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 -

Capital Janitorial Service Inc.
("Capital")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 98/334

DATE OF DECISION: August 11, 1998

DECISION

OVERVIEW

This is an appeal by Capital Janitorial Service Inc. ("Capital"), under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination dated May 8, 1998 issued by a delegate of the Director of Employment Standards (the "Director"). Capital alleges that the delegate of the Director erred in the Determination by concluding that Angelito Bonzon ("Bonzon") was not a manager and therefore owed wages in the amount of $2,782.99 plus interest for a total amount of $3,001.87 for overtime, statutory holiday pay, minimum daily pay and compensation for length of service.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was Bonzon a manager as defined by the *Employment Standards Regulation* (the *"Regulation")* ?

2. If Bonzon was not a manager, is there an entitlement to overtime, statutory holiday pay and minimum daily pay ?

3. Is Capital obligated to pay compensation for length of service to Bonzon ?

FACTS

The following facts are not in dispute:

- Bonzon was employed by Capital until October 31, 1997;
- Capital issued written notice of termination on October 8, 1997 which indicated that Bonzon's last date of work was to be October 28, 1997;
- The Record of Employment ("ROE") issued by Capital for Bonzon on October 31, 1997 indicates that the reason for issuance was "A" -shortage of work and further indicated that Bonzon was a "Janitor" and finally indicates that the last day worked was October 31, 1997;
- The second ROE issued by Capital for Bonzon on January 20, 1998 indicates that the reason for issuance was "E" -quit, does not indicate what Bonzon's occupation was but does indicate that the last day worked was October 31, 1997.

Capital argues that Bonzon was a supervisor/manager and is therefore not entitled to overtime pay and statutory holiday pay. Capital further argues that Bonzon was offered 20 hours per week work in October 1997 and refused it.

Bonzon argues that he was never employed as a manager by Capital and provided a warning letter dated October 8, 1997 from Capital which states in part "*...you verbally agreed to being able to doe the 'floor person' job full-time.....*" and at a later point states "*Tuesday night I sent Joey to show you where some floors were in a building you have never been to. Due to your arguing with him, he was unable to show you the job to be done.*"

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case the employer, Capital.

The question of whether an employee is actually a 'manager' as defined by the *Regulations* is one which has been the subject of a number of recent decisions by the Tribunal.

The *Regulations* define 'manager' as:

> *"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;"*

Previous decisions of the Tribunal, most notably BC EST #D479/97 have taken the position that :

> Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simple recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgements about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering schedules and training employees is typical of the responsibility and discretion accorded a manager.

There was no substantive evidence provided by Capital to show that Bonzon was indeed a manager. Rather, the evidence of the ROE's which were prepared by Capital, clearly indicate that Bonzon was a "Janitor". The warning letter to Bonzon dated October 8, 1997

further indicates that Bonzon was not a manager as the supervisor Joey was "sent to show" him the area where work was to be performed.

Based on the evidence provided and on the balance of probabilities I conclude that Bonzon was not a manager as defined by the *Regulation*.

The payroll records reviewed by the delegate of the Director clearly indicate that overtime wages, statutory holiday pay and minimum daily pay were not paid to Bonzon. Capital does not dispute that overtime, statutory holiday pay and minimum daily pay are owed to Bonzon. Based on the foregoing reasons, I conclude that wages for overtime, statutory holiday pay and minimum daily pay in the amount calculated by the delegate of the Director and set forth in the Determination are owing to Bonzon.

The obligation of an employer to pay compensation for length of service is set forth in Section 63 of the *Act* which provides:

> 63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee
>
> (a) is given written notice of termination as follows:
> (i) one week's notice after 3 consecutive months of employment;
> (ii) 2 weeks' notice after 12 consecutive months of employment;
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
> (c) terminates the employment, retires from employment, or is dismissed for just cause.

The undisputed evidence was that Bonzon was presented with written notice of termination on October 8, 1997 to be effective October 28, 1997. It is further undisputed that Bonzon actually worked beyond October 28, 1997 until October 31, 1997 as confirmed by both of the ROE's issued by Capital.

Section 67 (1) of the *Act* provides :

> *67. (1) A notice given to an employee under this Part has no effect if*
>
> *(a) the notice period coincides with a period during which the employee is on annual vacation, leave, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or*
> *(b) the employment continues after the notice period ends.*

There is no dispute that Bonzon worked after the end of the notice period. Pursuant to the provisions of Section 67 (1) *supra*, the notice has no effect.

Capital has not provided any evidence that Bonzon was in fact offered "alternative employment".

Based on the evidence provided and on the balance of probabilities, I conclude that Capital is obligated to pay compensation for length of service to Bonzon in the amount as calculated by the delegate of the Director and set forth in the Determination.

The appeal by Capital is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 8, 1998 be confirmed in the amount of **$3,001.87** together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance.

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Hans Suhr
Adjudicator
Employment Standards Tribunal