

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an application for reconsideration pursuant to Section 116 of  
the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

The Director of Employment Standards  
("the Director")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

**Panel:** Geoffrey Crampton  
David Stevenson  
Mark Thompson

**File No.:** 97/574

**Date of Decision:** November 7, 1997

## DECISION

### OVERVIEW

Pursuant to Section 116 of the *Employment Standards Act* (the “*Act*”), the Director of Employment Standards (the “Director”) seeks reconsideration of a decision of the Employment Standards Tribunal (the “Tribunal”), BC EST #D170/97, dated April 29, 1997 (the “Original Decision”). That decision involved an appeal by 429485 B.C. Limited operating Amelia Street Bistro (“Amelia Street Bistro”) of a Determination issued by a delegate of the Director dated December 3, 1996 which had concluded that Amelia Street Bistro had contravened the hours of work and overtime requirements of the *Act* in respect of the employment of Walter Telemans (“Telemans”) and ordered it to cease contravening the *Act* and to pay an amount of \$6,645.49.

The appeal was heard on the issue of whether Telemans’ employment was excluded from the hours of work and overtime provisions of the *Act* because he was a manager. The Adjudicator found Telemans to have been a manager and the Determination was cancelled. The Director says the Adjudicator erred in concluding Telemans was a manager as that term is defined by the *Regulation* to the *Act*.

### ISSUES TO BE DECIDED

There are two issues raised by this application: first, whether the circumstances of the case fall into one or more of the grounds upon which the Tribunal will reconsider a decision or order; and second, if the Tribunal concludes this is an appropriate case for reconsideration, whether the Adjudicator erred in concluding Telemans was a manager.

### FACTS

The facts are set out in the Original Decision. It is unnecessary to recite them in their entirety. We will, however, set out certain of the facts which we feel are significant to the arguments the Director has made for reconsideration.

Telemans was hired December 31, 1994 as the chef at Amelia Street Bistro, a lunch and dinner restaurant in Victoria. He terminated his employment in March, 1996. His job was to oversee the operation of the restaurant. His employment duties included:

- designing new menus;
- keeping inventory and performing food cost duties;
- ordering supplies and dealing with suppliers;

supervising staff, including hiring, firing, scheduling and training;  
maintaining computer records (which did not involve payroll);  
dealing with customers and the public; and  
performing cooking and kitchen duties, including clean up.

He was considered by employees to be the manager.

The Adjudicator concluded that Telemans' employment duties, specifically hiring and firing, ordering supplies and food cost duties, regularly and frequently scheduling work (including calling employees into work or sending them home early), training employees and directing their work at the restaurant, were primary and fundamental to the operation of the restaurant and, by having assumed them, he fell into the classification of manager. The Adjudicator appeared to be persuaded by the elements of supervision and direction present in the duties of Telemans, even though it was acknowledged that cooking duties were also a primary requirement of the job.

## **ANALYSIS**

Section 116 of the *Act* states:

- 116. (1) On an application under subsection (2) or on its own motion, the tribunal may*
- (a) reconsider any order or decision of the tribunal, and*
  - (b) cancel or vary the order or decision or refer the matter back to the original panel.*
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section.*
- (3) An application may be made only once with respect to the same order or decision.*

It is now firmly established that the Tribunal will not interpret the above provision to allow a dissatisfied party an automatic right of review. To the contrary, the Tribunal has stated the reconsideration provision will be used sparingly and has identified a number of grounds upon which it may choose to reconsider an order or decision. These grounds may be summarized as cases demonstrating: a breach of the rules of natural justice; a significant error of fact that is either clear on the face of the record or that arises from the introduction of new evidence that is both relevant to the order or decision and was not reasonably available at the time of the original hearing to the party seeking to introduce it; a fundamental error of law; or an inconsistency with other decisions of the Tribunal which are not distinguishable on their facts.

The Director raises three of these grounds in this application:

1. The Adjudicator made findings of fact which are demonstrably wrong on the face of the record;
2. The Adjudicator erred in law in concluding Telemans was a manager, specifically the Adjudicator failed to give effect to the definition of “manager” found in the *Regulation to the Act*; and
3. The decision is inconsistent with other decisions of the Tribunal that are not distinguishable on their facts.

The Director argues all of these grounds can be considered separately or in combination but the result should be a setting aside of the decision and a reinstatement and confirmation of the Determination. We agree that in the circumstances of this case, the Director has satisfied the Tribunal this is an appropriate case for reconsideration.

Section 1(1) of the *Regulation to the Act* defines, among other things, “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.*

There is no issue in this reconsideration that Telemans was considered to be a person employed in an executive capacity.

The issue here is whether Telemans’ primary employment duties brought him within paragraph 1(1)(a) of the definition of “manager” in the *Regulation to the Act*.

A number of decisions have addressed this part of the definition, both generally and in the context of the hospitality (restaurant) industry, including: *Anducci’s Pasta Bar Ltd.* (BC EST #D380/97); *Sambuca Restaurant Ltd.* (BC EST #D322/97); *T&C Ventures Ltd. operating as Town and Country Motor Hotel* (BC EST #D152/96); *Restauronics Services Ltd.* (BC EST #D131/96); and *Trev-Cher Enterprises (1992) Ltd. operating Fynnigan’s Pub* (BC EST #D098/96). In each of these cases the focus of analysis has been the primary employment duties.

In *T&C Ventures Ltd.*, the Tribunal stated, at page 5:

The issue is whether or not Taylor’s **primary** employment duties consisted of supervising or directing other employees. (**emphasis included**)

And, in *Restauronics Services Ltd.*, the Tribunal stated, at page 3:

At issue is whether or not Hjerpe’s primary employment duties consisted of supervising and directing other employees. In the materials presented by Restauronics and hearing evidence given by their management staff, I am not persuaded that Hjerpe’s primary employment duties consisted of supervising and directing other employees. In a normal working day, Hjerpe mainly performed the role of chef and food handler/server. She may have had some peripheral administrative duties given in her job description and she certainly would have brought her experience as a chef with respect to monitoring other staff, however, I find that this in itself did not put her in a position as a “manager”.

The Director argues that the term “primary employment duties” must be interpreted as describing those employment responsibilities which represent the chief call on the employee’s time. The Director then says persons who do not spend a majority of their working time supervising and directing other employees are not, for the purposes of the *Act*, a “manager”. We agree the amount of time an employee spends on supervising and directing other employees is an important factor in determining whether the employee falls within the definition of manager (see *Anducci’s Pasta Bar Ltd.* and *T&C Ventures Ltd.*). 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. That point was made by the Tribunal in *Anducci’s Pasta Bar Ltd.*:

Many of the duties to which the employer pointed as evidence of Lum’s managerial status did not address the definition of 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.

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 or identified by other employees 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. The Director raises a concern that an interpretation of manager which does not accept the limited scope of exclusion from the minimum standards of the *Act* could have serious consequences for persons in positions such as foreman and first line supervisor who spend a significant amount of time supervising and directing other employees but frequently do not exhibit a power and authority typical of a manager. As we stated above, the degree to which some power and authority typical of a manager is present and is exercised by an employee are necessary considerations to reaching a conclusion about the total characterization of the primary employment duties of that employee.

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.

Also, when considering the reason for the employment of a person, it would be relevant that the person was hired to perform, and was continuing to perform, a job that would not normally be thought of as related to supervising and directing other employees. For example, in *Anducci's Pasta Bar Ltd.*, *supra*, the Tribunal thought it was relevant that the job which the employee was hired to perform was food handler/server, not supervisor or manager. In this case Telemans was hired as the chef at Amelia Street Bistro.

It follows from the foregoing that we agree the Adjudicator did not correctly interpret and apply the definition of manager in the context in which it was being considered, which is whether Telemans' primary employment duties consisted of supervising and directing other employees. We do not need to consider the other grounds of appeal.

## **ORDER**

The Director has asked we cancel the decision and reinstate the Determination. We are not prepared to do that. Although the legal analysis of the issue before the Adjudicator was flawed, the Adjudicator did refer to certain facts which, even on a proper analysis of the issue, may have led to the conclusion Telemans was a manager for the purposes of the hours of work and overtime provisions of the *Act*. Pursuant to paragraph 116(1)(b) we refer the matter back to the original panel. The original panel should be guided by the analysis we have set out and should consider such matters as whether the majority of the call on Telemans' time was related to supervising and directing employees, whether he had and exercised any of the power and authority typical of a manager, that is, did he in fact have final judgment and discretion in respect of those matters listed above and, if so, to what degree, and whether the primary reason for his employment was to supervise and direct other employees or, as suggested by the decision, to perform the duties of a chef.

Geoffrey Crampton  
Chair

David Stevenson  
Adjudicator

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Mark Thompson  
Adjudicator