

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Michael Patrick Allard

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO: 97/204

DATE OF HEARING: June 30, 1997

DATE OF DECISION: June 14, 1997

DECISION

APPEARANCES:

Michael Patrick Allard	for himself
Jackie Korscil	Advocate for Michael Patrick Allard
Ken Fenton	for Silver Knight Heating Ltd.

OVERVIEW

This is an appeal by Michael Patrick Allard (“Allard”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination (File No. 081474) dated March 07, 1997 by the Director of Employment Standards (the “Director”).

The Determination found that Allard was a “manager” as defined in the *Employment Standards regulations* (“ESR”) and therefore exempted from the provisions of Part 4 of the Act. Allard appeals on the grounds that the Director's Delegate did not really listen to his side of the story and that he was not in a management role as defined by the Act.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether Allard worked as a “manager” as defined by the ESR or whether he was an employee and entitled to overtime pursuant to Part 4 of the Act.

FACTS

Ken Fenton (Fenton), the President of Silver Knight Heating Ltd. (“Silver Knight”), had known Allard in Ontario where they had both worked in the gas fitting business. Allard had worked under Fenton in Ontario. Fenton moved to British Columbia and set up the business known as Silver Knight Heating Ltd. which is involved in gas and other heating installations and related projects.

Fenton contacted Allard in Ontario and asked him if he was interested in moving to B.C. and coming to work for him. Fenton needed a foreman and offered Allard \$18.00 per hour. Allard negotiated that he could bring one of his helpers with him and this was approved. Fenton also arranged for interim housing for Allard upon his arrival in B.C.

The evidence of the two parties distinctly differs as to the role played by Allard in the business. Allard maintains he was simply an employee like any other and had no special supervisory duties whereas Fenton alleges that he hired Allard as a foreman and that Allard fulfilled that role.

Having heard the evidence of both parties and reviewed the documentation provided I find the following facts for the purpose of this decision.

Fenton was the owner of the business whose prime responsibility was to bring in the work for the company. He would see the customers, estimate the jobs and quote out the contracts. Although he is a qualified gas fitter Fenton rarely involved himself at the actual job sight. Allard would meet with Fenton at the company office either the night before or each morning to set-up the scheduling of jobs for the day.

Once out of the office Allard was in charge of any other employees who worked on the job sight. This included other fitters, assistants, and an apprentice. He admitted on cross examination that he directed and supervised these employees. He had the authority and did decide the hours of work on a daily basis. This, on many occasions, involved keeping employees working overtime at the beginning of the week so that they could finish early on a Friday. This incurred costs for the business because overtime is paid at a premium and he was not required and never did seek approval to work such a schedule. Allard now claims compensation at overtime premium rates for these artificially and self-created overtime hours.

Allard was in charge of checking employee's time cards and on at least one occasion altered a time card and has signed them as "Foreman". Allard could indirectly fire an employee simply by asking Fenton to do so. He was known on the job site as the foreman and at times reprimanded other employees. He had authority to approve or disapprove of pay increases for other employees. He had the use of the company credit card. He altered the company working hours to commence at 7:30 am instead of 8:00 am. He had the authority to complete an account and to collect from the customer. When Fenton did attend on a job site he would defer to the authority of Allard and take instruction from him.

An evidentiary/disclosure issue was brought to my attention subsequent to the hearing by letter received on July 02, 1997. Allard claimed in this letter that he had not been given prior notice or disclosure of certain documents which were presented at the hearing by Fenton on behalf of Silver Knight. These documents consisted of two time cards signed by Allard and two customer bills prepared and signed by Allard. Allard is correct that these documents were not disclosed prior to the hearing. However, at the hearing I specifically asked his advocate whether there was any objection taken to these documents and was told that they were not objected to. The documents were relevant in showing the role played by Allard in the business and, of course as these documents were in Allard's handwriting or contained his signature, he would have had prior knowledge of them. It is not open to the appellant to take exception to the admissibility of these documents after the fact.

ANALYSIS

On an appeal the appellant has the onus of satisfying the Tribunal that the Determination is in error. When I review all of the management duties performed by Allard I find there is no basis to disagree with the Determination. Section 34 (1) of the *Employment Standards Regulations* provides that Part 4 of the *Act* does not apply to a manager. Manager is defined as a person whose primary employment duties consist of supervising and directing other employees and this was clearly Allard's primary responsibility. He also worked alongside the other employees but the Director's delegate determined, and I agree on the evidence before me, that Allard's primary responsibility was to supervise and direct the others whoever they were from time to time.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

A handwritten signature in black ink, appearing to read 'J. Orr', with a long, sweeping horizontal stroke extending to the right.

**JOHN M. ORR
ADJUDICATOR
EMPLOYMENT STANDARDS TRIBUNAL**