



An appeal

- by -

Continental Auto Sales Ltd.
("Continental")

- 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: David B. Stevenson

FILE No.: 2000/756

DATE OF HEARING: February 9, 2001

DATE OF DECISION: March 7, 2001

DECISION

APPEARANCES:

on behalf of Continental Auto Sales Ltd.	Kathryn Taylor Sandy Taylor
on behalf of the individual	On his own behalf
on behalf of the Director	Hans Suhr Jennifer Longdo

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Continental Auto Sales Ltd. (“Continental”) of a Determination that was issued on October 11, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Continental had contravened Part 3, Sections 18 and 28 and Part 4, Section 40 of the *Act* in respect of the employment of Dennis Chapman (“Chapman”) and ordered Continental to cease contravening and to comply with the *Act* and to pay an amount of \$7,359.44.

Continental says the Determination is wrong in two respects, first, in its conclusion that Chapman was not a “Manager” as that term is defined in the *Employment Standards Regulation* (the “Regulation”), and, even accepting Chapman was not a “manager” under the *Act*, Continental says the calculation of the number of hours that Chapman had worked is wrong.

ISSUE

The issues are whether Chapman should be considered to be a manager for the purposes of the *Act* and, if he is not, whether Continental has shown there is an error in the calculation of the number of hours worked by Chapman. Continental also alleges the Director made several errors of fact because she failed to contact a number of potential witnesses. Whatever concern may have arisen from this allegation has been alleviated through the hearing process, as all of the persons named as potential witnesses appeared at the hearing and provided their evidence.

THE FACTS

The Determination provided the following background information;

Continental Auto Sales Ltd. (the “Employer”) is a used auto sales business, which is under the jurisdiction of the Act. Chapman worked from March 19, [1999] to April 20, 2000 as a salesman earning a monthly salary of \$3280.00.

Continental says that conclusion does not completely capture the financial arrangement between Continental and Chapman. They say the financial arrangement also included an agreement that Chapman would receive an annual bonus of 5 percent of the net profits of the business. They say this bonus never became payable as there was no profit in the business during the period Chapman was employed. Continental points to a letter, dated September 16, 1999 which was prepared at the request of Chapman for his bank, that outlines the arrangement as they described it. Chapman saw the letter. In response, Chapman does not dispute there was a “bonus” component to his arrangement with Continental, but says the bonus was payable on the net profit from the sale of vehicles. To the extent the financial arrangement between Continental and Chapman becomes relevant to the decision I must make, I prefer the evidence of Continental on this point.

The claim made by Chapman was that he was not paid overtime wages during his term of employment. Continental had not kept any records of the daily hours worked by Chapman. They were, in this respect, in breach of Section 28 of the *Act*. Continental took the position from the outset that Chapman was a manager under the *Act*, as that term is defined in the *Regulation*, and was not entitled to overtime wages.

In the Determination, the Director, correctly in my view, identified the elements of the definition of “manager” for the purposes of the *Act*:

This definition means that a person is only a manager if their primary duties are hiring or firing employees, disciplining or evaluating staff, regularly and frequently scheduling work and overtime, and directing the work of employees. It is understandable that not [sic] the duties of a manager may be expanded beyond those stated above, but it must be demonstrated that they are the employee’s **primary** duties.

A person, who does not solely supervise and direct, the work of an employee may also fall within the definition of “manager” if they are acting in an Executive Capacity. This would include someone who exercises substantial authority in decisions that affect the business and/or other duties that involve active participation in the control, supervision and administration of the business.

The Director did not find the facts established during the investigation or the material provided by Continental during the investigation justified a conclusion that Chapman was a manager for the purposes of the *Act*. In the appeal, Continental provided a substantial amount of additional material that they said showed he was a manager. The Director objected. I chose to allow the additional material. Even though the material itself had not been provided to the Director, most

of it did no more than support the assertion made by Continental that Chapman had complete authority and control over the business.

The evidence indicated that Chapman had a significant amount of authority in the business of Continental. Continental was owned by Sandy and Kathryn Taylor. Neither had much experience running a used auto sales business and they required a person with considerable experience in auto sales to run Continental. Chapman seemed to fit the bill. His resume showed ten years experience in the auto business as salesperson and sales manager. In his resume, it states:

With my work experience I have experience in all facets of Auto business, sales, sales manager, new & used, fleet and lease manager. Appraisals of all automobiles and wholesaling.

Mr. and Mrs. Taylor also owned Prince George Auto Wrecking Ltd. and most of their time and energy was spent in the day to day operation of that business. They relied heavily on Chapman's experience, effectively leaving Chapman to run Continental on a day to day basis.

Chapman made decisions relating to the operation of the business. He incurred expenses on behalf of the business. Many of these expenses were of an administrative nature, including: advertising; business cards; authorizing gas purchases for test drives; vehicle searches; office supplies and expenses; insuring vehicles on the lot; and vehicle repairs and/or detailing. He also assisted customers secure financing and/or insurance for the purpose of facilitating a vehicle purchase and communicated with financial institutions and/or insurers for that purpose. He had effective input on several business decisions: to extend the hours of operation of the business and hire Robert Haydock; and whether to take a "loss" on the sale of a vehicle. In some cases he made decisions relating to the operation of the business without any discussion with Mr. or Mrs. Taylor: to terminate Julie Knight and to establish a "warranty insurance plan". It was Chapman's responsibility to set the selling prices on vehicles and to decide the "trade-in" value of a vehicle, although I also accept that this responsibility was carried out within guidelines that were not established by Chapman. There were few employees of Continental. Besides Mr. Haydock, Continental employed Julie Knight, Dave Rutherford and Debbie Graham and none of these employees worked for any length of time. Chapman did not hire any of the employees, but he was solely responsible for assigning and scheduling their work, including deciding whether and when the employees were required to work.

The payment of all salaries and payable accounts for Continental were done by Sandy Turner, a bookkeeper employed by Prince George Auto Wrecking Ltd. No account, except some of the normal monthly accounts, was paid unless it was approved for payment by Chapman. Any questions concerning the accounts were directed to Chapman. Employee time sheets were also required to be approved by Chapman.

Crystal Taylor is the daughter of Mr. and Mrs. Taylor. For a period of time following Chapman's departure from his employment at Continental, she ran the business. For

approximately two weeks before his departure, Ms. Taylor worked with Chapman to learn the administrative aspects of operating the business. She testified that on his last day of work, Chapman left at noon and did not return.

Chapman could, and did, take time off without seeking approval from Mr. or Mrs. Taylor. Chapman used Crystal Taylor and Mr. Haydock to relieve him on those occasions, using Mr. Haydock even after Mr. Haydock had been let go. Mr. and Mrs. Taylor knew of this arrangement and told Chapman only that it was his responsibility to pay Mr. Haydock, they were not going to re-employ him.

Chapman set and controlled his own hours of work, which, he said, except for the period Mr. Haydock was employed, corresponded with the hours of operation of the business. The Determination notes that Chapman “kept records on a daily basis and submitted them with his complaint.” These records took the form of two calendars, one for the year 1999 and the other for the year 2000, and were provided at the hearing. In his evidence, Chapman said he filled the calendars out on a weekly basis in his home. In the Determination, the Director indicated that she had “. . . reviewed the records submitted by Chapman and . . . decided to accept those records as an accurate reflection of the hours of work performed.” The Determination also notes that Mr. Haydock had been interviewed concerning Chapman’s hours and he:

. . . confirmed that Chapman’s hours during his employment were around 8am - 5pm during the time he worked there.

Mr. Taylor testified that the business was closed on statutory holidays. In his calendar, Chapman indicated he had worked from 9:00 am to 5:00 pm on Remembrance Day, November 11, 1999. In the same month, he indicated he was off work on November 25, 1999. The calendar used by Chapman showed both American and Canadian statutory holidays. The two days in November, the 11th and the 25th, are identified as “Veterans Day” and “Thanksgiving”, respectively. In cross-examination, Chapman was adamant that the business was open November 11, 1999 and he had worked that day as shown in his calendar. I do not believe him. I am persuaded to this conclusion by an examination of the telephone records for the month of November, 1999, which show no long distance telephone calls were made from the business on November 11 (as compared to seven long distance calls and one fax transmission made from the business on November 10 and twelve long distance calls and two fax transmissions on November 12). As well, there were three long distance calls and a fax transmission made from the business on November 25, including one to a number personally associated with Chapman in Whistler, B.C. I conclude that Chapman simply made a mistake when he was creating his record of hours worked and showed the statutory day off in November as the American Thanksgiving holiday instead of the Remembrance Day statutory holiday.

Mr. Haydock was employed for a period commencing April 10, 1999 and ending July 31, 1999. Except for the month of April, 1999, no daily record of hours worked by Mr. Haydock was kept. This was Chapman’s decision. The daily record of hours for April, 1999 was kept by Chapman.

Mr. Haydock was hired to cover extended hours of operation, until 8:00 pm from Monday to Saturday and 10:00 am to 5:00 pm Sunday, which commenced on or about the date he was hired. The daily record shows he typically worked from 3:00 pm to 8:00 pm. In one respect, the daily record of hours that was kept by Chapman for Mr. Haydock is inconsistent with the record of hours worked submitted by Chapman to the Director. On April 16, 1999 the record shows no hours worked. An “X” is marked through that day and the notation “Funeral” appears. Chapman’s record of hours worked shows he worked from 8:00 am to 4:00 pm, begging the question, who worked until 8:00 pm? The daily record indicates Mr. Haydock worked from 11:00 am to 4:00 pm on Sunday April 18, 1999 and from 3:00 pm to 8:00 pm on Sunday, April 25, 1999. These hours are inconsistent with Chapman’s evidence that the business was open on Sundays from 10:00 am to 5:00 pm.

ARGUMENT AND ANALYSIS

The definition of manager in the *Regulations* reads:

“manager” means

- (a) *a person whose primary duties consist of supervising and directing other employees, or*
- (b) *a person employed in an executive capacity.*

Continental did not argue that Chapman was a person described in paragraph (a), but rather was “employed in an executive capacity”. Continental says that Chapman was hired to run the used auto sales business and that he did so, making key decisions relating to the conduct of that business. Continental points to Chapman’s almost exclusive control over the administrative matters affecting the business and expenses incurred by the business as further support for its argument. Continental says the financial arrangement, which included a bonus based on the net profits Chapman had indicated he would generate for the business, also supports their argument.

Chapman argues that he was simply hired as a salesperson, that he had no supervisory duties and did not function in an executive capacity in the business. Otherwise, he relies on the conclusions reached in the Determination. The Director argues that the facts continue to support a conclusion that Chapman was not a manager as that term is defined in the *Regulation*. The Director reiterates that for a person to be considered to be employed in an executive capacity for the purposes of the definition of manager, that person must exercise substantial authority in respect of decisions that affect the business or otherwise perform duties that involve active participation in the control, supervision and administration of the business. As I indicated above, I agree with the Director’s statement as a matter of principle. The Director noted that the evidence presented at the hearing would have to be considered and that questions of credibility respecting the evidence, on which the Director took no position, might have to be addressed.

In *Re Sunshine Coast Publishers Inc.*, BC EST #D244/96, the Tribunal considered the concept of “executive capacity” in the context of the editor of a community newspaper and indicated that the term included a person with substantial administrative or managerial power relating to the control, supervision and management of a business. In *Re Northland Properties Ltd.*, BC EST #D004/98, the Tribunal commented on this decision:

In *Sunshine Coast Publishers Inc.*, BC EST #D244/96, the tribunal adopted an approach to the second branch of the definition that recognizes the reality that many senior executives, persons charged with the authority and discretion to make key decisions and independent judgements affecting the conduct of the business, often have few, if any, duties relating to supervising or directing other employees.

In *Benny’s Bagels Ltd.*, BC EST #D387/98, the Tribunal stated:

In order to be employed in an executive capacity, the person must have “duties in such capacity that 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.

As noted in *Director of Employment Standards (Re Amelia Street Bistro)*, BC EST #D479/97, a consideration of whether an employee is or is not included in the definition of “manager” is predominantly a fact-finding exercise that will depend upon a total characterization of that person’s duties, authority, autonomy and discretion relative to the business.

With respect, I must disagree with the conclusion of the Director in this case. I conclude that Chapman is a manager for the purposes of the *Act*. There is no doubt in my mind that Chapman was hired to, and did, run, or manage, the business of Continental. He had sufficient autonomy and authority to make substantially all of the decisions affecting the operation of that business. On those decisions which also involved participation by Mr. and Mrs. Taylor, he had effective recommendation on operational decisions. Mr. and Mrs. Taylor deferred to his experience. He had sufficient control of the business to terminate Julie Knight and to implement a used car warranty program without consulting or notifying Mr. or Mrs. Taylor. He had supervision over the employees of the business, deciding when and if they would work. He decided whether and where cars would be sent for repair or detailing and how much money was put into repairing, detailing and “marketing” the vehicles. He set the selling prices of the used vehicles and set the value for trade-in vehicles. Even acknowledging he was guided in this by what was an acceptable profit margin, the profit margin was within a range and he had authority to approve any sale within the profit margin, whether it was at the top or the bottom of the range. His approval was necessary on any sales made by Mr. Haydock. In effect, he had complete control and discretion over the “profit” realized on the sale of any vehicle. He also participated in decisions about whether a vehicle would be sold at a loss. He set his own hours and decided

whether and when he would take time off. He had authority to arrange how his time off would be covered. The appeal is successful on the first ground of appeal.

Even if I am wrong in my conclusion that Chapman was a manager for the purposes of the *Act*, the evidence also supports the alternative ground of appeal. If it was necessary, I would conclude that the calculation of the amount owing made by the Director, and based on the information provided by Chapman, has been shown to be wrong and should be revisited by the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 26, 2000 be cancelled.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal