

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 -

Taverna Corfu Ltd.
(" the Taverna ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/251

DATE OF HEARING: August 1, 2000

DATE OF DECISION: August 24, 2000

the parents, but Stephen in the main operated and managed a jazz club which is right below the restaurant.

When Arian was hired the Taverna had too many people managing too few people and it was not clear who reported to who. Part of the solution was to hire Arian and give him more responsibility over the kitchen than the chef that he replaced. The Taverna claims that Arian was given sole responsibility for ordering food from suppliers and setting prices. On that I find that Arian ordered food from suppliers and that he received food on delivery. And I find that he had a say in what suppliers were used and could make suggestions regarding daily specials. I am not, however, presented evidence which clearly shows that Arian set any prices and/or that he had the final authority over the restaurant's menu, the food that was purchased and/or the suppliers used. I am shown only two letters, both from persons with ties to the Liapis family, that describe Arian as the restaurant's "Kitchen manager" and in which it is suggested that it was Arian that decided what, if anything, was to be purchased from the suppliers. That does nothing to establish who actually made the final decision on a supplier. It seems most unlikely to me that either of the writers, as they are both outsiders, would have any way of knowing who made final decisions.

The job of head chef at the Taverna is not that of executive chef. The Taverna is a small restaurant. Its kitchen employed in the relevant period only 5 or 6 people at a time. And Arian as head chef performed most of the cooking. Arian also washed dishes, mopped floors and, on one occasion, he fixed the dishwasher. Arian clearly understood that as head chef, he was to do whatever had to be done so that food was prepared as and when the owners expected.

Arian supervised the staff in the kitchen as a senior employee supervises junior employees. He also trained a dishwasher.

The Taverna tells me that Arian made recommendations in regard to hiring and firing staff. I find that in the relevant period that only one person was fired and that only one or two people were hired. Costa Liapis tells me that all of Arian's recommendations in regard to hiring and firing were accepted but one.

Arian was given the restaurant's alarm code and he was given keys to the restaurant but not the office in the restaurant.

Arian did not handle the Taverna's financial affairs. He did not have cheque writing authority. He did not prepare budgets, nor was he given a budget and told to work within that budget.

According to the Taverna, Arian set his own hours and decided who would work and who would not. I am led to believe that he could come and go as he pleased to some extent and that he could recommend that staff be sent home if not actually do that on his own. Arian did not develop work schedules or anything of the sort.

ANALYSIS

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.

Part 5 of the *Act*, sections 44 through 49, governs the payment of statutory holiday pay. But section 36 of the *Regulation* is that Part 5 of the *Act* does not apply to a manager.

The term “manager” is defined in section 1(1) of 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.*

I have found, in setting out the facts, that Arian was employed as the Taverna’s head chef and that he was not an executive chef.

The Taverna, on appeal, claims that the “sole reason for his employment was to run and manage the kitchen”. I find that that claim flies in the face of what Arian actually did day in and day out, namely, the Taverna’s cooking in the main.

The real question to be answered in this case is: Are his primary employment duties enough to bring him within section 1(1)(a) of the definition of “manager”? The current approach of the Tribunal to deciding that question is as set out in the decision, *Director of Employment Standards*, (1997) BC EST #D479/97 (Reconsideration of BC EST #D170/97). That leading decision calls for consideration of the following objective factors: (1) the power of independent action, autonomy and discretion; (2) the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business; (3) making final judgements about such matters as hiring, firing, authorising overtime, time-off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering work schedules, and training the employees; and (4) that the person’s job description included supervising and directing employees. Those objective factors, however, must be present in the person’s daily activities. Moreover, the person must actually exercise such power.

A job description was never prepared for the job of head chef at the Taverna.

I accept that Arian supervised and directed staff to an extent: As head chef, it was his job to see that work got done on his watch, that it was done reasonably efficiently, and that food was prepared as customers and the Taverna’s owners expected. And I have found that he did in fact train a dishwasher and that he made recommendations regarding hiring and firing and whether persons should stay or go home on any given day. But that is a very minor part of what he did on the whole. There is not clear evidence that he

exercised great independence or autonomy, indeed, the evidence is largely to the contrary. There is simply no evidence in this case to show that Arian made any final decision on any personnel matter of real importance. And I am satisfied that he spent very little time supervising and directing employees.

Arian clearly did not have the final say over who would be hired and fired. He only made recommendations and, on one occasion, his recommendation was rejected.

It is not shown to me that it was Arian's job to authorise overtime, vacations and other time off on a daily basis.

I have found that Arian was in fact given the restaurant's alarm code and keys to the restaurant. He made recommendations regarding suppliers and daily specials. He received food as it was delivered to the restaurant and he checked on that food. But while those are duties of some responsibility, it is not to supervise or direct employees, nor is it, for that matter, to direct a business.

The Taverna is a small business. Its need for managers is correspondingly small. In Costa Liapis it had a general manager. It was Stephen Liapis and the parents that took over for Costa in his absence, not Arian. The Taverna simply had no need for yet another manager. I therefore find it rather unlikely that Arian was either hired as an executive chef or as a manager whose primary duties were the supervision and direction of other staff. As matters are presented to me, I am led to believe that Arian primary employment duties were that of a chef and that he did not supervise or direct kitchen staff, on any other employees, to a significant extent.

ORDER

I order, pursuant to section 115 of the *Act*, that Taverna Corfu Ltd. pay Cyrus Arian wages as set out in the Determination dated March 15, 2000, namely, \$4,318.23, and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal