

An appeal

- by -

Sewa Pacific Service Corporation operating as Sewa Restaurant
(“Sewa”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2002/001

DATE OF DECISION: May 8, 2002

DECISION

APPEARANCES:

Al Strachan	Representing Sewa
Kin Wa Leung	On his own behalf

OVERVIEW

Sewa Pacific Service Corporation operating as Sewa Restaurant (“Sewa” or “the employer” for ease of reference) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 12, 2001. The Determination orders Sewa to pay Kin Wa Leung \$5,442.33 in wages, vacation pay and interest included.

Underlying the Determination is a decision that the employee is not a “manager” as that term is defined in the *Employment Standards Regulation* (the “Regulation”) and that he is therefore entitled to overtime pay. The employer, on appeal, argues that the decision is wrong, the employee is a manager. I have heard from the employer and find that there is not evidence to show that the Leung’s primary duties were that of a manager as the term “manager” is defined in the *Regulation*. The Determination is accordingly confirmed.

An oral hearing has been held in this case.

ISSUES

The issue is the matter of whether the employee is or is not entitled to overtime wages. Underlying that issue is the main issue which I must decide, the matter of whether the employee is or is not a manager as the term “manager” is defined in the *Employment Standards Regulation*.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS

I have heard from the parties at length and, on doing so, find that the important facts are pretty much as the delegate found them to be.

Leung was head chef of Sewa Restaurant prior to reorganization of the corporation’s restaurant operations. The restaurant was in this period run by Misayo Nakagawa, owner of the employer; Danny Chow, general manager of dining; Tommy Chow, the dining section manager; and Leung. I find that Nakagawa considered Leung to be an important part of her management team. He enjoyed the same medical and dental benefits as the other ‘managers’. Much of his time was spent cooking but, as head chef, he had other important duties to perform. He had kitchen staff to supervise. He signed time cards. It was his job to divide up the tips. He ordered food stuffs. He signed for deliveries. While Nakagawa

retained the final say on discipline, hiring and firing, it was on Leung's recommendations that such matters were decided. It was also Leung's job to develop new dishes which would then be added to the menu if they were approved by Nakagawa.

Nakagawa owns four different restaurants and it was decided in 1998 that there were efficiencies to be gained if certain tasks common to all four of the restaurants were centralized in a new operation called Sewa Central Foods Division ("Sewa Central"). By August, 1998, Sewa Central was up and running. Sewa Central took over responsibility for human resources, purchasing, the production of noodles and the preparation of foods like soups, sauces and sushi rice. Taka Shimoshige and Kiyoshi Tsuji were put in charge of Sewa Central. They reported to the owner.

Sewa Central's place of operations was Sewa Restaurant. The rear of the restaurant was divided into two separate work areas, that of Sewa Central and a kitchen for Sewa Restaurant.

Leung was assigned new duties as part of the employer's reorganization. The restaurant ceased to be his exclusive concern and he was put in charge of Sewa Central's noodle production unit. As such, he spent the greater part of his workday making noodles, that is, mixing ingredients and operating noodle making machinery. Leung had two helpers and he provided them with a certain amount of supervision and direction. If Leung had a power to hire and fire workers, there is not evidence to show that he exercised such power.

In the period that Leung made noodles, he also acted as a relief cook. For about two hours in the middle of his workday, he did the cooking in the restaurant's kitchen. The delegate had decided that he continued to be responsible for food costs, inventory and designing new menus for the restaurant in this period. The employee takes issue with these conclusions but whether he was or was not is unimportant for the purposes of the appeal.

The employer claims that Leung was still the head chef of the restaurant and that he continued to exercise the same level of power as before the reorganization. Mr. Leung claims that he was in fact replaced as head chef by a Mr. Wei. I find that Leung did not supervise or direct kitchen staff to the extent that he did before the reorganization. Clearly, he was not in position to provide kitchen staff with much of any supervision and direction. He was rarely in the kitchen of the restaurant. He was in the main concerned with the making of noodles.

The delegate was satisfied that Leung exercised some of the power and authority typical of a manager but she was led to believe through her interviews, a significant number of interviews I should add, that Wei took over responsibility for directing kitchen staff and that it was Wei that was responsible for interviews, hiring and terminating kitchen staff. The employer takes great exception to the latter set of conclusions but, on the important matter of whether Leung had an added responsibility for hiring and firing, I find that that is not even argued. I am told by the employer that final decisions were still being made by the owner. That said, it is clear to me, as I am about to explain, that really nothing turns on the matter of whether it is Mr. Wei or Mr. Leung that was the head chef at this point, the primary duties of the employee being what they are.

On or about February, 2000, Leung was moved back to working in the restaurant's kitchen. The delegate has found that his primary responsibility continued to be that of a cook. She estimates that about ninety percent of Leung's time was spent cooking in this last period of the employment. I am not shown that she is wrong in that assessment of the employee's duties.

ARGUMENT & ANALYSIS

I accept that the employer considers Leung to have been one of “her managers” and a valuable employee at that. The question that I must answer is, however, Was Leung a “manager” as that term is defined in the Employment Standards Regulation. If it is that he was a manager, he is not entitled to overtime pay. If not, he is entitled to overtime like most employees.

Part 4 of the Act calls for the payment of overtime pay. But section 34 (1) (f) of the Regulation provides that Part 4 of the Act does not apply to a manager.

The term “manager” is defined in section 1 (1) the Regulation. The definition is as follows:

“**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.

In *Director of Employment Standards*, (1997) BC EST # D479/97 (Reconsideration of BC EST # D170/97), a panel of the Tribunal had this to say in regard to determining whether a person is or is not a manager for the purposes of the Act.

“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. That point was made by the Tribunal in *Anducci’s Pasta Bar Ltd.*:

“Many of the duties to which the employer pointed as evidence of Lum’s managerial status did not address the definition of manager in the Regulation. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees.”

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterisation 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 or identified by other employees 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.”

The panel went on to find that the following objective factors are important to deciding whether a person is or is not a manager for the purposes of the *Act*:

- The power of independent action, autonomy and discretion;
- the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business;

- the power to make 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, and
- that the person's job be that of a manager or a supervisor.

The employee need not have a responsibility and discretion about all three of the above noted matters. But it is not sufficient to say that a person has the power and authority which is typical of a manager. It must be shown that the person has actually exercised such power. Beyond that, the matter of whether a person is or is not a manager is a matter of degree.

It is not argued in this case that Leung was employed in an executive capacity and, clearly, he was not. It follows that unless it is shown that Leung's primary employment duties were to supervise and direct other employees that he is not a manager and that he is entitled to overtime pay.

As matters are presented to me, it is not shown that Leung was at any point a manager, neither before or after the reorganisation. Leung did not have the authority to make important final decisions. He made nothing more than recommendations in respect to menu and hiring and firing which were then accepted or rejected by the owner. He had a number of important responsibilities and he had a hand the supervision and direction of employees. That is clear. But tasks like dividing up the tips and developing dishes to serve in a restaurant, while important, are not part of supervising and directing employees. Most importantly, I find that he was not primarily concerned with 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. He had a hand in some of that but it is clear to me that his primary duties were that of chef and noodlemaker.

Mr. Leung's job is similar in the important respects to that of the chef in *Amelia Street Bistro*, BC EST # D108/98, the chef in *Victoria Panda Restaurant Ltd.*, BC EST D183/00, and the chef in *Taverna Corfu Ltd.*, BC EST # D346/00. In each of those cases it was found that the employee was not a manager but an employee entitled to overtime wages for work after 8 hours in a day or 40 hours in a week.

I am satisfied that the Determination is one to confirm.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 12, 2001 be confirmed in the amount of \$5,442.33 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal