

An appeal

- by -

Brewsky's Pub Ltd.  
("Brewsky's")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** April D. Katz

**FILE No.:** 2001/501

**DATE OF HEARING:** September 21, 2001

**DATE OF DECISION:** September 25, 2001

## DECISION

### APPEARANCES:

Rod Egerton	on behalf of Brewsky's Pub Ltd.
Janet Parrett	on her own behalf

### OVERVIEW

Brewsky's Pub Ltd., ("Brewsky's") appealed the Director of Employment Standards Determination issued on June 13, 2001 which found Brewsky's owed the kitchen manager, Janet Parrett \$714.18 for overtime wages. Brewsky's had paid straight time for hours found by the Director's Delegate to be overtime.

### ARGUMENT

Brewsky's argued that the first time it was aware that the status of the kitchen manager position as a manager under the *Employment Standards Act* was when the Determination arrived. Brewsky's argued they allowed Janet Parrett to have flexible hours, which she scheduled herself because managers were not paid overtime. Brewsky's relied on the kitchen manager to set her hours so that no overtime occurred because it was not necessary.

Janet Parrett argued Brewsky's knew the issue of manager was in question because a fact sheet was sent to the Brewsky's about 'manager' under the *Act* as an attachment to an early letter. Janet Parrett indicated she was over ruled regularly in her scheduling and was required to fill in all jobs in the kitchen when it was short handed. She indicated she hired and fired staff with the approval of Brewsky's pub manager. She submitted that her overtime was pre authorized. Janet argued that her primary responsibilities were cooking and that she ordered supplies and dealt with staff supervision for a small part of her time.

### ISSUE TO BE DECIDED

Was Janet Parrett a 'manager' within the meaning of the *Act*.

### FACTS

Most of the facts are not in dispute. Janet Parrett started as a line cook with Brewsky's in April 1998 and ended her employment on December 16, 2000. Within the first year of work Janet Parrett was promoted to kitchen manager and earned \$15.70 per hour at the end of her employment. Brewsky's expected the kitchen manager to hire, schedule and supervise staff in

the kitchen. The kitchen manager ordered supplies and dealt with sales representatives and suppliers. Brewsky's estimated the ordering and scheduling took 2 hours a day.

## **LAW and ANALYSIS**

The onus is on an appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law.

### **Manager**

The Determination found that Janet Parret was not a manager as defined in B.C. Regulation 396/95.

Section 1(1) of the B.C. Regulation 396/95 to the *Act* defines "manager":

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.

Brewsky's argued that Janet Parrett was a manager. Brewsky's evidence was that the issue of the kitchen manager being a manager within the meaning of the Act was not raised with the employer during the investigation. Brewsky's argued that the kitchen manager had hiring and firing power and scheduled employee's days of work.

Janet Parrett's undisputed evidence was that she worked primarily as a cook and filled in for other jobs when staff did not appear or it was busy. She stated that her scheduling decisions were frequently overruled by the pub manager and her hiring and firing decisions were recommendations only. She would recommend salary increases for hard work and her recommendations were ignored. She did do the ordering within the bounds of profit margin set by the pub manager. Costs for wages and supplies were to match sales reports so that 30% of the costs were wages and 40% was food costs.

When Janet Parrett wanted to work a short day and make up the time later by a longer day she would check with the pub manager. The pub manager allowed this to go on for months in the belief that he was accommodating Janet Parrett's needs not because she was needed for all the hours.

After Janet Parrett left the kitchen manager's position ceased to exist. The pub manager does all the scheduling.

The definition of manager was considered by the Tribunal and was reconsidered by three adjudicators in *429485 B.C. Limited Operating Amelia Street Bistro* ("Amelia Street Bistro") [1997] B.C.E.S.T.D. No. 503, BCEST #D479/97. They discussed a number of previous cases and concluded as follows.

“ 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; he or 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 a 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.”

In *Amelia* a cook was ordering supplies and scheduling and found to be an employee not a manager because his primary duties were cooking not hiring and ordering.

The evidence from Janet Parrett was that she did not have the final say except with respect to ordering within a financial limit. She recommended staffing decisions and her schedules were over ruled by the pub manager.

Most importantly most of Janet Parrett's time was not spent managing but cooking. Her 'primary employment duties' did not 'consist of supervising and directing other employees'. All the employees had duties and she worked along side other employees.

There was nothing in Brewsky's evidence, which substantially disputed the conclusions in the Determination. I allowed Brewsky to lead evidence on the question of the manager position based on the representation that it was not addressed during the investigation. I do not find sufficient evidence that the Director erred in concluding that Janet Parrett was not a manager within the meaning of the *Act*. Brewsky's appeal is denied.

**CONCLUSION**

There is ample evidence to support the findings in the Determination. Brewsky's has failed to meet the evidentiary burden to support a successful appeal. I find that there is no error in fact or law in the Determination. The appeal is denied.

**ORDER**

Pursuant to section 114 (1)(a) of the *Act* Brewsky's Pub Ltd.'s appeal is dismissed. Pursuant to section 115 of the *Act*, the Determination dated June 13, 2001 is confirmed.

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**April D. Katz**  
**Adjudicator**  
**Employment Standards Tribunal**