

An appeal

- by -

Louis Enterprises Ltd. Operating as Lou's Grill
(“Lou'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.: 2001/659

DATE OF DECISION: December 18, 2001

DECISION

SUBMISSIONS:

Appeal filed	on behalf of Louis Enterprises Ltd.
Lily Ninkovic	on her own behalf
D. Lynne Fanthorpe	on behalf of the Director of Employment Standards

OVERVIEW

The Director of Employment Standards (“Director”) found that Louis Enterprises Ltd. Operating Lou’s Grill (“Lou’s”) owed Lily Ninkovic (“Lily”) overtime, statutory holiday pay, and refund of ‘dine and dash’ charges after investigating a complaint. Lou’s appeal is based on the argument that Lily was a manager within the meaning of the *Employment Standards Act and Regulations* (“Act”) and was therefore not entitled to overtime pay.

This Appeal proceeded on the basis of written submissions from the Director’s delegate and Lily. Lou’s did not make any submissions after filling in the appeal form.

ISSUE

The sole issue in this appeal is whether Lou’s has shown that Lily was a manager.

ARGUMENT

Lou’s submission in the Appeal states that Lily was a manager with her primary duty being the supervision of restaurant staff. The appeal states that while she did serve customers her primary role was supervision and that is the reason she was paid more than other servers.

Lily argues that she had no ability to hire or fire without the owners involvement. She indicated she could not call emergency services with an unruly customer without the approval of an owner. She indicates she was one of four dining room supervisors and the kitchen had a manager. Lily’s authority was limited to monitoring daily or nightly dining room operations but her primary duties were serving her tables. The additional supervisors duties beyond serving customers was dealing with customer complaints, handling voids on the computer, setting up and shutting down the computer, putting money in the safe and making sure the restaurant and office were locked and alarmed at night. Lily had not responsibilities for ordering supplies for Lou’s or assigning shifts to staff.

The Director’s Delegate submits that Lou’s made the allegation that Lily was a supervisor with no supporting evidence. The Director’s position is that the duties Lily carried are like a supervisor or lead hand but are not those of a ‘manager’. Lou’s statement that Lily is a manager is misleading because there are designated managers for each section, the bar, the kitchen and

servers for each shift. Lily had no overall responsibilities. The Director argued that Lou's has not discharged the onus on it in an appeal.

THE FACTS

Lily worked for Lou's as a server from July 1998 until September 2000.

Lily filed a complaint claiming that she had worked hours of overtime without overtime pay. Lily also claimed recovery of \$75.88 deducted from her wages when a customer left without paying ('dine and dash').

Lily worked as a server on every shift. At no time was Lily paid overtime. Lou's does not dispute that Lily worked overtime as a server and as a supervisor. The pay records show that Lily worked overtime on many occasions. Lily worked statutory holidays and was paid straight time. This is not in dispute.

With time Lily had increased responsibilities and was named a shift supervisor. She had keys to the restaurant, the alarm codes and access to the safe to place the proceeds of a shift.

In the Appeal filed Lou's states

" Lily Ninkovic was a manager. Her primary duty was the supervision of the restaurant staff. While it is true that she also served customers, her main responsibility was supervision. She was paid at a higher rate (\$10.00/hr.) than the server rate."

No further evidence in support of these allegations was provided to the Delegate or for the Appeal.

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.

Lou's is appealing the Director's finding that Lily was a lead hand or supervisor and not a manager within the Act. Lou's has provided no other evidence to support the claim that Lily was a manager.

Manager

The Determination found that Lily 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

a person employed in an executive capacity.

The definition of manager was considered by the Tribunal on several occasions and was reconsidered by a three person panel in 429485 B.C. Limited Operating Amelia Street Bistro ("Amelia Street Bistro") [1997] B.C.E.S.T.D. No. 503, BCEST #D479/97. The Tribunal 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.”

Lily did not have the responsibilities set out for managers in this decision. She did not direct employees hours, hire or fire, change processes in the shifts or establish hours for employees. Lily had not authority to manage, she had the authority to supervise.

Lou’s provided no evidence to disturb or challenge the findings of the Delegate in the Determination.

CONCLUSION

Based on the evidence presented I find no basis on which to vary or cancel the Determination. Lou’s has not discharged the onus on it to demonstrate an error in the Determination. I deny the appeal and confirm the Determination

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated August 24, 2001 is confirmed.

April Katz
Adjudicator
Employment Standards Tribunal