

**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 -

Nickolas Poretsis and Vittoria Poretsis  
doing business as Aristocrat Cleaners  
("Aristocrat")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No:** 98/377

**DATE OF HEARING:** August 25, 1998

**DATE OF DECISION:** September 1, 1998

**DECISION**

**APPEARANCES**

Nickolas Poretsis and Vittoria Poretsis	On their own behalf
George Cirkelbach	On his own behalf
Mario Valinski	On behalf of the Director

**OVERVIEW**

This is an appeal by Nickolas Poretsis and Vittoria Poretsis doing business as Aristocrat Cleaners ("Aristocrat") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. 2262872) dated June 8th, 1998 by the Director of Employment Standards (the "Director").

Aristocrat employed George Cirkelbach ("Cirkelbach") as a cleaner/janitor and Cirkelbach complained that he was not paid certain statutory holidays and overtime as required by the *Act*. Aristocrat claimed that Cirkelbach was a "manager" and therefore exempt from the overtime and statutory holiday pay provisions. Aristocrat also claimed that Cirkelbach did not work the hours he alleged. The Director's Delegate found that Cirkelbach was not a manager within the definition of the *Act* and that because Aristocrat's records were inadequate the records provided by Cirkelbach were preferred.

Aristocrat appeals on the grounds firstly, that the Director's Delegate misconstrued Cirkelbach's position or misinterpreted the legal definition and secondly, that there were in fact records available to establish the hours worked but that insufficient time or opportunity was given to Aristocrat to answer the allegations made by Cirkelbach.

**ISSUE TO BE DECIDED**

There are two issues to be decided in this case. The first issue is whether Cirkelbach was a manager and therefore exempt from the overtime and statutory holiday pay provisions. The second issue is, if Cirkelbach was not exempt, should the employer be allowed to admit substantial evidence, in relation to the hours worked, that was not provided to the Delegate during the investigation. This latter issue also includes a consideration of whether the employer was given sufficient time and opportunity to respond to the allegations made by the complainant.

**FACTS**

Nickolas and Vittoria Poretsis own and operate a small commercial janitorial/cleaning business in Victoria called Aristocrat Cleaners which they started in 1991. The management of the business is shared between them and operates from their home. They employ from 4 to 6 employees depending on the demands of the business. Mr Poretsis manages most of the day to day side of the operation and actually does some of the work himself. Mrs Poretsis would assist Mr Poretsis but also looks after much of the office work.. She also has family responsibilities. She has three children. In the Fall of 1996 Mrs Poretsis was pregnant and took off some time from the business. George Cirkelbach, an employee at the time, was asked to take on some additional duties to assist Mr Poretsis. He was asked to check and supervise some of the other employees in addition to his regular work. Cirkelbach was allowed the occasional use of the business vehicle to enable him to check locations and to move from one site to another for his own work. He also carried the business "pager" on days that Mr Poretsis was not at work. He received a small pay increase and Mr Poretsis says that he considered Cirkelbach to be a supervisor. Some other employees wrote letters saying that they thought of Cirkelbach as a supervisor.

Mr and Mrs Poretsis testified that Cirkelbach had the authority to fire other employees although on further questioning Mr Poretsis agreed that the final decision would be his. Hiring decisions would also ultimately be done by Mr Poretsis although he would have welcomed suggestions or recommendations by Cirkelbach. These issues were theoretical as no firing or hiring was actually done during the time that Cirkelbach was employed. There was no written contract setting out the terms of employment or defining Cirkelbach's management responsibilities.

When it was brought to the attention of Mr and Mrs Poretsis that Cirkelbach was claiming overtime and statutory holidays they took the position that Cirkelbach was a manager and therefore the hours were not so important. The Delegate contacted Mr Poretsis for the first time on May 06, 1998 and left a message for Mr Poretsis to call back. He did so and a meeting was set-up for May 11th. At this meeting the Delegate advised Mr Poretsis of the employer's obligations and the onus on the employer to keep good records and asked for the records to be produced. The Delegate asked for the daily time records but Mr Poretsis said that they were destroyed. Mr Poretsis only produced the monthly payroll summary.

Several phone calls followed this first meeting in which the Delegate tried to access more detailed records. Vittoria Poretsis said that it was very difficult to access the daily records because of storage issues and her busy schedule. The final phone call occurred on May 29, 1998 after which the Delegate concluded that no records were going to be produced and finalised his Determination which was issued June 8, 1998.

Mr and Mrs Poretsis testified that the system of time-keeping was that the hours would initially be written down in a note book by Mr Poretsis and then these notes would be transferred to calendars in the home office and kept by Mrs Poretsis. Mrs Poretsis testified that she kept a detailed monthly calendar for each employee which showed the place and hours worked by each employee. She would keep a record of any mid-month advances and then at the end of the month the figures were given to the bookkeeper who would complete the payroll. The calendar pages were later filed away and from time to time sent to storage in boxes with other materials.

When the Delegate asked for the records Mr Poretsis said the daily records were destroyed. He testified that what he meant was the small note book not the monthly calendars. Mrs Poretsis said that she was very frustrated and stressed at having to find time to try to locate the calendars going back over two years. She felt that two weeks was a very unfair and unrealistic time expectation for her to locate the records.

Mr Cirkelbach also kept calendar records which he submitted to the Delegate but these records were not shared with the Poretsises prior to the Determination. During the course of the investigation Mr Poretsis told the Delegate the alarm records of the commercial businesses involved would be able to show the hours claimed by Cirkelbach were inaccurate. Vittoria Poretsis made efforts to get the alarm records but was initially told that they were not available beyond the current month and she was not able to access these records prior to the Determination. She has since done so and the alarm records raise some serious concerns about the accuracy of the hours claimed by Mr Cirkelbach.

## ANALYSIS

### The "Manager" Issue:

The relevant provisions of the *Regulations* are as follows:

#### ***Definitions***

1. (1) *In this regulation:*

"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;

#### ***Exclusions from Parts of the Act and this regulation***

34. (1) *Part 4 of the Act does not apply to any of the following:*

- (f) a manager;

The appellants say that Cirkelbach was a supervisor and therefore fell within the definition of "manager" under the *Regulations*. The appellants contend that because Cirkelbach was a manager the provisions of Part 4 of the *Act* (*the hours of work and overtime provisions*) do not apply.

It is not suggested that Cirkelbach was employed in an executive capacity and therefore the issue to be decided is whether Cirkelbach's primary employment duties consisted of supervising and directing other employees. This point was submitted to the Director's Delegate prior to his Determination but the Delegate was not persuaded that Cirkelbach was a supervisor or manager.

I am persuaded that Cirkelbach had some supervisory duties and that some employees thought of him as a supervisor. It is agreed by Cirkelbach that part of his duties were to check on other employees. These checks included a supervisory duty to ensure that other employees were on

site, on task, and that quality was maintained. Cirkelbach could report employees to management who would take the necessary disciplinary action although this never actually occurred. I also accept that Cirkelbach was never aware that he could actually fire another employee and in light of Mr Poretsis evidence I do not believe that this was actually the case.

The title given to a position is not relevant in determining whether the employee is a manager for the purposes of the *Employment Standards Act*. It is the specific employment duties of the position that must be looked at: *Sambuca Restaurant Ltd* (1997) BC EST #D322/97. I would also add that the perception of other employees about the status of the particular position is not relevant unless consistent with the actual duties performed.

It was agreed by Mr Poretsis that Cirkelbach did not have the final authority to hire, fire, or discipline other employees. He could report them to management and it may have been part of his duties to do so if necessary but he could not make the decisions himself. There was no evidence that Cirkelbach actually directed any of the other cleaners in the performance of their duties.

There is no doubt in my mind, and all of the evidence confirms, that Cirkelbach's primary duties were as a cleaner. Eighty to ninety percent of his time was spent on actual cleaning/janitorial services. Even accepting the evidence of Mr and Mrs Poretsis cleaning work took up no less than 80% of Cirkelbach's activities. I accept that some of Cirkelbach's time during some portion of his employment was spent checking on other employees and carrying the pager. However, his primary employment duties did not consist of supervising or directing other employees.

I conclude that, although Cirkelbach did perform some supervisory duties for some portion of time, his primary employment duties did not consist of supervising and directing other employees. I conclude that he was not a "manager" and therefore Part 4 of the *Act* does apply and he is entitled to overtime pay and statutory holiday pay.

There was some issue raised toward the end of the hearing that Cirkelbach was a "contractor" for part of his time working for Aristocrat. To ensure certainty in this matter I find that Cirkelbach was at all times an employee.

Failure to Provide Records - New Evidence:

This is a difficult issue because the *Act* clearly puts the onus on the employer to keep accurate records on a daily basis of the hours worked by an employee but does not stipulate the form of those records. This Tribunal has found on a number of occasions that where the employer fails to keep accurate records those of the employee will most likely be preferred.

This Tribunal has also held that an employer has a duty to produce the records in a timely fashion during the investigation and will not be allowed to "lie in the weeds" and then produce the records on appeal: *Tri-West Tractor Ltd.*, BCEST #D268/96; *Kaiser Stables*, BCEST #D058/97 *et al.*

The apparent failure of the employer to produce the records was reasonable grounds for the

Delegate to proceed with the Determination in the absence of those records and to prefer the records of the employee. However, the failure to provide the evidence to the investigator is not an absolute bar to further production of evidence. In *Freemart Financial Services Inc.*, BCEST #D104/97 the Tribunal found that some degree of latitude may be allowed depending on the circumstances. There are many decisions of this Tribunal which follow the reasoning in *Tri-West Tractor Ltd.* but almost all qualify the rule to some degree using such words as "generally" or "normally" new evidence will not be allowed at the appeal stage.

In this case I am satisfied that the employers did not deliberately fail to provide the records. There may have been some misunderstanding about the daily records being destroyed, but this was only the notebook and not the calendars upon which the full detail was recorded. Mrs Poretsis genuinely tried to acquire the alarm records prior to the Determination and only failed to produce her calendars because of her own workloads and other time commitments. In this case the two weeks allowed simply was not sufficient under all of the circumstances.

I also take into account that the alarm records had to be acquired through third parties and required the consents of the commercial clients involved. These records appear to clearly show that the employee could not have worked the hours he claimed.

One of the stated purposes of the *Act* is to promote the fair treatment of employees and employers and in this case, under these circumstances, I am persuaded that it is fair to allow the employer the opportunity to put all of the evidence before the investigator and that it will not be unfair to the employee as this investigation has proceeded efficiently. A further delay will not be an undue hardship to the employee.

Conclusion:

I therefore conclude that the Determination was correct in finding that Cirkelbach was an employee at all times and not a manager. I also find that Cirkelbach was at all times an employee and not a "contractor".

I further find that the records of the daily hours worked contained on the calendars by Mrs Poretsis should be considered and the alarm records should also be considered by the investigator.

**ORDER**

I order, under Section 115 of the *Act*, that this matter is referred back to the Director for further investigation which should include a consideration of the employers' calendar records and the alarm records and any other relevant information to determine the hours worked including statutory holidays and overtime.

**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**