

**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 -

Ohyama & Roche Inc. operating Aviano Restaurant & Bar  
("Aviano")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 97/631

**DATE OF HEARING:** October 10, 1997

**DATE OF DECISION:** October 21, 1997

**DECISION**

**APPEARANCES**

Wendy Downes	on behalf of Ohyama & Roche Inc. op Aviano Restaurant & Bar
Jeff Leggat	on behalf of Ohyama & Roche Inc. op Aviano Restaurant & Bar
Eugene Dery	on behalf of Ohyama & Roche Inc. op Aviano Restaurant & Bar
Jurgen Spang	on his own behalf
Alain Fortier	on behalf of Jurgen Spang

**OVERVIEW**

This is an appeal by Ohyama & Roche Inc. operating Aviano Restaurant & Bar (“Aviano”), under Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations dated July 28,1997 issued by a delegate of the Director of Employment Standards (the “Director”). Aviano alleges that the delegate of the Director erred in the first Determination by concluding that Jurgen Spang (“Spang”) was owed overtime wages and compensation for length of service, plus interest, in the total amount of \$8,297.26 . Aviano alleges that as the first Determination was in error, the Penalty Determination in the amount of \$150.00 was also incorrect.

**ISSUES TO BE DECIDED**

The issues to be decided in this appeal are;

1. Was Spang a manager as defined in the *Act* ?
2. If Spang was not a manger, is he owed overtime wages ?
3. Was Spang entitled to compensation for length of service ?
4. Was the Penalty Determination appropriately issued by the Director ?

**FACTS**

Spang was employed by Aviano as a ‘Sous-Chef’ from February 2, 1996 to December 9, 1996.

Spang and Downes (the General Manager ) engaged in a heated discussion which resulted in Spang leaving the workplace.

Spang filed a complaint with the Employment Standards Branch alleging that he was owed overtime wages and that his employment was terminated without just cause.

The Director investigated the complaint and determined that Spang was not a 'manager' and therefore entitled to overtime wages and further that Spang was entitled to compensation for length of service. The Director subsequently issued a Determination on July 28, 1997 in the amount of \$8,297.26.

The Director determined that as Ohyama & Roche Inc. had been previously issued a Penalty Determination in the amount of \$0.00 for contravening Section 40 of the *Act*, the current contravention should result in a penalty of \$150.00 pursuant to Section 98 of the *Act* and Section 28 of the *Employment Standards Regulation* ( the "*Regulation*"). The Director subsequently issued a Penalty Determination on July 28, 1997 in the amount of \$150.00.

Wendy Downes ("Downes"), Eugene Dery ("Dery") and Jeff Leggat ("Leggat") testified on behalf of Aviano.

Spang and Alain Fortier ("Fortier") testified on behalf of Spang.

Dery stated that he considered Spang as part of the management of the kitchen and while on shift, Spang was in charge of the kitchen. Dery further stated that Spang would also be in total charge in his, Dery's, absence. Dery further stated that Spang did have the authority to hire / fire employees although he had not done so. Dery finally stated that he was hired as executive chef near the end of Spang's period of employment.

Downes stated that she considered Spang as part of the management team, Spang had keys to the managers office and, as well Spang enjoyed a number of perks which were restricted to management.

Leggat stated that he was in the kitchen during the heated discussion between Downes and Spang and further stated that he clearly heard Downes tell Spang that "if you leave, don't bother to come back". Leggat further stated that he heard Spang reply "fine" and then observed him leave the kitchen.

Fortier stated that he was the executive chef who hired Spang and he did not consider Spang as a manager. Fortier further stated while part of Spang's duties consisted of "looking after" the kitchen staff, approximately only 1 hour per shift would have been spent in supervising other staff while the majority of Spang's duties were to be on the line doing food preparation. Fortier further stated that he, as the executive chef, did all of the hiring / firing of employees. Fortier further stated that he prepared the shift schedules and Spang was scheduled for regular shifts the same as the other employees. Fortier finally stated that if Spang came in to the kitchen to "try a new recipe or dish" during a time that he had not

been scheduled, Spang would be required to punch in and out so he would be paid for this time.

Spang stated that he was never told he was a manager, nor was he ever told that he had the authority to hire / fire employees. Spang further stated that he did not participate in making up the schedules, that function was done by the executive chef. Spang further stated that he punched in and out for work the same as the other employees. Spang further stated that he only left the kitchen after the heated discussion with Downes to cool off and had no intention of quitting his job. Spang further stated that he contacted the owner of Aviano's who told him that he should not worry about it, he (the owner) would make sure Spang was not fired. Spang finally stated that after a number of meetings with the owner were postponed by the owner, Spang was told by the owner that the matter had been left in Downes' hands and "if Wendy (Downes) says you are fired, that's it".

### **ANALYSIS**

With respect to the issue of whether Spang is a manager, I must consider the statutory definitions contained in the *Employment Standards Regulation* (the "Regulation") as well as examine the actual duties performed during his period of employment. 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;*

Based on the evidence provided and on the balance of probabilities, I conclude that Spang was **not** a manager as defined by the *Regulation*. There is no doubt that Spang performed some managerial duties, however those duties only accounted for a small portion of his overall duties and were not a **primary** part of his duties. Spang did not hire / fire anyone during his period of employment. Spang was scheduled for work and required to punch in and out the same as the other employees. There was no evidence provided that Dery, the executive chef, was required to punch in and out for work. The evidence provided did not support the contention of Aviano that Spang was employed in an executive capacity.

Having concluded that Spang was not a manager, I must now consider the overtime issue. The evidence is clear that Spang worked overtime hours. The evidence also indicates that Aviano paid Spang the amount of \$1,710.63 for his overtime hours upon his termination. The evidence from Aviano indicates that the overtime was calculated and paid at the rate of 1 1/2 and did not include any hours of double time.

A comparison of the calculation performed by the Director and that performed by Aviano shows that Spang worked 13.75 hours at double time from February to March 31, 1996 and a further 31 hours of double time from April 1 to December 9, 1996.

Based on the evidence provided, I conclude that Spang is owed overtime wages

I have calculated the overtime wages owing to Spang as follows:

13.75 hours	x \$6.75	= \$92.81
31 hours	x \$7.25	= \$224.75
subtotal		<u>= \$317.56</u>
4% vacation pay	\$317.56 x .04	= \$12.70
<b>TOTAL</b>		<u><b>= \$330.26</b></u>

With respect to the issue of whether Spang is entitled to compensation for length of service, I must consider the circumstances of the events leading to Spang's termination.

Based on the evidence provided, I conclude that Spang is not entitled to compensation for length of service. Spang voluntarily terminated his employment when he left the kitchen after having been clearly advised by Downes that if he left, he should not bother to come back. Spang does not dispute that Downes told him this, he merely states that as he was not 'scheduled' to be a work he could leave and further that Downes did not have the authority to fire him, only the owner could.

With respect to the issue of the Penalty Determination, I must consider the appropriateness of the Director issuing this Determination.

There is evidence of a previous Penalty Determination in the amount of \$0.00 for a contravention of Section 40 of the *Act*. I have already concluded that Aviano contravened Section 40 of the *Act* as Spang was entitled to additional overtime wages in the amount of \$330.26.

I therefore conclude that as a result of this second contravention of Section 40 of the *Act*, it was appropriate for the Director to issue the Penalty Determination in the amount of \$150.00.

The calculation of total wages owing performed by the Director does not take into account the total wages of \$31,884.37 paid to Spang as reported on the T-4 slip for 1996, nor does it take into account the \$1,710.63 overtime wages paid to Spang on termination.

In summary therefore, I have concluded that Spang is not a manager, is owed a total of **\$330.26** for additional overtime wages plus the accompanying vacation pay and is not owed compensation for length of service. I have further concluded that it was appropriate for the Director to issue the Penalty Determination.

The appeal by Aviano is allowed to the extent as outlined above.

**ORDER**

Pursuant to Section 115 of the *Act* I order that the Determination dated July 28, 1997 in the amount of \$8,279.26 be varied to be in the amount of **\$330.26** together with interest calculated pursuant to Section 88. I further order that the Penalty Determination dated July 28, 1997 in the amount of **\$150.00** be confirmed in all respects

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**