

**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 -

Victoria Panda Restaurant Ltd.

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No.:** 2000/096

**DATE OF HEARING:** April 27, 2000

**DATE OF DECISION:** May 4, 2000

**DECISION**

**APPEARANCES**

William McCreadie	On behalf of Victoria Panda Restaurant Ltd.
Hui Peng Zhu	On his own behalf
Kileasa Wong	Cantonese Interpreter

**OVERVIEW**

This is an appeal by Victoria Panda Restaurant Ltd. ("Panda") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination numbered ER# 085861 dated February 04, 1999 by the Director of Employment Standards (the "Director").

The Panda Restaurant in Victoria has an interesting history. It was opened and owned by the City of Minyang in China as part of a friendship program between the City of Victoria and a sister City in China. Mr. McCreadie, along with some partners, owned the building in which the restaurant leased its location. In October of 1994 the Chinese owners of the restaurant closed the doors and returned to China. The landlords were left with a fully operational restaurant but no tenant.

After trying unsuccessfully to find suitable tenants to operate the restaurant, the landlords incorporated Victoria Panda Restaurants Ltd to operate the restaurant. McCreadie pointed out that they were not restaurantors and they proceeded to hire managers to run the restaurant for them.

Hui Peng Zhu ("Zhu") was employed as a cook from November 01, 1995 to August 23, 1997. Initially he worked under a chef but from August 1996 to August 1997 he worked on his own or with another cook called Lau. During this one year period Zhu worked a considerable amount of overtime hours. Panda submitted that Zhu was the kitchen "manager" during this one year period and therefore was not eligible for overtime payments. The Director determined that Zhu was not a "manager", that he was entitled to overtime payments, and that he was owed \$10,981.43 in overtime and statutory holiday pay.

Panda has appealed on the basis that the Director erred in finding that Zhu was not a manager.

Although Panda also raised issues with regard to the accuracy of the hours recorded, this ground was effectively withdrawn at the hearing when McCreadie conceded that he was not in a position to dispute the hours as the employer did not keep records.

**ISSUES**

The primary issue to be decided in this case is whether the Director erred in determining that Zhu was not a manager during the period from August 1996 to August 1997.

A secondary issue relates to the manner in which the Director's delegate has calculated the overtime rate of pay or the interpretation of "Regular Wage".

## **FACTS**

As set-out above in the overview, Zhu was employed by Panda November 1, 1995. When he was first hired he was an assistant cook and worked under a chef, referred to in these proceedings as Oscar. There is no question that he was a regular employee at that time. In August 1996 Oscar was dismissed and the kitchen was then operated by Zhu and Lau until August of 1997.

Panda submits that Zhu and Lau became co-managers of the kitchen. Mr. McCreadie testified that he had learned that it was important to the success of a Chinese restaurant that the kitchen be allowed to operate in the "Chinese style". I took him to mean that the kitchen was an entity unto itself and that the kitchen staff had to have a large degree of independence from general management. McCreadie hired a "front-end" manager who was in charge of all the reservations, tables sittings, serving staff, reception, and payment. He says that Zhu was a kitchen manager.

McCreadie testified that Zhu had freedom to buy food supplies, set his own hours in cooperation with Lau, manage the kitchen as he saw fit, and hire extra staff as and when necessary. He noted that there were two employees who worked quite often. One of these employees was Darren Zhu, Mr. Zhu's son, and a Gordon Woo. The other extra staff were treated as "casual" and paid in cash so there is no record of their employment.

There was no written employment or management contract between Panda and Zhu. There was no written job description. However, in August 1997, McCreadie asked Zhu to sign a document confirming that he had been a manager over the previous year. Zhu declined to sign it.

Zhu testified that he never was a manager. He concedes that he did do some of the food purchasing because of his contacts in the Chinese community in Victoria and that Lau did some of the purchasing in Vancouver. He agrees that he was able to supply some extra help for banquets but he says that the ultimate decision was made by the front-end manager who was, he submits, the general manager of the restaurant. Banquets occurred approximately 2-3 times per month. When there was no banquet Zhu says that he basically worked alone, as Lau worked the mornings and afternoon and he worked the evenings.

Zhu said that his main duties were the food preparation, cooking, and clean-up. He would buy food sometimes and recommend staff for special occasions. A letter provided by the front-end manager says that Zhu was responsible for staffing the kitchen, ordering food, and maintaining the kitchen in a satisfactory condition.

## **ANALYSIS**

The *Act* provides, in Part 4, the various provisions in relation to hours of work and overtime that must be paid by an employer to an employee. However the *Regulation* contains certain exclusions from the normal duty to pay overtime.

The relevant section of the *Regulation* is as follows:

*Exclusions from hours of work and overtime requirements*

34 (1) Part 4 of the Act does not apply to any of the following:

(g) a manager

The term "manager" is defined in the Section 1 of the *Regulation* 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;

There is no suggestion in this case that Zhu was employed in an executive capacity so only part (a) of the definition is in issue.

While employment standards legislation, being "benefit conferring" legislation, should be interpreted in a "broad and generous manner", exceptions from such benefit conferring should be construed more strictly: *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.). Therefore it follows that the definition of "manager" should be construed strictly in accordance with the language in the *Regulation*.

The question to be decided is whether Zhu's "primary employment duties" consisted of supervising and directing other employees. Zhu may have had a great deal of autonomy in running the kitchen as he wished and he may have authority over purchasing food supplies but his primary duties were that of chef and food handler. Even accepting Mr. McCreddie's submission that Zhu had authority to hire extra staff as and when he felt it was necessary, the evidence does not support a finding that his primary duties consisted of supervising or directing those employees. In fact, I accept Zhu's evidence that for much of the time Zhu worked alone.

I conclude that Mr. Zhu was not a person whose primary employment duties consisted of supervising and directing other employees. He may have managed the kitchen as he wished but he did not, primarily, supervise other employees. Therefore he was not a "manager" within the meaning of the *Act*.

In assessing the evidence about Zhu's primary duties I am mindful that this is an appeal and the burden of persuasion is on the appellant to satisfy me that the Director's determination was wrong. In this case I am satisfied that the Director's delegate applied the proper parts of the legislation and interpreted the definition of "manager" appropriately. In this regard the determination will be confirmed.

Regular Wage:

The secondary issue in this case is the manner in which the *Employment Standards Branch* interprets the term "regular wage" in order to calculate overtime.

"Regular wage" is defined in section 1 of the *Act* as follows:

*"Regular wage" means*

- (a) *if an employee is paid by the hour, the hourly wage,*
- (d) *if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work,*

In calculating the regular wage for employees paid monthly, the Director's practice has been to apply the formula set out in the definition on a weekly basis. If a normal or typical monthly workplace is one where most employees work a standard 35, 37.5 or 40 hour week the formula set-out in the *Act* works well to calculate the normal or average hourly rate. However the formula does not work so well where an employee's hours vary considerably from week to week or month to month.

There is a fundamental flaw in the definition as drafted in that it requires a finding of what were the "normal or average weekly hours of work". But, it does not indicate over what period of time the average should be calculated or a "normal" considered. The Director has adopted a practice of calculating the average every week which can result in anomalies where an employee's so called "regular" wage fluctuates wildly from week to week: see also *Re: KwikVan Express Ltd* BC EST #D144/00.

I can not see how such irregular rates could be considered to represent a "regular wage". I do not think that this could have been the intention of the Legislature. In my opinion, where such anomalies arise, it is necessary to look at the whole relationship over the whole period of the time involved in establishing what is the normal or average weekly hours of work.

In this case, I, like the parties, found the calculations by the Branch to be anomalous, indiscernible, and completely lacking in common sense. However, neither party wished to have the calculations revisited, largely because of the uncertainty of what may result.

Despite my conclusions about the manner of calculation of the "regular wage", I have decided that it furthers the purposes of the *Act* to respect the wishes of the parties and not refer this matter back to the Director to have the regular wage recalculated.

The failure to refer the matter back or to vary the determination in relation to the calculation of "regular wage" is not intended as any condonation or approval of the manner of calculation.

**ORDER**

I order, under section 115 of the *Act*, that the Determination is confirmed.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**