Employment Standards TRIBUNAL

An appeal

- by -

Patina Salons Ltd.
(the "Appellant")

- 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: W. Grant Sheard

FILE No.: 2002/229

DATE OF DECISION: July 15, 2002

DECISION

SUBMISSIONS:

Dr. P. Fransblow	on behalf of the Appellant Employer
Lynnette Kelly	on her own behalf
Debbie Sigurdson	on behalf of the Director

OVERVIEW

This is an appeal by the Employer, Patina Salons Ltd. (the "Appellant") based on written submissions pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on April 2, 2002 wherein the delegate ruled that the Employee was not a manager and that she was owed overtime wages of $2,378.95 plus interest of $147.85 for a total due of $2,526.80. In a separate decision another delegate issued a zero dollar penalty as a disincentive to prevent contraventions of the *Act.*

ISSUE

Was the Director's delegate correct in finding that the Employee was not a manager such that she was entitled to overtime wages?

ARGUMENT

The Appellant's Position

In a written appeal form dated April 25, 2002 and filed with the Tribunal the following day the Appellant says "I feel that she was paid management wages, was unwell a lot of the time, by my first hand observation, and we stayed the course, but she was flatly too infirm to carry on - back problems gastro-intestinal and emotional problems." The Appellant goes on to indicate that it would like to change or vary the order (as opposed to canceling it) stating "we'll meet you half way to get rid of this".

The Respondent's Position

In a written submission dated May 20, 2002 and filed with the Tribunal the following day the Respondent says, in part, "The comments that Mr. Fransblow has made in his appeal are not only slanderous but are completely irrelevant to the Determinations to which this case is regarding to." She goes on to say "I am an extremely stable individual and have had an excellent work history with not one problem with any employer. Also I have never had any type of intestinal problems? Which again I state is completely irrelevant to the issue at hand of overtime hours due." The Respondent concludes saying, "This is a claim for overtime wages that are due to myself, that I have worked for - this is not a damage claim/complaint, therefore I will absolutely not meet anyone half way on this issue." Inferentially, the Respondent says that the Determination should be confirmed.

The Director's Position

In a written submission dated May 17, 2002 and filed the same day the Director's delegate says as follows:

> "The Director submits that Patina has failed to provide adequate grounds for an appeal of the Determination in its submissions. Patina has simply stated that Ms. Kelly was "paid management wages". The Director submits that the *Employment Standards Act* (the "*Act*") does not recognize 'management wages', or provide for a distinction between 'management wages' and any other type of wages. ……
>
> The Director submits that Ms. Kelly's alleged physical and/or emotional state has no relevance to her claim for overtime wages for hours worked. Patina has provided no evidence to negate the hours Ms. Kelly claims to have worked, and previous management at Patina has acknowledged the hours Ms. Kelly claims to have worked. The Director requests that the Tribunal refuse to consider any allegations of Ms. Kelly's physical and/or emotional health, as submitted by Patina, with respect to the appeal of overtime wages owed."

The Director's delegate requests that the Tribunal confirm the Determination of April 2, 2002.

THE FACTS

Patina Salons Ltd. (the "Appellant") is a day spa in Vancouver. The Respondent Employee, Ms. Kelly, worked for the Appellant from October 15, 2000 to February 28, 2001 at the rate of $2,700.00 per month. Ms. Kelly, worked hours in excess of 8 in one day and 40 in one week from December 17, 2000 to February 28, 2001, which was acknowledged by the parties. Ms. Kelly worked a flexible work schedule #1 as described in Appendix 1 of the *Employment Standards Regulation* (the "*Regulation*"). Ms. Kelly's primary employment duties consisted of customer service and administrative duties related to the front-end service of the salon. Ms. Kelly did not hire, fire, or set wage rates for employees. Ms. Kelly did not approve vacations, time off, or overtime for employees. Ms. Kelly did not discipline other employees and Ms. Kelly was paid for additional hours by the Appellant at her regular wage rate, not at overtime rates of pay.

The parties agreed that Ms. Kelly was hired to work a regular 10 hour day, 4 days per week, followed by 3 days of rest (flexible work schedule #1) and that, for the first two months of her employment, this schedule was followed. The parties further agree that from December 17, 2000 to February 28, 2001, Ms. Kelly worked additional 10 hour days on her days of rest, and that Patina compensated Ms. Kelly for those hours at her regular wage rate. During the investigation of the complaint the Appellant alleged that the Respondent was a manager and therefore exempted from the requirements of the *Act* and *Regulation* with respect to overtime wages. Ms. Kelly acknowledged that she was hired with the job title "manager" but she denied during the investigation that she performed the duties of a manager as defined by the *Act*.

ANALYSIS

The onus is on the Appellant to establish on a balance of probabilities an error in the finding of the delegate.

Section 34(1)(f) of the *Regulation* defines manager 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 *Employment Standards in British Columbia Annotated Legislation and Commentary*, The Continuing Legal Education Society of British Columbia, 2000 Consolidation, Vancouver, BC several cases are summarised with respect to the definition of manager in the *Regulations.* At page REGS-9 to 10 the following is said:

> 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 directing 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. *Re British Columbia (Director of Employment Standards)*, [1997] B.C.E.S.T.D. No. 503 (QL), BCEST #D479/97 (Crampton, Stevenson, Thornicroft, Adj.).

Further, at page REGS-10 it is said:

> In determining whether an employee is a "manager", the employee's absolute level of remuneration is not relevant, although the employee's comparative compensation within the organization may be relevant. *Re Common Ground Publishing Corp*., [2000] B.C.E.S.T.D. No. 446 (QL), (30 October 2000), BCEST #D433/00 (Thornicroft, Adj.).

At page REGS-14 the following is noted:

> An employee whose duties included opening the salon, depositing money, making appointments, ordering products, taking payments from customers, and who possessed a key to the office, was held not to be a manager. *Re Jeffrey & Co. Hair Design Ltd.*, [1998] B.C.E.S.T.D. No. 547 (QL), (23 November 1998), BCEST #D530/98 (Petersen, Adj.).

I agree with the Respondent's submission that the Appellant's submissions are irrelevant to the issue of whether or not the Respondent was a manager as defined by the *Regulation*. Similarly, I agree with the Director's submission that the assertion the Respondent was paid "management wages" is not determinative and does not assist. I further agree with the Director's submission that the Appellant's assertion of physical and/or emotional problems with respect to the Respondent have no relevance to her claim for overtime wages for hours worked or whether or not she was a manager.

I find that the Appellant has failed to meet the onus upon it to demonstrate an error in the Determination with respect to the facts found or law applied.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated April 2, 2002 and filed under number ER066-907, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal