled to overtime.

A manager is exempt from hours of work and overtime requirements of the "Act" by S. 34 (1)(f) of the *Employment Standards Regulations*. The definition section defines a manager as "a person whose primary duties consist of supervising and directing other employees" or as "a person employed in an executive capacity".

Amelia Street Bistro hired Telemans to oversee the whole operation of the restaurant. He was responsible for hiring and firing, ordering supplies and food cost duties, regularly and frequently scheduling work (calling employees into work or sending them home early). He performed training for employees and directed their work at the restaurant. These duties are primary and fundamental for the operation of a restaurant. The person who assumes these primary duties then falls into the classification of manager. The key elements of supervision and direction are present on the facts in this case even if cooking duties were also a primary requirement of the job.

I find that Telemans was a manager and is excluded from the hours of work and overtime requirements of the “Act”. Amelia Street Bistro has not contravened the hours of work and overtime requirements of the “Act” and is not required to pay \$6,645.49 to Walter Telemans.

ORDER

In summary, I order under Section 115 of the “Act”, the Determination File No.053125, dated December 3, 1996 be cancelled.

Niki Buchan
Adjudicator
Employment Standards Tribunal