

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 -

Betty Nga-man Tsoi Tang
("Mrs. Tang")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/387

DATE OF HEARING: August 25, 1999

DATE OF DECISION: September 16, 1999

DECISION

OVERVIEW

This is an appeal by Betty Nga-man Tsoi Tang (“Mrs. Tang”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 7, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Mrs. Tang alleges that the delegate of the Director erred in the Determination by concluding that she was a manager and therefore not entitled to overtime wages and statutory holiday pay.

PRELIMINARY ISSUE

Mr. Tang on behalf of Mrs. Tang requested that the hearing be postponed as Mrs. Tang was still in Hong Kong due to her sister being very ill. Mr. Tang further advised that he did not ask Mrs. Tang if she wanted to participate via teleconference as suggested by the Tribunal due to the time difference from Hong Kong to Vancouver.

Mr. Tang agreed that he was present at the work place for the period of time that Mrs. Tang claims overtime wages and statutory holiday pay and further agreed that he was aware of all of the issues involved.

Mr. Tang was not able to provide any proof that Mrs. Tang was actually in Hong Kong.

Counsel for Moutai Mandarin Restaurant (1993) Ltd. (the “Employer”) submitted that the hearing should proceed as the Employer was present, had arranged for witnesses to be present and to grant a postponement under the circumstances as explained by Mr. Tang would be an unnecessary delay. Furthermore, Mr. Tang is aware of the issues with regard to Mrs. Tang and able to represent her interests.

The panel considered the reasons put forward by Mr. Tang and after a review of the material on file declined the request for postponement.

APPEARANCES

William Tang	on behalf of Betty Nga-man Tsoi Tang (“Mrs. Tang”)
Anna Wong	interpreter provided by the Tribunal
Chung Mah Chan	on behalf of Moutai Mandarin Restaurant (1993) Ltd.
Acme Chan	on behalf of Moutai Mandarin Restaurant (1993) Ltd.
Leanne Walsh	articling student with Walsh & Company counsel for Moutai Mandarin Restaurant (1993) Ltd.

ISSUES

The issues to be decided in this appeal are:

1. Was Mrs. Tang a manager as defined by the *Act* ?
2. If Mrs. Tang was not a manager, is she entitled to overtime wages and statutory holiday pay ?

FACTS

The following facts are not in dispute:

- the duties Mrs. Tang was to perform included:
 - interviewing and making decisions regarding hiring new staff,
 - made staff schedules and assigned work to staff
 - supervising staff
 - dealing with restaurant advertising including newspaper and radio
 - handling and distributing daily tips
 - handling cash
 - dealt with customer complaints
- Mrs. Tang was the only non-family staff permitted to give customers a 10% discount;

Mr. Tang testified that:

- Mrs. Tang had no experience so how could someone hire her as the manager;
- the Record of Employment (“ROE”) first issued to Mrs. Tang did not list her occupation as manager;
- only after the complaint was filed was an amended ROE issued listing Mrs. Tang’s occupation as manager;
- Mrs. Tang also filled in as necessary (wait on tables, cashier) when it was busy or if no staff was available;
- Mrs. Tang only made decisions regarding the restaurant with the approval of Mr. Chan.

Mr. Chung Man Chan (“Chan”) testified that:

- he was not able to look after the restaurant and do the cooking so he hired Mrs. Tang to look after the ‘front’ end (dealing with customers, suppliers, advertising representatives etc.)

- he hired Mrs. Tang because he had known her for a number of years and felt that she would be an asset to the business;

Acme Chan (“A. Chan”) testified that:

- Mrs. Tang was responsible for:
 - overlooking the staff
 - hiring staff
 - taking care of cash
 - dealing with customer complaints
 - arrange for replacement employees
 - prepare employee schedules
 - assign work to employees
 - help out wherever needed
 - dealing with advertising representatives
- Mrs. Tang was also the only non-family member authorized to give customers a 10% discount;
- she worked in the restaurant every day during the summer of 1998 and part time when school started in September;

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Mrs. Tang.

The Employment Standards Regulation (the “*Regulation*”) defines ‘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;*

The issue here is whether Mrs. Tang is a manager as defined in the *Regulation*. The task of determining if a person is a manager must address the definition of manager in the *Regulation*.

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

have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

The uncontradicted evidence was that Mrs. Tang was hired as the manager, did the hiring, scheduling of employees, calling in employees, assigned work and dealt with customer complaints.

The evidence further disclosed that Mrs. Tang was involved in dealing with advertising representatives, albeit, the final decision on advertising was left to Chan.

The evidence was also that Mrs. Tang helped out serving or on the cash as required.

Based on the evidence provided and on the balance of probabilities, I conclude that Mrs. Tang's primary employment duties consisted of supervising and directing other employees. Mrs. Tang was therefore employed as a manager as defined in the *Regulation*.

Mrs. Tang, as a manager is excluded from the provisions of the *Act* pertaining to overtime wages and statutory holiday pay.

An unsolicited post hearing submission was received on behalf of Mrs. Tang, The panel declined to review that submission during the consideration of this matter.

The appeal by Mrs. Tang is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 7, 1999 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal