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 -

CDJ Enterprises Ltd. operating as Chillanos Restaurant and Bar
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/227

DATE OF DECISION: May 17, 2000

DECISION

APPEARANCES/SUBMISSIONS

Danny Zein & Bob Wickland	for the employer
Paul C. Neumann	for himself
Ed Wall	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the employer, CDJ Enterprises Ltd. operating as Chillanos Restaurant & Bar (the "employer") from a Determination dated March 10, 2000. That Determination found the employer liable for overtime pay to the complainant in the amount of $1,771.72. The Director's Delegate determined that the employer had breached Sections 40(1) and 40(2) of the *Act*.

ISSUE(S) TO BE DECIDED

1. Is the complainant an employee or a manager under the *Act*?

2. If the complainant is found to be an employee, did the delegate err in accepting the complainant's personal daily work records over the employer's schedules as proof of hours worked?

FACTS

The employer operates a restaurant & bar in the Prestige Hotel in Nelson, British Columbia. The complainant was employed from June 14 through November 11, 1999.

The primary issue is whether the complainant worked as a manger. The employer's position is that the complainant was initially hired as a manager. The employer argues that the complainant had supervisory duties and was in charge of the direction of other employees. The employer argues that the complainant was paid a bi-weekly salary and was allowed flexibility in his work schedule. The employer argues that the complainant was given discretion in the manner in which he carried out his duties and responsibilities as long as those duties were fulfilled. The employer argued that the complainant's salary was fixed whether he worked 20 hours per week or 30 hours per week or 40 hours per week. The employer states that in instances where the complainant worked less than 40 hours per week no adjustment was requested or made to the bi-weekly salary. Finally, the employer states that the complainant was on a fixed salary and the employer at no time authorized overtime hours or payment.

The Employment Standards Regulation defines "manager" as follows:

> *(a) a person whose primary employment duties consist of supervising and directing other employees, or*
>
> *(b) a person employed in an executive capacity.*

The file material does not indicate that the complainant played any role in hiring or firing employees. Neither does the material show that he played any role in discipline or evaluating the performance of the employees. Likewise he did not participate in the scheduling of the work force, the day to day direction and control of employees in the kitchen or budgeting for the kitchen's operations.

The title given to a person or a position is not relevant in determining whether the incumbent is a manager for the purposes of the *Act*. The test requires an examination of the actual duties and responsibilities of the person to determine whether or not that person is an employee or a manager. (See Re: *Nugget Family Restaurant Ltd.* BC EST #D368/96)

I find the complainant does not qualify under part (a) of the definition.

If the complainant does not qualify under (a) the question then becomes whether he was employed in an executive capacity. To determine whether a person works in executive capacity one looks at whether the person in question exercises any substantial authority in decisions affecting the business; or, whether the duties of the person actively involve that person in the control, supervision and administration of the business affairs. There is no indication in the file material or the argument submitted by the employer that the complainant was involved in any executive capacity with the employer's operation.

The Tribunal has had the opportunity to examine the question of managerial capacity on many occasions. A leading case is *429485 B. C. Ltd. operating Amelia Street Bistro* BC EST #D479/97 reconsideration of BC EST #D170/97) where a three person panel stated:

> "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."

In order to be a "manager" as defined in the Regulation the management function must be the employee's primary responsibility. Re: *Munday* BC EST #D326/96.

It is notable that once the complainant filed his complaint and the employer was made aware of the complaint the employer reclassified the complainant. That is, the employer accepted, upon reading the Guidelines to the *Employment Standards Act*, that the complainant was not a manager. The employer began keeping proper payroll records at that point as required under the *Act* for this employee. (See *CDJ Enterprises Ltd. operating as Chillanos Restaurant and Bar* BC EST #D203/00).

There is no evidence before me to indicate that the employer, upon reclassifying the complainant, substantially changed his duties. That is, the employer at that point recognized that the

complainant was not a manager; however, it does not change the fact that he was not a manager from the time of his hiring until the employer reclassified him.

I turn now to the secondary issue which is the question of the integrity of the time records. The employer submitted the kitchen schedule which shows that the complainant's daily hours of work were not recorded. Rather the schedules show merely whether the complainant was on shift or off shift on any particular day. That is significant because it appears that the schedules for the remaining eight employees show them working specific hours i.e. 6-2 or 5-10 or 8-3. When the employer was questioned about the schedules and the daily time records by the delegate the employer went back and revised the schedules by writing in a total of daily hours worked on the face of the schedules. The employer did not enter a specific shift but rather estimated the hours worked each day based on when the kitchen closed and which other employees worked the same shifts.

The employer did not keep proper daily payroll records as required under Section 28 of the *Act*. The employer's argument for not keeping those records was that the complainant was a manager and therefore the employer was not required to keep the detailed records as though he were an employee. The employer was assessed a $500.00 penalty for failure to kept those records. That penalty was appealed and the appeal was dismissed. (See *CDJ Enterprises Ltd. operating as Chillanos Restaurant and Bar* BC EST #D203/00).

The employer did submit a copy of the complainant's pay stub for his final pay period. The document contained certain payroll information such as a bi-weekly pay period, salary, gratuities and vacation pay but did not show the number of hours worked in the pay period or the daily records of hours. The employer also submitted a copy of a cheque made out to the complainant with a notation that the payment was an adjustment to vacation pay.

The complainant, on the other hand, submitted his personal time records showing the hours he worked each day from June 14, 1999 through November 12, 1999. The delegate accepted those hours as an accurate record of the hours worked by the complainant each day. The delegate based his calculation of pay for the overtime worked on those records.

It is not an unusual situation to find that an employer has failed to keep proper payroll records as required by the *Act*. The failure to keep such records can seriously hamper an investigation following a complaint under the *Act*. Where the employer has not kept the records as required under the *Act* the delegate is obliged to consider other relevant evidence in his investigation. In this case the best evidence that was available was the personal record kept by the complainant. The delegate accepted that the complainant had kept his records on a daily basis. The employer could submit no additional evidence to refute the records kept by the complainant other than to say that he felt the complainant didn't work the amount of overtime that he claimed. However, the employer was not able to produce any documentation from the schedules to refute the employee's claim.

In situations such as the present case the delegate may accept the employee's records as being the best evidence where the employer cannot produce proper payroll records or other substantial evidence to refute the employee's own records. The Tribunal will uphold such a decision where it is just and reasonable to do so. (See Re: *Wilson c.o.b. Emcee Yard and Garden* BC EST #D190/99; Re: *Hi Rise Salvage Ltd.* BC EST #D293/97; and Re: *Dosanjh* BC EST #D487/97).

Based on the circumstances of this case I am not able to accept the employer's argument that the complainant was a manager. Alternatively I do not accept the employer's reconstruction of the schedules from his memory and the hours other employees had worked those days as refuting the complainant's personal records. For these reasons the appeal is dismissed.

ORDER

The Determination dated March 10, 2000 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal