

DECISION OF ADJUDICATOR  
IN THE MATTER OF AN APPEAL  
PURSUANT TO SECTION 2-75 WITH RESPECT TO A DECISION OF AN  
EMPLOYMENT STANDARDS OFFICER PURSUANT TO  
**THE SASKATCHEWAN EMPLOYMENT ACT,**  
**R. S. S. S-15.1 (as amended)**

APPLICANT: J.J. Tomas Holdings Ltd. o/a Twisted Tartan Pub & Eatery  
3510- 8<sup>th</sup> Street East  
Saskatoon, SK

RESPONDENT: Brandy Marchinko (Weishaupt)

and

Director of Labour Standards  
Ministry of Labour Relations and Workplace Safety



DATE OF HEARING: March 29, 2016

PLACE OF HEARING: Room 2.1  
Sturdy Stone Building  
#500 – 128, Fourth Avenue South  
Saskatoon, SK

**1. INTRODUCTION**

This is an appeal by J.J. Tomas Holdings Ltd. o/a Twisted Tartan Pub & Eatery (hereinafter referred to as "J.J. Tomas") with respect to a Wage Assessment issued by the Respondent, the Director, Employment Standards Branch, Ministry of Labour Relations and Workplace Safety, on January 14, 2016. The Wage Assessment required the Appellant to pay Brandy Marchinko the sum of \$486.92, representing overtime pay. The Wage Assessment was prepared pursuant to s. 2-74 of *The Saskatchewan Employment Act*, R.S.S. S-15.1 (as amended). The focus of the Appeal is with respect to the application of *The Employment Standards Regulations*, Chapter S-15.1 Reg 5 Section 3(4) which states that the provisions of *The Act* do not apply to an employee who performs services that are entirely of a managerial character.

This matter was heard before me on the above date and the parties were given until April 12, 2016 to provide written submissions. Present for the Respondent at the Hearing were Shelley Stretch, Department of Employment Standards and Brandy Marchinko, the employee. On behalf of the Appellant present were Matt Baxter, Cassie Keenan and Jim Tomas, the owner and employer.

## II. PRELIMINARY MATTERS

Initially the Respondent requested permission to amend the wage assessment to a greater amount as new figures had been provided by the employee on short notice. The Applicant objected to proceeding on the basis of the new figure until it had an opportunity to review its own records to confirm whether the proposed revised amount was correct. While this would have necessitated a postponement of the Appeal, I provided the two parties with an opportunity to discuss this prior to proceeding any further with the Appeal. On reconvening, the Respondent indicated that it would withdraw the request to amend the Wage Assessment and so we proceeded with the Appeal. The parties agreed that should I find in favour of the Applicant, the amount in the Wage Assessment was appropriate.

All parties agreed on the issue to be determined and agreed that all parties, including those giving evidence, could remain present throughout the Hearing. While generally the Appellant presents their case first, it made more sense to hear from the Employee first, to establish the basis for the Wage Assessment, prior to dealing with the Employer's perspective and reasons for the Appeal. Neither party took issue with this process.

## III. THE ISSUE

The primary issue in this Appeal is whether the employee, Brandy Marchinko, was a manager of the Appellant, 'J.J. Tomas'. If it is determined that Brandy Marchinko was a manager, then the exemption pursuant to *The Employment Standards Regulations*, Chapter S-15.1 Reg 5 Section 3(4) would apply.

## IV. FACTS

The facts were not in dispute and the evidence from both sides as to the employee's duties was similar. The employee was initially hired as a server at the Twisted Tartan Pub & Eatery and when the assistant manager left, Ms. Marchinko took her spot and her duties thereafter included a number of managerial functions. The employer sought to have the reason for Ms. Marchinko's termination brought before me; however, I concluded that it was not relevant to the issue before me and declined to hear that evidence.

### i. EVIDENCE OF EMPLOYEE

Brandy Marchinko testified that she commenced working for the Applicant at the Twisted Tartan Pub & Eatery in September, 2014 and left that employment in September, 2015. She was initially employed as a server or waitress and her duties consisted primarily of serving customers, taking food orders and cleaning up. She reported to Matt Baxter, the manager of the pub and other establishments owned by the Applicant. When Mr. Baxter was busy or not on the premises, Ms. Marchinko reported to Ricki, the assistant manager. Ricki quit on May 31, 2015 and Ms. Marchinko took over her duties. She also continued working as a server. Matt Baxter was the general manager, but was not always on the premises. If he was not, then Ms. Marchinko was the manager on site. Their shifts were organized such that one of them was always present. If they were both

present, then staff would come to Ms. Marchinko and she would talk to Mr. Baxter or they would go directly to Mr. Baxter.

Ms. Marchinko was examined and cross-examined thoroughly. She agreed that once she took over the assistant manager position from Ricki, she shared the below duties only with Mr. Baxter. No other employee carried out these functions.

- 1) She was in charge of the cash drawer and the VLT's. After 10:00 pm the cash was her responsibility. Emptying the VLT's was solely her responsibility. She could pay out VLT winnings.
- 2) She supervised the other servers, hostess, bouncers and porters. She made sure the servers were doing their job and that customers were being attended to. If one server was too busy, she would tell another server to assist her. If a server was not doing her job, Ms. Marchinko had the authority to discipline that server by reducing the number of tables that she was serving and give those tables to a server who was working harder.
- 3) She had the authority to void mistakes of the servers. She also could void charges to bills, as a 'promo'. She could provide free meals or beverages.
- 4) When Mr. Baxter was on the premises, the other waitresses, hostess, bouncers and porters would report to him. When Mr. Baxter was not there, these employees would report to her.
- 5) She drafted the work shift schedule. This would subsequently be approved by Mr. Baxter. She would also review holiday or time off requests and entered that information into the schedule.
- 6) She did not hire employees. She did not make decisions about firing, but did fire one employee on the instructions of Mr. Baxter.
- 7) She and Mr. Baxter were the only ones who could sign the other employees in or out.
- 8) She scheduled her own hours and her own shifts. This was never questioned.
- 9) She was responsible for cash out and putting the money in the safe.

Jobs that Ms. Marchinko did not have included:

- 1) She did not have authority to sign cheques.
- 2) She did not participate in any managerial type meetings.
- 3) She did not receive any 'perks' such as a manager might receive. (There was no evidence as to what these perks might be.)
- 4) While she could put in a good word for someone, she had no influence on hiring or firing.
- 5) Other than dictating how many tables each server would serve, she had no authority to discipline other employees.

Ms. Marchinko did not receive a pay raise when she was promoted to supervisor or assistant manager.

## **ii. EVIDENCE OF EMPLOYER**

The Appellant called two witnesses. The first was Cassie Keenan, who was employed as a server at the same premises from June to September, 2015. Ms. Keenan testified that she viewed Ms. Marchinko as her manager. She stated that other than Mr. Baxter, Ms. Marchinko was the only one who had access to the VLT cash float, access to the alarm

codes, access to the office and was able to take in everyone's cash float. If Ms. Keenan had a scheduling issue or wanted time off, she talked to Ms. Marchinko. Ms. Marchinko would tell her what to do – and if she wasn't doing her job, the repercussion was that Ms. Marchinko would assign her fewer tables. If she was sick, while she was supposed to call the bar, instead she would text Ms. Marchinko. Ms. Keenan's evidence was not disputed.

Matt Baxter testified on behalf of the Applicant. He is general manager of the bars owned by the Applicant. Mr. Baxter acknowledged that he is the one who put Ms. Marchinko into the managerial position when Ricki left and that in his opinion, she did a good job. He agreed with the evidence of Ms. Marchinko (indicated above), noting that, unlike the other servers, Ms. Marchinko's hours never had to be approved; rather she would enter her own hours into the system and that would go straight to payroll.

## V. DECISION

The requirement to pay overtime is set out in *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (the "Act"). However, *The Employment Standards Regulations*, Chapter S-15.1 Reg 5 Section 3(4) states that the overtime provisions do not apply to "an employee who performs services that are entirely of a managerial character." The word 'entirely' does not mean completely and only, but rather 'continuously'. Therefore, a server who is promoted to manager, but still fulfills duties as a server can fall within the exception created by the section.

The law in this area is well settled in Saskatchewan. In *Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards)* (1995), 136 Sask R 187 (QB) [*Westfair Foods*], Klebuc, J. stated:

[22] The word "entirely" was judicially considered by Wimmer J. in *Michael Hill v. Robert C. Begg, Keith O'Shea, and Mr. Mechanic Sales & Service (1982) Ltd.*, Sask. Q.B. No. 686/86, J.C. Saskatoon, December 29, 1987(unreported). There the plaintiff accepted employment as the manager of a garage service department which also required him to do some work as a mechanic. Upon the termination of his employment, the plaintiff claimed wages for overtime on the grounds that his services were not entirely of a managerial character. Mr. Justice Wimmer concluded the plaintiff fell within the exception contained in s. 4(2) for the following reasons:

. . . He reorganized the department, assigned and supervised the work and, in consultation with O'Shea, he effected some changes in personnel. He was not accountable for his hours and did not punch a time clock as did other employees of the department. It is true that he did some mechanical work himself but that does not mean his services were not entirely of a managerial character within the meaning of section 4(2) of the Act. In my opinion, the word entirely in the section is to be understood in the sense of continuously in contra-distinction to from time to time. A "hands on" manager can still fall within the exception created by the section. I am satisfied that Michael Hill's services were continuously of a managerial character and that there existed no statutory obligation to pay him overtime.

I agree with his definition of the word "entirely" for the purposes of s. 4(2) of the Act and will apply it to the matter before me.

[24] What constitutes "of a managerial character" for the purposes of s. 4(2) of the Act will vary according to the facts of each case. Hence, an all-encompassing definition for the phrase is impractical. However, a reference to those characteristics and functions indicative of, or at least associated with management positions, as indicia for determining whether an employee's services are of a managerial character are, in my view, appropriate. The indicium making up such criteria can readily be extracted from case authorities, dictionary definitions, reports of arbitration awards and legal writings on employment law. The fundamental ones in my opinion are:

- (1) The supervision and direction of other workers;
- (2) The discipline of subordinates, individually or as part of a management team;
- (3) Evaluating the performance of subordinates;
- (4) Hiring and promoting of subordinate staff;
- (5) Some independence and discretion in performing assigned duties;
- (6) Supervision of a collective agreement, where the work place is unionized;
- (7) Negotiating remuneration individually rather than collectively;
- (8) Level of remuneration, vis-à-vis, non-managerial staff;
- (9) Participation in carrying out the employer's budgets and performance requirements.

This list is not intended to be all inclusive; nor must each criterion be found to exist before an employee's position can take on a managerial character; nor is each criterion entitled to equal weight. To the contrary, in my opinion only the functions of supervision and right to discipline are of fundamental importance and therefore of greater significance.

As indicated, while Ms. Marchinko did not hire and fire employees, she supervised and directed all of the other employees (except kitchen staff). This was not particularly complicated: if a table needed clearing, she would tell the server or porter to get it done; if a customer had to be removed, she would ensure that the bouncer took care of it; if a customer was unhappy with a meal or service, she could void all or part of their bill; if a table was not being properly attended to, she would direct the server to perform her job and if she did not do so, she would reduce that server's tables. When a substantial part of a server's income is derived from tips, this can be viewed as a punishment. To that end, in disciplining the servers, Ms. Marchinko was in a position to reduce a server's income in this manner. Regarding work schedules, Ms. Marchinko entered all of the information and was able to permit or deny holiday time. Ms. Marchinko also set her own hours. To that end, Ms. Marchinko could determine the shifts and number of hours worked not only by herself but by the other servers. While Mr. Baxter would 'sign off' on the schedule, he only reviewed it to ensure that all shifts were properly covered, not who worked what shifts or hours.

Finally, Ms. Marchinko was given tremendous responsibility for money. When she was working as manager, only she had access to the safe, all cash, VLT's and was able to perform any alterations (voids) at the till. She also locked the building at closing and had access to the alarm codes. None of the other employees were able to do this. While


these duties are not specifically referred to in the *Westfair Foods Ltd* decision, these responsibilities and duties placed Ms. Marchinko in a different category than the other employees and should be considered managerial.

Based on the evidence, I find that Brandy Marchinko was indeed a manager and primarily and continuously carried out managerial duties while employed with J.J. Tomas.

## VI. CONCLUSION

The appeal is allowed. Pursuant to s.4-6(1)(a) of *The Saskatchewan Employment Act*, the wage assessment and the decision of the Director are revoked.

Dated at Saskatoon, in the Province of Saskatchewan, this 30<sup>th</sup> day of June, 2016.

  
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Leslie T. K. Sullivan, Q.C.  
Adjudicator

### Appendix A

#### Exhibit List

Employer Exhibit	Item	Employee Exhibit	Item
ER 1	Written Argument #1	EE 1	Booklet with 9 tabs – materials provided by Employment Standards officer
ER 2	Reply to EE3 Rebuttal	EE2	Written Argument #1
		EE3	Rebuttal

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at [www.saskatchewan.ca](http://www.saskatchewan.ca).

#### **Right to appeal adjudicator's decision to board**

**4-8(1)** An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

- (3) A person who intends to appeal pursuant to this section shall:
  - (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
  - (b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.
- (4) The record of an appeal is to consist of the following:
  - (a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;
  - (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
  - (d) any exhibits filed before the adjudicator;
  - (e) the written decision of the adjudicator;
  - (f) the notice of appeal to the board;
  - (g) any other material that the board may require to properly consider the appeal.
- (5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.
- (6) The board may:
  - (a) affirm, amend or cancel the decision or order of the adjudicator; or
  - (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

#### **Appeal to Court of Appeal**

**4-9(1)** With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

- (2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.
- (3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

#### **Right of director to appeal**

**4-10** The director of employment standards has the right:

- (a) to appear and make representations on:
  - (i) any appeal or hearing heard by an adjudicator; and
  - (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and
- (b) to appeal any decision of an adjudicator or the board.