

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 -

Jeffrey & Co. Hair Design Ltd.
("Jeffrey" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/557

HEARING DATE: November 18, 1998

DECISION DATE: November 23, 1998

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DECISION

APPEARANCES/SUBMISSIONS

Mr. Charles Pakosh on behalf of the Employer

Mr. John Black on behalf of Ms. Cordele Harrison (“Harrison”),
Ms. Karina Gordon (“Gordon”) and Imelda Margawand

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on July 30, 1998 which determined that Jeffrey was liable for unpaid overtime wages, statutory holiday pay and vacation pay to Harrison, Gordon and Margawand (the “Employees”). The Director’s delegate found that the Employees were owed \$4,889.52. The delegate also issued a penalty of “\$0.00” which was not appealed.

Briefly, the delegate’s findings and conclusions may be summarized as follows:

- Jeffrey operated a hair salon in Vancouver, B.C.
- Harrison was an employee of Jeffrey, employed as a technician, between November 1, 1996 and June 21, 1997. She was paid on a commission basis.
- Gordon was an employee of Jeffrey, employed as a hair stylist, between November 1, 1996 and June 21, 1997. She was paid on a commission basis.
- Margawand was an employee of Jeffrey, employed as a receptionist/assistant manager, between November 1, 1996 and May 28, 1997. She was paid \$7.00 per hour.
- Gordon was entitled to \$2,793.16 on account of overtime, statutory holiday pay and 6% vacation pay (plus interest). The basis for his finding was the following:

“The complainant Gordon submitted a copy of records showing hours worked each day. The Employer’s records for Gordon and Harrison indicated the days they worked and their commission rate, but did not contain the record of hours worked. The Employer was informed of the records of Gordon, however has failed to provide any evidence to the contrary (sic.)”

- Harrison was entitled to \$481.74 on account of overtime, statutory holiday pay and 6% vacation pay (plus interest).

“There were no records provided by either party with regard to the complainant Harrison’s hours of work. The available evidence was used to calculate the amounts owed.”

- Margawand was entitled to \$1,614.62 on account of overtime, statutory holiday pay and 6% vacation pay (plus interest). The delegate found that Margawand was neither a manager nor employed in an executive capacity. The delegate based his decision with respect to amounts owing on the following:

“The pay records supplied by the employer indicate the days worked, and the total hours worked in each pay period. Attachment No. 4 indicates the number of hours worked in a pay period by multiplying the number of days by 8, and then subtracting the total hours paid to obtain a difference. These represent the hours of overtime worked by the complainant. There is insufficient evidence to indicate which may have been double rate hours and therefore the officer has indicated the payment of overtime at rate and one-half (sic).”

The Employer disputes the finding that Margawand was not a manager or employed in an executive capacity and amounts awarded in the Determination.

FACTS AND ANALYSIS

In Margawan’s case the question is whether she is a manager or, alternatively, is employed in an executive capacity (Section 1 “manager”, *Employment Standards Regulation* (the “*Regulation*”)). If she is a manager Part 4 (Hours of Work and Overtime) and Part 5 (Statutory Holidays) do not apply to her (Section 34(1)(f) and 36, *Regulation*). In short, if Margawand is a manager, she is not entitled to claim for overtime and statutory holiday pay; if she is not, she is entitled. There is no dispute that employees under the *Act* is are entitled to payment of overtime wages (Section 35 and 40), statutory holiday pay (Part 5) and vacation pay (Section 58). The dispute pertains to the amounts awarded in the Determination.

The Employer does not dispute that it owes statutory holiday pay to Harrison. The Employer argues that the amount payable should be based on the commissions earned. Harrison is agreeable to that. In view of the fact that neither the Employee nor the Employer have any records of hours worked, it is not clear to me how the delegate arrived at the hours upon which his calculation is based. In the circumstances, I am prepared to accept that the amount owed to Harrison is \$345.70

plus vacation pay at the rate of 6% (the rate actually paid by the Employer according to the pay stubs), \$25.79. Together with interest at the rate awarded by the delegate, she is entitled to \$395.80.

With respect to Gordon, the situation is somewhat different. Gordon produced a hand written record of her daily hours. She testified that she kept this record on a daily basis while she was employed by the Employer. The delegate relied on Gordon's records. The Employer argues that Gordon's recorded hours are exaggerated, given the salon's opening hours: Tuesdays, 9:00 a.m. to 3:00 p.m., Wednesdays, 9:00 a.m. to 9:00 p.m. and Saturdays 9:00 a.m. to 5:00 p.m. The Employer produced a summary of hours worked. However, in my view, this document may at best be characterized as an estimate of hours worked based on the average time for services provided. The source of this document was the salon's appointment book which was not before me at the hearing. Megan Pakosh, who testified for the Employer, agreed that Harrison and Gordon did not have access to this appointment book when they worked at the salon. From the summary presented at the hearing, it appears that the Employer includes only the time actually spent performing services, and not the time during which the Employees were required or allowed to be at the work place. In the circumstances, I prefer Gordon's records. With respect to vacation pay, I agree with the delegate that Gordon was entitled to 6% (the rate actually paid by the Employer according to the pay stubs). I find no reason to disturb the Determination with respect to her.

Turning to Margawand the first issue is whether she is a manager. Section 1(1) of the *Regulation* of the *Act* defines, inter alia, "manager":

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.

The issue of whether a person is a manager has been addressed in a number of decisions of the Tribunal. In *T & C Ventures Ltd.*, BCEST #D152, the Tribunal stated: "The issue is whether or not Taylor's primary employment duties consisted of supervising or directing other employees." In *Amelia Street Bistro*, BC EST #D479/97, reconsideration of BC EST #D170/574, the reconsideration panel noted, at page 5:

"... We agree that the amount of time an employee spends on supervising and directing other employees is an important factor in determining whether the employees falls within the definition of manager We do not, however, agree that this factor is determinative or that it is the only factor to be considered. The

application of such an interpretation could lead to inconsistent or absurd results.

The task of determining if a person is a manager must address the definition of manager in the *Regulation*. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business....

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment And the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.

We also accept that in determining whether a person is a manager the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. 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 judgements 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 a manager.... 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 manager. It is not sufficient simply to say that a person has that authority. It must be shown to have been exercised by that person."

In my view, it is not the intent of the definition of “manager” in the legislation to include first line supervisors and foremen who do not frequently exhibit the power and authority typical of a manager. Such authority, which is question of degree, typically includes the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business. The authority must be shown to be exercised by the employee said to be a manager. In order to be employed in an executive capacity, the person must have “duties in such capacity relate to active participation in control, supervision and management of business”. This typically includes the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business.

The Employer stated that Margawand’s duties included opening the salon, bank deposits, supervising other employees (particularly with respect to the dress code), make appointments, schedule customers and inventory and ordering products used at the salon. The Employer also testified that she had been involved in an attempt to hire two of her friends for the salon. As well, the Employer says that she had a key to the office, something other employees did not. Pakosh stated that she was the manager when he was not there--about half the time the salon was open. Margawand denied that she was involved in the hiring of any employees. She said that she had a key because Pakosh was often not there in the morning and the employees needed access to the office where client files were kept. She testified that her duties were opening the doors in the morning, shampooing, cleaning up, washing floors, making coffee and tea for customers, booking appointments, taking payments from customers and preparing cash/accounts every evening. On occasion she also did the owners’ personal laundry and baby-sat their child. In all of the circumstances, I do not accept that Margawand was a manager as defined in the *Regulation*. She did, as accepted by the delegate, exercise some supervisory responsibilities, however, I agree with the delegate that she was not “a person whose primary employment duties consist of supervising and directing other employees”. I also agree that she was not employed in an executive capacity. In reaching this conclusion, I am mindful of the remedial purposes of the *Act*.

The delegate based his determination on the actual payroll records supplied by the Employer. In the circumstances, I accept those. I am not prepared to interfere with the determination except with respect to vacation pay. It appears that the delegate awarded Margawand vacation pay at the rate of 6%. The correct rate is 4% (as agreed by Margawand). In the result, I reduce the amount awarded accordingly on that account to \$52.82. Margawand is, therefore, entitled to \$1,311.07, plus interest, for a total of \$1,397.60.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated July 30, 1998 be varied as follows:

1. Harrison be paid \$395.80;
2. Gordon be paid \$2,793.16; and
3. Margawand be paid \$1,397.60.

These amounts must be paid to the Employees together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal