Employment Standards TRIBUNAL

An appeal

- by -

Quality Auto Sales Ltd.
(the “Employer” or “Quality Auto”)

- 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: Ib S. Petersen

FILE No.: 2002/483

DATE OF HEARING: December 2, 2002

DATE OF DECISION: January 6, 2003

DECISION

APPEARANCES:

Mr. Bob Frew	on behalf of the Employer
Mr. Joseph Haan	on behalf of Mr. Ryan Vanderheyden

OVERVIEW

This is an appeal of a Determination dated August 22, 2002. In that Determination the Delegate concluded, first, that Mr. Vanderheyden was not a manager for the purposes of the *Act* and, second, had been terminated without just cause and entitled to compensation for length of service. The delegate found that he was entitled to a total of $2,122.56.

The background facts may be gleaned from the Determination.

Quality Auto operates an Avis car rental agency at three locations, including one in Langley. On January 12, 2002, Mr. Vanderheyden was terminated from his employment with Quality Auto at the Langley location. He had been employed since July 16, 2001 as a "counter manager" at the hourly rate of $9.15. Following his termination, Mr. Vanderheyden filed a complaint with the Employment Standards Branch alleging that he was owed commissions, overtime wages, statutory holiday pay, compensation for length of service and compensation for uniform cleaning cost.

In a lengthy and detailed Determination, the Delegate concluded, with reference to the definition of "manager" in the *Employment Standards Regulation* (the "*Regulation*"), that Mr. Vanderheyden was not a manager under the Act because he did not direct and supervise other employees. As well, because he exercised only "limited discretion," he was not employed in an "executive capacity." In short, he was not a manager and, therefore, entitled to overtime wages (Sections 35 and 40) and statutory holiday pay (Sections 44 and 45). She awarded $1,419.75 on this account.

The Delegate also concluded that Mr. Vanderheyden was entitled to payment for cleaning his uniform and commissions. She did not accept the Employer's assertion that this was included in his hourly wages of $9.15. In the absence of documentation, the Delegate estimated the cleaning costs to be a little shy of $100 (Section 25). The Delegate did not accept that the Employer was entitled to withhold a little over $150 on account of commissions for December 2001 and January 2002 because of the Employer's legal action against Mr. Vanderheyden (Section 21).

Finally, the Delegate rejected the Employer's contention that Mr. Vanderheyden was terminated from his employment with cause. The Delegate noted that the burden to show cause for termination rests with the Employer. She rejected to Employer's argument that it had "just cause" for failing to properly clean rental vehicles. She found that it had not been established that Mr. Vanderheyden had been properly warned about his failure to clean rental vehicles. She also did not accept the Employer's assertions of dishonesty. The Employer complained that Mr. Vanderheyden had stolen a calendar (used to record his hours) and a pornographic magazine left in a rental vehicle. Moreover, she did not accept the assertion that Mr. Vanderheyden had "pawned" a video camera left behind in a rental vehicle. Finally, the Delegate rejected the allegation that Mr. Vanderheyden had improperly rented a vehicle.

ISSUES

The Employer disagrees with most of the Determination. The Delegate's findings with respect to the commissions and meal breaks are not in dispute. Briefly put, however, the Employer says that it was entitled to terminate Mr. Vanderheyden because of his conduct. The Employer maintains that it was entitled to terminate him for the failure to properly clean rental vehicles. He was warned verbally many times. The Employer also continues to maintain that Mr. Vanderheyden was terminated for dishonesty (essentially based on the matters before the Delegate). The Employer also reiterates its position that Mr. Vandeheyden was a manager. He is therefore, in the Employer's view not entitled to overtime wages and statutory holiday pay. The Employer also disagrees, it would appear, with the conclusion that uniform cleaning costs could not be included in the hourly wages. In a nutshell, those are the issues before me.

FACTS AND ANALYSIS

In this case, the burden is on the Employer, as the Appellant, to persuade me that the Determination should be set aside. In the circumstances, for the reasons that follow, I am not persuaded that the Employer has discharged that burden.

At the hearing, the Employer called a number of witnesses to testify under oath or affirmation. Mr. Simon Barron, the city manager for Avis and the person dealing with agents like Quality Auto; Mr. Mark Frew, the son of Mr. Bob Frew and a counter manager; and Ms. Dana Gloyn and Sonja Nedd, also counter managers. Ms. Nedd, who apparently was writing an exam on the day of testified via telephone. The Respondent, Mr. Vanderheyden, did not testify or call any witnesses.

With respect to issues regarding credibility, I adopt the often quoted words of the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

I ordered that the witnesses be excluded. Despite the fact that only the Appellant provided *viva voce* testimony, and led its witnesses through much of their evidence, there were, all the same, some inconsistencies and contradictions in the evidence. I did on several occasions during the hearing request that the Employer ask more "open-ended" questions of its witnesses. While the Employer tried to do that, I am concerned that much of the Appellant's evidence was obtained through leading questions.

1. Termination of Employment

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The principles consistently applied by the Tribunal to the question of "just cause" have been summarized as follows (*Kruger*, BCEST #D003/97):

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

    2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;

    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

The Employer relied on a number of grounds for Mr. Vandeheyden's termination. These grounds may be briefly set out as follows:

1. Mr. Vanderheyden ignored Avis policy by failing to properly clean rental vehicles. He was warned numerous times. The Delegate was wrong in not accepting the Employer's evidence and position.

2. Mr. Vanderheyden was dishonest. He took a calendar (on which he recorded his hours) from the Employer and copied it. He did this without authorization. He also stole a pornographic magazine left in a rental vehicle. Mr. Vanderheyden discussed "pawning" a video camera left in a rental vehicle.

3. Mr. Vanderheyden rented a vehicle to a person in contravention of policy.

I will deal, in turn, with the grounds for termination. In view of the fact that some of these are very serious allegations, I propose to deal with them in detail.

I turn first to the alleged failure to properly clean rental vehicles. This was the only ground expressly relied upon by the Employer in its termination letter dated January 12, 2002. In the letter, Mr. Frew stated that he had inspected rental vehicles, apparently cleaned by Mr. Vanderheyden, on December 31, 2001 and January 3, 2002. While the letter provides more detail, it is sufficient to say that on both days he had found dirty vehicles-- not up to Avis' standard. The letter went on to assert that he had spoken with Mr. Vanderheyden "on numerous occasions" about this and "*for the above reasons* [his] services [were] no longer required immediately" (emphasis added). The letter stated that it included, among others, pay up until 5:00 p.m. Saturday January 12, 2002.

I accept Mr. Barron's testimony that cleanliness of its rental vehicles is an important business consideration. However, if, as the Employer expressly states, these were the reasons, and were serious, as is now contended, I am surprised that the Employer did not take immediate action, on January 3, or shortly thereafter. In my opinion, the reason is that it was not regarded as a sufficiently serious matter to warrant dismissal. Indeed, quite frankly, it does not make sense to me that the Employer did not give Mr. Vanderheyden the letter on or about January 3 even as a warning letter if the matters were as serious as is now suggested.

Most employment offenses are minor instances of misconduct by an employee are not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show, first, that a reasonable standard of performance was established and communicated to the employee. This, in my mind is not an issue. I accept that Avis has a standard and that Mr. Vanderheyden was aware of that.

The termination letter, however, does not indicate that the employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so. In fact, he was terminated.

The Employer argues that he was given "numerous warnings." Perhaps, however, but there was little direct evidence to that effect before me. Mr. Mark Frew testified that Mr. Vanderheyden had been told "at least 2 times." He was then asked if there were "other times," suggesting 3-4 times. He agreed with 3 more times. There were no particulars of these warnings (when, where, what, who etc.). The Delegate noted in the Determination, correctly, in my view, that the "Employer failed to provide details regarding the verbal warnings including the dates, the people present, what was said etc." Based on the evidence before me at the hearing, I echo those sentiments.

The employee must also have been adequately notified that their employment was in jeopardy by a continuing failure to meet the standard. There was little evidence of that. Mr. Mark Frew explained that there was a telephone conversation between him and Mr. Vanderheyden to the effect that the latter "asked him if his employment was in jeopardy." The reference to the cleaning of vehicles--or, indeed, the context of the telephone conversation--was not clearly established in my mind. In fact, I do not know on the evidence when this conversation took place. Fairly viewed, I do not think that the evidence establishes that Mr. Vanderheyden was warned that his employment was in jeopardy.

The employee must also have continued to be unwilling to meet the standard. In my view, this last aspect was not met on the evidence.

Although this was not the event that triggered the termination, the Employer sought to bolster its case for "just cause" with reference to an further incident of Mr. Vanderheyden failing to clean vehicles to company standard. Although there is--clearly and surprisingly--no reference to it in the termination letter, the Employer says that he also on January 12 failed to properly clean a vehicle. I think, on balance, that the reason is that the Employer, in fact, had decided to terminate Mr. Vanderheyden around early January--it just did not tell him. The Company does not have many full-time employees and Ms. Nedd trained for a position as counter manager from January 2 to 12. According to Ms. Nedd, who started January 13 as Mr. Vanderheyden's replacement, both in direct and cross examination, all vehicles at the location were in acceptable condition except one, a blue Malibou. This latter vehicle was not up to Avis's standard. I accept that. However, it was clear from Mr. Haan's cross examination, that she was not present at the location and had no direct knowledge of whether Mr. Vanderheyden had, in fact, cleaned

the vehicle in question. She agreed, in fact, that it "could have been anybody." Mr. Frew, surprisingly, did not testify.

At the hearing, the Employer also sought to bring out other complaints about Mr. Vanderheyden. He did not properly clean the office, did not complete "shop duties," had made promises to customers about vehicles that could not be kept, and had telephone manners that were "not up to par." I do not accept these allegations. Even if they are true--and I entertain doubts that they are, given the lack of particulars, both of the circumstances, and of any warning handed out--in my opinion, they are not sufficient to establish cause for termination. If these were grounds for termination, I am equally surprised that they were not mentioned in the termination letter. In my opinion, the Employer is seeking to "boot-strap" a weak case.

I now turn to the Employer's allegations of dishonesty. I did caution the Employer at the hearing that such allegations are not easily proven and to proceed with caution.

In England et al., *Employment Law in Canada* (3d) (Toronto and Vancouver: Butterworths, 1998-at pages 15.21-22), the learned authors consider the standard of proof where dishonest conduct is alleged:

> "When the employer alleges theft or some other fraudulent conduct as the reason for dismissal, the greater stigma attached to such conduct has resulted in most courts imposing on the employer a more exacting --standard of proof than the regular civil law "balance of probabilities" but one which nonetheless falls short of the criminal law test of "beyond a reasonable doubt". Collective agreement arbitrators have adopted a similar "intermediate" standard. Various linguistic formulations have been articulated in an attempt to clarify the nature of this standard, but none has attained a particularly edifying degree of exactitude. Ultimately it appears to boil down simply to whether or not the court is satisfied that the worker committed the acts in question. ... It follows that an employee can be dismissed for "just cause" on the basis of the employer suspecting that he or she acted dishonestly, provided the facts existing at the date of the dismissal confirm, on the balance of probabilities, that the employee probably committed the wrongful acts, even though the employee is subsequently shown in a criminal trial not to have done so. ... There must be evidence, on the balance of probabilities, that at the date of the dismissal the employee actually committed the wrongdoing in order to confirm the employer's suspicions. In other words, the employer's suspicions cannot be merely speculative or otherwise unsubstantiated by evidence. ... The critical point is that if an employer "suspects"--in the layperson's commonly understood sense of that word--that an employee has committed theft or fraud, and the facts at the date of dismissal confirm that the employee likely did the acts in question on the evidentiary balance of probabilities, summary dismissal will be ruled for "just cause". ..."

(See also *Helton Industries Ltd. (c.o.b. Westgate Door Industries--A Division of Helton Industries Ltd.)*, BCEST #D269/99). In my view, there must be clear and cogent evidence that on the balance of probabilities establishes the conduct.

The Employer relied, as well, on three separate incidents, or classes of incidents, to show dishonest conduct. Mr. Vanderheyden took a calendar (on which he recorded his hours) from the Employer and copied it. He did this without authorization. The Employer accused Mr. Vanderheyden of having stolen this calendar. He also stole a pornographic magazine left in a rental vehicle. Mr. Vanderheyden discussed "pawning" a video camera left in a rental vehicle. None of these matters were raised by the Employer as "reasons" for the termination in the January 12, 2002, letter. In my view, this speaks volumes.

The Employer says that Mr. Vanderheyden took a calendar from the office. From the Determination it is not in dispute, that he took the calendar and photocopied it. Ms. Nedd testified that there was no photocopier at the work location and the fax machine, apparently, could not copy the calendar because of its size or bulk. I gather that Mr. Vanderheyden removed the calendar from his work location on a monthly basis to copy the information contained in it. The calendar was used to record his hours of work. Other counter managers also recorded their hours on calendars. According to the Determination, Mr. Vanderheyden left the calendar with the Employer. He used the copy in his complaint and it was disclosed to Quality Auto. The Employer says that he did not have the authority to remove the calendar. He should, as I understand it, have kept his own records on paper or a diary etc. Perhaps, but there is nothing that requires me to park my common sense at the door to the hearing room.

In the appeal, the Employer says that the calendar "was missing." There was no direct evidence under oath or affirmation on that point. However, even if it is true that the calendar was "missing," that does not establish that Mr. Vanderheyden "stole" it as boldly alleged. This is pure speculation and conjecture. I note again that Mr. Frew had the opportunity to testify to these matters but did not do so. An adverse inference may be draw from that. The evidence does not establish theft. In my view, the Employer's argument also has no merit and does not, in any way, establish that Mr. Vanderheyden was dishonest.

As an aside, I find it somewhat ironic--and contradictory--that the Employer in trying to persuade me that Mr. Vanderheyden is a manager in an "executive capacity," and yet did not have the authority to take a calendar and copy it in a next door stationary store.

The issue of the calendar and the alleged theft of a "pornographic" magazine were raised after the Employee had filed his complaint under the *Act* (letter from Quality Auto, dated April 18, 2002). The letter accuses Mr. Vanderheyden of

> "blatant, illegal theft committed by you. An investigation to determine if there is other missing property is currently underway."

Mr. Vanderheyden was as well alleged to have removed a "pornographic" magazine from the work place. Apparently, the magazine had been left in a rental vehicle. Mr. Mark Frew testified that Mr. Vanderheyden told him he "took it home" and wanted to "add it to his collection."

I would agree with the Appellant that an employee may not take its--or, indeed, its customers'--property for his or her use without permission. That property belongs to the employer or the customer. Avis has a policy for dealing with such property. Theft is a serious matter and may, in the appropriate circumstances, be cause for termination.

In any event, while this matters was brought up by the Employer in its response to the complaint to the Branch (April 18, 2002), from the Employer's own statement in that letter it is clear that this was not a recent event and that Mr. Frew had known about it for a long time. The letter states:

> "You also admitted to myself *last summer* to be in possession of property (specifically a magazine) taken from a returned rental car...." (Emphasis added)

In my view, the circumstances here do not justify termination.

On the evidence, I am not convinced that theft occurred. I do not accept the Employer's characterization. There was little evidence of the surrounding circumstances, and what little there was, points, in my

opinion, not to "dishonest" conduct. Mr. Vanderheyden was, on the evidence, seen leaving with the "pornographic" magazine. It does not appear, on the evidence, that he was trying to hide it or was otherwise circumspect about it. In fact, Mr. Mark Frew said Mr. Vanderheyden told him he was adding it to his collection. In cross examination, Mr. Mark Frew admitted he had "no idea" if the magazine was left behind because the customer did not want it. In any event, if this was theft, as is now asserted, why did the Employer--and it is clear that both Mr. Frew and his son knew about it the time, *i.e.*, "last summer"--not take action then. In my view, this indicates that the Employer did not consider this to be theft at the time.

Moreover, even if Mr. Vanderheyden's conduct did, indeed, constitute theft--and I expressly reject that, the undisputed fact the Employer knew about it since the summer of 2001, and did not take any action, constitutes condonation. In *Just Cause: The Law of Summary Dismissal in Canada* (Aurora: Toronto, Vancouver, 2001), Echlin and Certosimo note (at p. 7-11):

> "An employer, who knowingly elects to continue the employ of someone who has, in effect, repudiated the employment contract, cannot later summarily dismiss that employee for the same misconduct."

In my view, this incident cannot now be resurrected as a ground for termination.

There is no evidence that Mr. Vanderheyden "stole" a video camera, although this is implied. Mr. Frew put the question to his son, Mr. Mark Frew, if Mr. Vanderheyden (at some point in time) had "joked" about "pawning" a video camera, apparently, left behind in a rental vehicle, and splitting the difference. There was no evidence of when this might--and I use the word "might" advisedly--have occurred. While such a "joke," and I am using the Employer's characterization, is in poor taste, it is not evidence of theft or dishonesty.

The Employer also sought to add to its case for just cause with an allegation that Mr. Vandeheyden released a vehicle to a person other than the person who supposedly rented it. The Delegate found that the Employer did not "provide any documentation or support for its allegation that the Complainant rented a vehicle ... in breach of an Avis policy." The incident was raised by the Employer in a letter to Mr. Vanderheyden dated August 15, 2002, shortly before the Determination was issued, but after the April 30, 2002 date for providing additional information and documentation (the Delegate letter dated April 12, 2002 setting out her preliminary findings and conclusions).

I understand from the parties that this incident is subject of an action in the Supreme Court of British Columbia, though, as far as I understand, not against Mr. Vanderheyden. Rather it is an action involving the Employer, Avis and the insurer of the rental vehicle. The particulars of the various litigation involving were not entirely clear to me, though I understand that the Employer has brought an action against Mr. Vanderheyden in the Provincial Court of British Columbia for "breach of duty and/or breach of trust."

I do not agree with the Delegate that there was "no support" for the allegations. The Employer's letter certainly provides some factual allegations. The Employer explains that the documentation--copies of rental agreements--were not available to it from Avis until August or September. In the circumstances, I accept that. Some of the documentation, Avis' rental policy, I think likely would have been available to the Employer prior to April 30, 2002. The circumstances of this incident were somewhat murky. In light of the burden on appeal, the responsibility rests with the Employer to satisfy me that the Delegate erred in

her conclusions. I am not persuaded, on my view of the evidence, that the Delegate's conclusions were wrong.

As I understand it, from the letter from Quality Auto, dated August 15, 2002, a vehicle was rented to a Mr. Scott Warner on December 5, 2001 by Mr. Vanderheyden. On December 6, this vehicle was exchanged for another vehicle. The vehicle was released to an "unauthorized driver" for a $90.00 cash prepayment. On December 14, the vehicle was again exchanged for another vehicle without consideration. The vehicle was subsequently damaged and had to be written off. I gather from Mr. Frew's submissions at the hearing that the vehicle ended up in a ditch and the police attended the accident scene. The vehicle was found in the possession of a person other than Mr. Warner, who, according to Mr. Frew's submissions cannot now be found. The Employer argues that the vehicle was rented and exchanged contrary to Avis policy.

Mr. Frew relies heavily on the rental agreements. He says they prove that the vehicle was exchanged by a person other than the person who rented it, namely Mr. Warner. He says that the signatures on the rental agreements are different. While it would have been preferable to have heard Mr. Vanderheyden's testimony on this, he is not required to testify. The signatures, on the photocopies available to me at the hearing, at least superficially, appear different. Without further evidence, that is, in my view, all that is proven by these documents. To suggest, as does the Employer, that the rental agreements are evidence that Mr. Vanderheyden released the vehicle to a different person than Mr. Warner is a stretch. Mr. Frew submitted that he was not present when the vehicle was rented or exchanged. He submits that the police told him the vehicle was in the possession of an unauthorized driver, not Mr. Warner.

The Employer quoted and took issue with a statement in a submission, October 4, 2002, by Mr. Vanderheyden:

> "...The "unauthorized driver" was in each case the same individual by the name Dave, who was well known to Bob and Mark Frew as he regularly (on average once per week) rented vehicles from them. Bob Frew was present, and acknowledged Dave, at the time the Chevrolet Impala replaced the PT Cruiser...."

In my view, this quote provides some support for the Employer's contention that the vehicle was, in fact, released to an "unauthorized" person, contrary to Avis' policy and procedure.

All the same, as I have indicated above, the circumstances of this incident are, on the evidence, not entirely clear to me. Mr. Frew did not testify under oath or affirmation. Mr. Mark Frew explained that he was not there when the vehicles were rented or exchanged. He testified that proper procedure was that a vehicle could be exchanged by the original driver (on the rental agreement) or someone listed as an "additional" driver. It is clear from the written appeal submissions that Mr. Frew denies knowledge of this "Dave." Mr. Mark Frew denied in his direct examination that he knew "Dave." In cross examination, however, he was asked if he knew "Dave" and acknowledged that he had "spoken to him" and rented to his common law wife." He agreed with the proposition that "there is a Dave." The role of this "Dave" was not explained to me. In view of the evidence before me, I conclude that the Employer has not met the burden on appeal with respect to this incident.

In any event, even if I accepted the Employer's characterization, the underlying facts, *i.e.*, the rental and exchange, were known to it prior to the dismissal on January 12, 2002. This incident was not part of the "reasons" expressly set out by the Employer in the dismissal letter and I do not accept that this incident provides cause for dismissal.

In the result, and for all of the above reasons, I uphold the Determination with respect to the termination of Mr. Vanderheyden and he is, therefore, entitled to compensation for length of service. I add that the Employers charges of dishonesty and theft are, in my respectful opinion, based on suspicion, speculation, conjecture and little evidence.

2. Management Status

Turning to the more complex issue whether Mr. Vanderheyden was a manager, Section 1(1) of the *Regulation* under 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.

This is the definition relevant to this decision. The *Regulation* has now been amended (*effective* November 30, 2002), changing the definition of "manager." After the hearing had been concluded, the Employer filed a submission--actually a fax cover sheet with excerpts from the "fact sheets" published by the Employment Standards Branch. One of the examples of a "manager" set out in the fact sheet is a "counter manager" for an auto leasing company. While I appreciate the Employer's point, I am of the view that ought not to consider this last submission. First of all, it was provided after the hearing had concluded. Second, and, perhaps, most importantly, this is not the definition that was in force and effect when the Determination was issued. The definition of "manager" is a matter of substantive law, as opposed to procedural law, and does not change retroactively.

I approach the definition of "manager" with the following principles in mind. It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and an interpretation which extends that protection is to be preferred over one which does not (see: *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides (in part):

> 2. The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

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 a leading case, *Amelia Street Bistro*, BCEST #D479/97, reconsideration of BCEST #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."

At the hearing, there was an issue regarding Mr. Vanderheyden's proper title. Mr. Vanderheyden had invited the Employer to bring business cards. It appears that he had a business card indicating that he was a "rental sales agent." The Employer produced a number of cards at the hearing. As I understood it, the point of this was that the original card for persons in Mr. Vanderheyden's position was "manager" but that cards had been printed--erroneously, I gather, by Avis--indicating "rental sales agent." Perhaps, as suggested by the Employer, a mistake was made. Mr. Haan quickly pointed to the Record of Employment (ROE), issued by the Employer and signed by Mr. Frew, indicated that Mr. Vanderheyden's employment was as a "rental sales agent." I note, as well, that Ms. Nedd agreed in cross examination with the characterization that she was a "rental sales agent." In any event, as noted by the panel in the *Amelia Street* case, the label attached to the relationship by the parties, *i.e.*, title, is not important. What is important is the *substance* of the relationship, not the label given to it by the parties.

In this case there is little evidence to support that Mr. Vanderheyden's "primary employment duties" consisted of supervising other employees. Quite the contrary. On the evidence, the "counter managers," as the Employer call them, have limited supervisory responsibilities: they work mostly alone at their location and they can (and do) call in part-time employees occasionally to help out if they are busy. Clearly, Mr. Vanderheyden does not fall within Section 1(a) of the *Regulation*.

The Employer argues that Mr. Vanderheyden was employed in an executive capacity. This term is not specifically defined in the Regulation. I, therefore, start out by referring to comments in an earlier decision of the Tribunal (*Re O'Hara*, BCEST #D128/98):

> "¶ 22 The legislation makes a distinction between a person who is engaged in the supervision and direction of employees and a person employed in an "executive capacity". Either may be a manager and, as such, excluded from the overtime provisions in the legislation. In my view, it follows that the latter need not supervise and direct employees. I agree with my colleagues in Amelia Street Bistro, above, that the remedial nature of the Act and the purposes of the Act are proper considerations. As stated by the panel in Amelia Street, the degree to which power and authority typical is present and exercised by an employee are necessary considerations to reaching a conclusion about the "total characterization" of the primary employment duties of the employee. 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 consistently asked its witnesses to confirm that they exercised "key decision making authority" in the company. They obliged, not surprisingly, by answering in the affirmative. That term is not self-explanatory.

The Employer also sought to make the point that all counter managers had similar powers and responsibilities. While I accept that, perhaps, Ms. Nedd and Ms. Goyn were similar to Mr. Vanderheyden, in my view, Mr. Mark Frew, who also had the titled counter manager, had more of a "management role" in the company. He was paid a salary and he carried out inspections of locations other than the one where he worked. Given the fact that he is the "owner's" son, that is hardly surprising.

The evidence, even discounting for the somewhat different ways of explaining the duties and responsibilities among the counter managers who testified, indicated that counter managers did "everything" at their location: answering telephones, renting vehicles, selling optional insurance (on a commission basis), washing and cleaning vehicles, and cleaning the office (including garbage and vacuuming).

It is clear from the evidence that there was an element of supervision of the occasional part-time employee in the counter manager's position. Ms. Nedd had called in part-time employees just twice.

I also accept that there was an element of involvement in training fellow employees, new counter managers. The Employer conceded that this did not happen during Mr. Vanderheyden's tenure, *i.e.*, he was actually not called upon to train others. However, counter managers were involved in training. For the most part, this involved providing advice over the telephone. On the evidence, I am not persuaded that this was a major component of the work.

I also accept Mr. Barron's testimony that one of the important duties is to safeguard company assets, the company vehicles, and that rental agents (Avis' term) or counter managers (Quality Auto) can cause loss to Avis or the Employer if they do not carry out their duties improperly. Mr. Barron candidly

acknowledged in cross examination that he had limited first hand knowledge of Mr. Vanderheyden and his responsibilities.

All the same, perhaps, the strongest point in the Employer's case is that the counter managers work for the most part alone at one of the Employer's three locations. I agree that one of their functions is to safeguard company assets, namely rental vehicles. The incident with Mr. Warner, mentioned above, perhaps, provide an indication of what can happen when policy is not followed. Mr. Mark Frew testified that he had "key decision making authority" because there was "no-one around" and he "would have to make decisions." I accept Ms. Nedd's testimony that the position of counter manager entails some room for decision making and exercise of discretion or judgement, for example, whether a customer is qualified. I my opinion, however, that discretion is limited by Avis' (and the Employer's) policies and procedures. Counter managers frequently sought advice and guidance, for example, from Mr. Mark Frew, the senior counter manager. I do not think it can be reasonably argued that the Delegate erred when she concluded that Mr. Vanderheyden exercised "limited" discretion. In my view, she was correct in her assessment.

In conclusion, I do not accept that Mr. Vanderheyden was a manager as defined in the *Regulation*. In reaching this conclusion, I am mindful of the remedial purposes of the *Act*. In the result, I am not persuaded that the delegate erred.

As he is not a manager he is not excluded from the overtime and statutory holiday provisions of the *Act*.

The argument that the Employer is entitled to include uniform cleaning cost in the hourly rate is without merit.

ORDER

I order that the Determinations dated August 22, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal