

BC EST #D105/96

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C.38

- by -

Brotten Management Group Inc.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Jerry W. Brown

FILE No.: 96/111

DATE OF DECISION: June 3, 1996

DECISION

OVERVIEW

This is an appeal brought by Lorne Broten on behalf of Broten Management Group Inc., Canadian Water Superstore Inc., Sun Water Systems (B.C.) Ltd., Water Mart Holding Inc., Royce Everest Enterprises Inc., Cappy Holding Inc. (the "Broten Companies") pursuant to Section 112 of the *Employment Standards Act* (the "Act"), from Determination No. CDET 000875 issued by the Director of Employment Standards (the "Director") on January 24, 1996. The Director determined that the Broten Companies, the employer, had contravened the Act as set out in the claim filed by Warren Florness ("Florness"). Florness claimed that the Broten Companies owed him overtime pay for work which he performed during for the period March 1, 1995 to June 30, 1995.

FACTS

Florness began working for the Broten Companies on or about September 1, 1994. Florness was terminated on August 22, 1995. The Broten Companies, at this time, were developing new markets, products and enterprises. On an April 24, 1995 Broten Companies' flow chart Florness was listed as a sales staff member. On a May 29, 1995 chart prepared by the Broten Companies, Florness was still listed as sales staff.

The Broten Companies issued a memo dated March 29, 1995 indicating that all staff were expected to work whatever hours necessary to ensure the opening of the Canadian Water Superstore. A memo dated May 2, 1995 also indicated that overtime was expected for other reasons. A further memo dated February 10, 1995 indicated that there was concern about unnecessary meetings and wasted time. An memo dated April 18, 1995 deals with time sheets and the requirement to submit them.

On August 11, 1995 the Broten Companies issued a memo saying they were going to make staff reductions. On August 10, 1995 Florness received notice that he was being terminated effective August 25, 1995. During the period in question the Broten Companies did not pay overtime to Florness.

Florness filed a complaint on September 26, 1995 alleging that he was owed overtime by the Broten Companies. The Broten Companies did not dispute the overtime calculations of the Director's delegate as set out in the materials for the period in question.

There was a job description prepared by the Broten Companies on June 13, 1995 indicating that Florness was a sales representative. It clearly set out his duties and in no place did it indicate Florness was a supervisor, managed staff or that he was employed in an executive capacity.

The Act states:

Section 35: Maximum hours of work

35. An employer must pay overtime wages in accordance with section 40 if the employer requires or, directly or indirectly, allows an employee to work
- (a) over 8 hours a day or 40 hours a week, or
 - (b) if the employee is on a flexible work schedule adopted under section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.

ISSUE(S) TO BE DECIDED

1. Was Florness employed in a management or executive capacity?
2. If not, was he owed overtime as calculated by the Director's delegate?

ANALYSIS

The two flow charts, which were not disputed by the Broten Companies clearly indicate that Florness was a sales staff member. They also indicate that no one reported to Florness, but rather in fact Florness was on the bottom of the ladder and at any particular point in time reported to more than one person. This was confirmed by Terry Mosdell, who according to memos and the flow charts was hired as the general manager for the Broten Companies for part of the period of Florness' employment. In his letter Mosdell clearly states that Florness was a sales staff member and at no time was a member of the management team or employed in an executive capacity. The

Brotten Companies did not attempt to refute this other than by making a general denial indicating that Florness was management and in an executive capacity.

Additionally, according to the Director's delegate, two names were given by the Brotten Companies for the Director to contact about Florness' employment. They were Geoff Brown, a senior executive for the Brotten Companies and Lorne Brotten, the C.E.O. According to the Director's delegate, Lorne Brotten never returned calls or messages left on his answering machine. Geoff Brown did and his explanation, according to the Director's delegate, confirmed Florness' story. Keith Ridd and Terry Mosdell also supported Florness' account and confirmed that Florness was not a manager or person employed in an executive capacity.

It is quite clear that based on the information provided by both Florness and the Brotten Companies that Florness was not a manager nor was he employed in an executive capacity. In fact, in Lorne Brotten's response to the Director's delegate he says "Management at the Waterstore advised me Mr. Florness used to sit about and visit after hours". This also indicates he understood that Mr. Florness was not management.

With respect to issue no. 2, the overtime calculation, there is an onus on the employer to keep and maintain accurate record of hours worked for each employee. The Brotten Companies had ample opportunity to respond to a request made by the Director's delegate to provide more information to show that overtime was not owed based on their records.. Based on the Director's delegate's submission and the fact that there was no evidence refuting this calculation, I see no reason to alter the Director's delegate's decision as to the amount owed.

ORDER

In summary, I order under Section 115 of the Act, that Determination No. CDET 000875 be confirmed.

JERRY W. BROWN
Adjudicator
Employment Standards Tribunal

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