

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 -

Anducci's Pasta Bar Ltd.
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 97/227

DATE OF HEARING: August 12, 1997

DATE OF DECISION: September 17, 1997

DECISION

APPEARANCES

Peter Lightbody	for the Employer
Andy Molicca	for the Employer
Wesley Brown	for the Employer
Brent Smithhurst	for the Employer
David Lum	for Theresa Lum
Theresa Lum	for herself
Lesley A. Christensen	for the Director

OVERVIEW

This is an appeal by Anducci's Pasta Bar (the "Employer") of a Determination issued by a Delegate of the Director on March 12, 1997 pursuant to Section 112 of the *Employment Standards Act* (the "Act"). The Determination found that the complainant, Theresa Lum ("Lum"), was not a manager as defined under the *Act*. Based on the Employer's records, the Determination further found that Lum was entitled to overtime pay, statutory holiday pay, reimbursement for special clothing, reimbursement for the costs of laundering her uniform, compensation for a paycheque that Lum did not receive and compensation for length of service. The Employer's appeal addressed in the first instance Lum's status as a manager. If she were found to be a manager as defined in the *Act*, then she would not be entitled to overtime and statutory holiday pay. Although the Employer conceded that Lum was entitled to compensation for her uniform, it argued that the figure in the Determination was too high. Finally, the Employer alleged that Lum was not terminated but instead failed to appear for work, thereby indicating that she had resigned her position.

ISSUES TO BE DECIDED

There were four issues to be decided. Was Lum a manager as defined in the *Act*? Did she receive a paycheque issued by the Employer? Was the cost of special clothing in the Determination correct? Did the Employer terminate Lum's employment?

FACTS

The Employer operates a pasta restaurant and retail outlet in Burnaby. The primary feature of the business is a restaurant, but there is a counter at which customers buy fresh pasta for preparation elsewhere. The operation includes two kitchens: one to prepare food to be served to customers; and a second kitchen (known as the "cuccina") in which the pasta and sauces are produced. Lum was employed from December 6, 1994 to December 17, 1995 as the leader in the cucina.

Mr. Andy Molicca (“Molicca”), the owner of the restaurant, testified that he hired Lum in 1995 to perform work in the cucina he had previously done himself. He sought a qualified chef for the position. Initially, Lum was paid on an hourly basis, but sometime during her tenure with the Employer, Molicca converted her to salaried status, which he combined with a wage increase. Only Lum, Molicca and three other employees were on salary status.

Molicca testified that Lum made her own schedule of hours and scheduled other employees in the cucina. However, the schedules were relatively standard, and staff seldom varied from their normal weekly rotation. Lum stated that she did not schedule staff. Employees from the cucina scheduled for weekend work who wanted a change of schedule went to Molicca to make the arrangements. Lum or Molicca was the first person into the restaurant, around 8:00 a.m. Lum left when her work was finished at the end of the day. Lum was one of four persons with a key to the building. Lum pointed out that on her days off she gave the key to another employee who was responsible for opening the building. She counted the cash in the cucina and recorded sales of each type of pasta and the sauces. Lum deposited cash in the company safe, but did not have the combination.

Lum normally attended management meetings, as did the operations manager, shift leaders and the floor staff. Lum reported on operations in the cucina. According to Molicca, these meetings discussed specials in the restaurant and other subjects Molicca described as the “three P’s”, people, productivity and profit. Other persons who attended the meetings were unaware of the “three P’s”, although they did not disagree with Molicca’s description of the contents of the meeting. The people issues included the development of staff to move up in the organization and customer complaints. Molicca testified that management meetings occurred weekly, although other witnesses recalled in practice meetings were held less frequently. Lum came to the meetings to discuss specials and kept a log with customer complaints. Lum testified that she attended some management meetings, but not all, perhaps five or six during her year of employment.

Lum was in charge of the cucina, supervising two to five people. Another individual, Chris Esnard, managed staff in the kitchen, i.e., the facility which prepared food directly for the customers. Lum’s written job description included the phrase “overseeing everyone else in the cucina” and training employees. In addition it referred to making or “directly supervising the making” of sauces, lasagna and cannelloni. Mr. Wesley Brown (“Brown”), who had worked in the cucina, testified that the written job description was essentially accurate. Lum did the “prep” work, i.e., preparing the raw materials for cooking, in addition to ensuring that other employees did the work correctly. Both Brown and Lum received complaints from customers. According to Brown, Lum spent most of her time doing “chef work.”

Lum described her typical working day as preparing food for the cucina or for cooking in the kitchen. There was a “prep sheet,” which contained a list of tasks to be performed. Each of the staff had assigned duties and referred to the prep sheet for guidance. After food had been prepared, she made sauces, usually two different sauces per day. She also roasted meat and made bread. The “vast majority” of the day, she had her “hands on food.” Some of her instructions were issued while she was working on the food. Lum estimated

that she spent an hour a day on the prep sheet and half an hour counting and depositing cash. If the cucina was especially busy, she asked Molicca for extra staff.

The leader was responsible for ordering supplies for the cucina and ensuring that all deliveries were received as ordered. Lum explained that Molicca and Chris Esnard negotiated with suppliers. All food was received through the cucina. She occasionally ordered extra supplies. Lum kept recipes for the use of employees and had access to the safe for cashing out. Smithhurst stated that Lum or Chris Esnard ordered extra supplies. They did not negotiate prices. All supplies entered the premises through the cucina.

Molicca stated that Lum had the authority to hire and fire, although he could not recall anyone actually being fired during the period of Lum's employment. However, she was responsible for hiring interviews, despite the lack of hiring during Lum's employment. Molicca did recall one employee being terminated during Lum's employment. There was no evidence of Lum's involvement in the decision. Mr. Brent Smithhurst ("Smithhurst") a former operations manager for the Employer, took care of its payroll during Lum's employment. When Lum changed from hourly pay to salaried status, he put her into the management classification in the payroll. Smithhurst stated that Lum had "input" into hiring, but could not recall an example. Similarly, he did not know of any dismissals during Lum's employment. He was convinced that Lum was a manager and knew that she had the authority to fire, since she was in charge of the cucina. Ms. Leanne Jurke, who was a shift leader in the restaurant near the end of Lum's employment there, assumed that Lum had the authority to hire and fire, but could not remember any incident.

Mr. Hector Salonga ("Salonga") was employed as a quality chef, beginning in October 1995, i.e., near the end of Lum's tenure. For his first two weeks, Salonga observed Lum's work. After she left, he assumed responsibility for the cucina. He too found the written job description basically accurate and stated that he did much the same work as Lum had done. Salonga stated that he had the authority to hire and fire, as did Lum, although staff issues were uncommon. He also worked with the other staff on production, i.e., preparation of food. However, he also stated that management roles in the Employer's organization had changed since Lum's departure. No one had told him that Lum had such authority, but as a manager he assumed that he (and Lum before him) had the authority. Employees in the organization had lockers for their personal effects, but Salonga had an office with a drawer and an area in the office for storage of his possessions, as Lum had before him.

Lum testified that she had never hired or fired anyone. During her time of employment, one individual was fired and Salonga and another person ("Lisa") were hired. She had no input into either decision, although only Salonga worked in the cucina. Had she wished to terminate an employee, she would have gone to Molicca, who would have listened to her, but not necessarily followed her recommendation. When employees were late for work, she spoke to them, but did not believe that she had authority to take further action. On two occasions, she refereed persons seeking work to Molicca, one a passer-by and the other a friend who had recently graduated from the British Columbia Institute of Technology. She did handle customer complaints from the retail side of the operation, which do not seem to have been numerous.

A second element in dispute in this case was an alleged underpayment of Lum. During the course of the investigation, Ms. Lum told the Director's Delegate that she had not received two cheques that the Employer stated had been paid to her. The cheques in question were dated November 27, 1995 for \$421.17 and December 8, 1995, for \$583.91. The Director's Delegate found that the November 27 cheque had been deposited to Lum's account on December 14, 1995, and the November 27 cheque had been deposited to the Employer's account on November 28 by Smithhurst, without endorsement by Lum.

Molicca stated that occasionally employees cashed their pay cheques with the Employer, which did not require an endorsement. He recalled Lum cashing cheques in that fashion, although he did not recall the November 27 cheque. Lum did not raise the matter with him prior to the termination of her employment. Smithhurst believed that Lum had received cash for her cheque from the Employer, largely on the grounds of the practice in the organization and the lack of any complaint from Lum at the time.

Lum testified that she had complained about not receiving all of her pay, although she was not certain of the status of one cheque. She concluded that she had been paid for only one week for the last period in November. Her normal paycheque was \$960. Lum said that it was not possible that she received the money in cash. It was not her practice to cash her pay cheque at the restaurant.

The third issue concerned the circumstances of Lum's termination of employment. Apparently Lum and Molicca had a falling out late in 1995. In addition, there may have been an argument between Lum and Molicca's mother, who worked part-time in the cucina. On December 11, 1995, Molicca wrote Lum terminating her employment effective January 1, 1996, citing increased costs and decreased revenues. The letter further asked Lum to inform the Employer should she not desire to continue working there for the remainder of December. The letter also offered to provide references to a future employer. Lum stated that Molicca handed her the letter personally, and she told him that she would work her scheduled hours. She worked from December 12 through December 16.

Molicca described Lum as bitter about her employment. On December 16, he called Lum and spoke to her roommate, telling Lum not to come into work. She had disrupted the staff and had been rude to his mother. He and Lum did not speak about her termination again, and Lum did not appear for work after the telephone call. Molicca believed that Lum had another job, because he had received a call from her new employer. Lum testified that she in fact received two messages from Molicca, one on her answering machine and another from her roommate, both telling her not to come into work. Lum did not know of any incident with other staff or Molicca's mother to cause her termination. She worked five or six shifts at another restaurant in December, largely to learn from the chef there.

ANALYSIS

The major issue in this case is Lum's status as a manager. The applicable definition of a manager under the *Act* is in Section 1 of the *Employment Standard Regulation* 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.

Mr. Lightbody argued that Lum fell within that definition, citing *429485 B. C. Limited Operating Amelia Street Bistro*, BC Est #D170/ 97. He further argued that “primary” should be taken to mean principal or chief, according to the dictionary definition. In her reply, the Director's Delegate argued that Lum spent over 50 per cent of her time working with food, so she could not be a “manager” under the terms of the statute.

After reviewing the evidence, I conclude that Lum was a “leader”, not a manager. Indeed, her job title was “leader,” not manager. The title chosen by the Employer does not determine her status under the law, but in this case it was accurate. In making this distinction, I noted a number of key elements in the evidence.

Lum spent most of her day working on the preparation of food. Supervision and training were ancillary duties. The job description refers to overseeing the operations of the *cuccina* and the employees there. At any one time, there were typically three or occasionally four persons in the *cuccina* besides Lum. On its face, it is illogical to conclude that a small employer would hire a manager with the primary duties of supervising three or four persons to perform relatively routine tasks. When Molicca hired her, he stated he was looking first for a “qualified chef.” In other words, the initial requirement for the position was that the person have the technical qualifications for the kitchen. While a number of persons who worked for the Employer believed that she had the authority to hire and fire, there was no evidence that she did in fact have such authority.

On the contrary, staff were hired and one person was terminated without her participation in the decision. In particular, the decision to hire Salonga did not involve Lum, although Salonga was immediately assigned to work with her in the *cuccina*. Many of the duties to which the Employer pointed as evidence of Lum's managerial status did not address the definition of a manager in the *Regulation*. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees. Nor are they sufficiently responsible for an executive capacity.

In other words, Lum's duties were to assign work to other employees, exercise day to day responsibility for the operation of the cucina, including checking purchasing from time to time. She attended management meetings and dealt with staff issues infrequently and spent the large majority of her time preparing food.

Adjudicator Brown reached a similar conclusion in *Restauronics Services Ltd.* BC EST #D131/96. In that case, the Adjudicator concluded that the employee "mainly performed the roles of chef and food handler/server." He found that her administrative duties were "peripheral" and did not put her in the position of a manager. By contrast, in *Amelia Street Bistro*, the individual in question designed menus, kept the inventory, ordered supplies, hired, trained, fired and supervised staff, as well as performing cooking and kitchen duties. He oversaw the whole operation of a restaurant. In other words, the complainant's duties were more extensive than Lum's, and the adjudicator found that he was a manager under the *Regulation*. Moreover, the decision is under reconsideration by the Tribunal.

The second issue is the pay cheque. The Employer bore the onus of persuading the Tribunal that the Determination was incorrect. No evidence was presented to undermine the Determination. No witness, including Lum, could recall the handling of the cheque. The deposit to the Employer's account did not include her endorsement, a departure from normal administrative or banking standards. There was no explanation for the amount in question. Lum stated that she normally received \$960 per pay period, and the Employer's records confirmed that evidence.

Under these circumstances, there are no grounds for varying the Determination.

The third issue concerns Lum's termination of Employment. Molicca's letter of December 11, 1995 constituted written notice as required by the *Act*. Her uncontroverted evidence was that Molicca told her not to come to work again on December 16. Her employment status on that date is not an issue in determining her entitlement to compensation for length of service. There was no evidence that Lum resigned her employment.

In his opening, Mr. Lightbody raised the issue of the amount of compensation for laundry expenses for special clothing in the Determination, but he did not pursue that matter in the hearing, apart from asking Ms. Christensen how she calculated the number. It is not necessary to address the issue further.

ORDER

For these reasons, the Determination is confirmed, pursuant to Section 115 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal