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 -

John O'Hara
("O'Hara" or the "Employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	97/939
HEARING DATE:	February 24, 1998
DECISION DATE:	March 18, 1998

APPEARANCES

Mr. Art Mooney
Mr. Andrew Waddell
Mr. John O'Hara — on behalf of the Complainant Employee

Mr. John Shields — on behalf of the WestCoast Hydrant Services Ltd. ("WestCoast" or the "Employer")

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on December 10, 1997 which determined that Mr. O'Hara was a managerial employee and as such not entitled to payments on account of overtime.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Mr. O'Hara was a manager as defined in the *Act*.

FACTS

On May 1, 1997, the Employment Standards Branch received a complaint from Mr. O'Hara, an employee of WestCoast. The complaint indicated that Mr. O'Hara's job title was "sales manager". The complaint also indicated that Mr. O'Hara's hours of work were regular, but there was no indication of the number of hours worked. Mr. O'Hara sought compensation for overtime.

The Director's delegate found that Mr. O'Hara had been employed by WestCoast between October 11, 1994 and May 2, 1997, when he resigned. The delegate found that Mr. O'Hara was initially employed as a superintendent; between February and July 1996, he was an outside sales representative; and from August 1996 he was a sales manager. The Director's delegate found that Mr. O'Hara was a manager and, even if he were entitled to overtime pay, he failed to establish the quantum owing. Mr. O'Hara claimed to have been working from 7:30 a.m. to 5:00 p.m., but there were no records to support this, particularly as travel time and lunch breaks were not documented.

At the hearing, it was clear that there was considerable animosity between Mr. Shields and Mr. O'Hara, and the other (former) employees who testified on his behalf. Mr. O'Hara testified that he was hired as a superintendent, but that this was a mere formality, and in name only. He did not have any real authority as he was undermined by Mr. Shield's "autocratic" style of management.

Mr. Mooney, a former controller and manager of administration, testified much to the same effect about his employment. His hours of work then were from 7:30 a.m. to 5:00 p.m. The Employer's evidence was that Mr. O'Hara did work as a superintendent and that he supervised employees. The Employer does not dispute that Mr. O'Hara's hours of work when he was a superintendent were from 7:30 a.m. to 5:00 p.m.

Throughout his employment, Mr. O'Hara was paid a salary. With one exception, his pay stub indicated 80 hours per pay period. Unlike regular employees, but like Mr. Mooney, Mr. O'Hara did not provide time sheets to the employer unless his work was to be charged to a customer. Moreover, Mr. O'Hara did receive time off with pay on at least one occasion. He also received a bonus, characterized by the Employer as a "management bonus", on at least one occasion.

When Mr. O'Hara was superintendent his responsibilities included:

- supervising employees in the field and from the office;
- approving work performed by employees;
- writing work procedures for other employees to follow;
- disciplining employees;
- allocating and scheduling work for other employees;
- conducting orientation for new employees;
- receiving and approving time sheets for other employees;
- approving vacation time for employees; and
- instructing employees.

Mr. Waddell, called on behalf of Mr. O'Hara, testified that he regarded Mr. O'Hara as a "supervisor".

In February of 1996, Mr. O'Hara became "outside sales representative" for the Employer. In August of 1996 he became "sales manager", a position he held until he resigned on May 2, 1997. He took over that position when the former sales manager left WestCoast. The Employer's evidence indicated that Mr. O'Hara had some supervisory responsibilities while he was in sales. Mr. Shields testified that two employees reported to him at that time, namely Ms. Shirley Cheng and Ms. Georgia Carnahan, sales coordinators with the Employer. Ms. Cheng was assigned to work with him in the month of July to learn to be a proper sales coordinator. After that time, Mr. O'Hara testified, she worked with him for one week. The Employer submitted parts of a customer list with Mr. O'Hara's notations which indicated which customers he would be dealing with and which customers Ms. Georgia Carnahan would be dealing with. The notations also included instructions for dealing with customers. Mr. O'Hara denied that Ms. Carnahan reported to him. She dealt with smaller accounts, while he concentrated on larger accounts and developing new business. Mr. O'Hara was also involved in the hiring of sales staff. Mr. Shields placed an ad for a sales representative in a local newspaper. Mr. O'Hara did not have any prior knowledge of this, though prospective employees were invited to forward resumes to his attention. While Mr. O'Hara was involved in the interviews, it was clear that the final say in the matter lay with Mr. Shields.

While Mr. O'Hara was in sales, he enjoyed considerable autonomy in terms of setting his own hours of work and he spent most of his time visiting customers away from the Employer's premises. Mr. O'Hara's evidence was that he worked from 7:30 a.m. to 5:00 p.m. on average. Mr. Shields insisted that the hours of work were from 8:00 a.m. to 4:30 p.m., including a lunch break. One memorandum, dated April 17, 1997, from Mr. Shields to Mr. O'Hara, stated that the latter's hours of work were from "0730 to 1700 plus any additional time required for maintaining emergency call outs and conferences etc.". Mr. Shield's evidence was that this represented a change from earlier in view of poor sales performance. Those hours of work were also set out in a proposed "sales duties and compensation plan" prepared in March of 1997. The Employer produced a very large number of so called "Daily Sales Records". The Employer submitted that these records indicated when Mr. O'Hara's daily work hours. The records indicated "start times" and "finish" times and odometer readings (for the purpose of mileage payments). Mr. O'Hara testified that the records were completed by him, though not always on a daily basis, from notes he made in a notebook. Some of these records indicated a start time of "11:30 a.m." and "finish" at "4:30 p.m."; others indicated a start time of "12:30 p.m." and "finish" at "4:45 p.m."; others, again, indicated a start time of "8:00 a.m." and "finish" at "5:00 p.m."; and others, indicated a start time of "7:30 a.m." or earlier. In my view, these records, in conjunction with Mr. O'Hara's testimony and other documentation, suggest that he, at the very least, occasionally worked between 7:30 a.m. and 5:00 p.m. In other words, it appears that he worked hours in excess of 8†in a day or 40 in a week.

While he was employed in sales, the Employer continued to regard him as a management employee. Mr. O'Hara participated in certain meetings for management staff of the Employer. A memorandum, dated April 25, 1996, from Mr. O'Hara to Mr. Shields and others, suggest that he was part of what the Employer termed strategic planning for the WestCoast:

> "Below are some of the subjects discussed at Kelowna - suggest we schedule meeting next week for all to attend possibly late in the day when we can go uninterrupted for a while.
>
> Agenda
>
> 1. Improving inside areas
> 2. Categorize - customer base
> 3. Technicians to promote extras
> 4. Training for personnel
> 5. Creation or revival of "supplier catalogue"
> 6. Other company - re epoxy lining
>
> There are additional subjects that might require discussion - please enter them on the agenda and maybe we can set a meeting date."

The evidence was that Mr. O'Hara participated in no more than one or two of these meetings.

ARGUMENT/SUBMISSIONS

The arguments may briefly be summarized as follows. Mr. O'Hara argues that he was not a manager as defined in the *Act*. The titles "superintendent" or "sales manager" did not signify real management responsibilities and authority. He denies having other employees reporting to him. Mr. O'Hara argues that the Director's delegate failed to consider written evidence submitted to him or did not properly investigate the facts of his claim. Mr. O'Hara also argues that his claim for overtime hours based on his information that he worked, conservatively estimated, between "7:30 a.m. and 5:00 p.m." The Employer argues that Mr. O'Hara was a manager as defined in the *Act* because he supervised employees and was employed in an "executive capacity".

ANALYSIS

As mentioned above, the Employer argues that Mr. O'Hara was within the management exclusion with respect to hours of work and overtime. Section 1(1) of the *Regulation* of 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.

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 *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."

I accept that Mr. O'Hara was indeed a manager as defined in the *Regulation* during his tenure as superintendent for the Employer. I base that conclusion on a "total characterization" of his duties and responsibilities: supervising employees in the field and from the office; approving work performed by employees; writing work procedures for other employees to follow; disciplining employees; allocating and scheduling work for other employees; conducting orientation for new employees; receiving and approving time sheets for other employees; approving vacation time for employees; and instructing employees. While Mr. O'Hara testified that he was a superintendent "in name only", I am prepared to accept, on the balance of probabilities, that Mr. O'Hara exercised the a sufficient degree of managerial authority and that his primary responsibility employment duties consisted of supervising and directing other employees.

That does not conclude the matter. In February of 1996, Mr. O'Hara was appointed to a sales position. In my view, his primary duties then shifted from supervision to sales. Based on the evidence presented at the hearing, his supervisory duties became quite limited. He spent most of his time away from the Employer's premises visiting customers. While his title became sales manager, as evidenced by his business card and the Employer held him out to customers as the sales manager, I am not persuaded that he exercised any real managerial authority while he was in sales. Mr. O'Hara denied supervising any employee for any length of time. Unlike the time when he was a superintendent, the Employer did not present any substantial evidence describing Mr. O'Hara's supervisory duties. In the result, he was no longer a manager within the meaning of Section 1(a) of the *Regulation*.

Next, the Employer argues that Mr. O'Hara was employed in an "executive capacity". This is not defined in the legislation. Moreover, it has not received a great deal of consideration in earlier decisions of the Tribunal. In *Smedley*, BCEST #D552/97, my colleague dealt with the issue of "executive capacity" under the *Regulation*. He noted:

> "The term "executive capacity" is not specifically defined in the Regulation. The Oxford Dictionary defines an "executive" as:
>
> > n. a person or group that has administrative or managerial powers in a business or commercial organization, or with authority to put the laws or agreements etc. of a government into effect.--- adj. having the powers to execute plans or to put laws or agreements etc. into effect."
>
> Black's Law Dictionary defines "executive capacity" as "Duties in such capacity relate to active participation in control, supervision and management of business."

In *Choi*, BCEST #D066/96, the adjudicator found that the employee was employed in an executive capacity. In that case, the employee had the authority to hire and fire, though he had to seek prior approval; he prepared work schedules for employees; ordered stock; reviewed employment applications; and closed/opened the business. He did the same work as the regular employees as required. However, in that case, the owner of the business was rarely on site as he ran another business as well.

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.

Mr. O'Hara participated in certain meetings relating to the "control, supervision and management" of the business. However, his participation was limited to a few meetings. He did have input into management decisions, as evidenced by the memorandum quoted above. Based on the testimony of Mr. O'Hara and Mr. Mooney, it was clear that the real authority WestCoast is Mr. Shields. Both stated that he did not act on their suggestions or recommendations. Mr. O'Hara had very limited supervisory duties. His involvement in the hiring of a sales representative was minimal. Though he was involved in the interviews, the Employer did not consult with him before placing an add in the newspaper seeking a new employees to what was represented to be "his department". In my view, Mr. O'Hara was a sales representative without much real management authority. In the result, I conclude that Mr. O'Hara did not work in an executive capacity during his tenure in sales with WestCoast. As such, he may be entitled to overtime pay.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated October†29, 1997 be varied as follows:

1. Mr. O'Hara was an employee as defined in the *Regulation* from February of 1996. As such he was entitled to overtime pay.

2. Mr. O'Hara did work overtime hours while he worked in sales from February of 1996. In the circumstances, I am not able to determine the actual amount of overtime worked. I refer the matter back to the Director for further investigation to establish such amounts as may be owing on account of overtime.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal