

**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 -

Prins Greenhouses Ltd.  
("Prins")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 98/048

**DATE OF HEARING:** March 10, 1998

**DATE OF DECISION:** April 7, 1998

**DECISION**

**APPEARANCES**

Peter J. Keighley      on behalf of Prins Greenhouses Ltd.  
Kevin G. Hilliard      on his own behalf

**OVERVIEW**

This is an appeal by Prins Greenhouses Ltd. ("Prins"), under Section 112 of the *Employment Standards Act* ("the *Act*") against a determination which was issued on January 6, 1998 by a delegate of the Director of Employment Standards. The Director's delegate determined that a former employee, Kevin G. Hilliard ("Hilliard"), was entitled to receive overtime wages and vacation pay totaling \$13, 322.34 including interest payable as of the date of the Determination.

In its Reasons for Appeal, Prins submits that the Director's delegate erred when he determined that Hilliard did not have management functions as his primary duty. Prins also submits that Hilliard was employed to perform management duties and, therefore, is excluded from Part 4 of the *Act* (Hours of Work and Overtime) by virtue of Section 34 of the *Employment Standards Regulation* (B.C.Reg. 396/95)

This is the second determination to be issued by the Director's delegate as a result of the complaint made by Hilliard on March 10, 1997. A Determination dated July 2, 1997 dismissed the complaint for the reason that Hilliard was a manager and, therefore, excluded from the overtime provisions of the *Employment Standards Act* by section 34 of the *Regulation*. That Determination was appealed to the Employment Standards Tribunal by Hilliard.

In its Decision (BCEST #D296/97) dated August 1, 1997 the Tribunal found that the reasons for issuing the Determination dated July 2, 1997 were inadequate and declared that the Determination was null and void. As a result, it ordered that the Determination be cancelled.

The Director's delegate requested, received and considered additional evidence from both Prins and Hilliard and issued another Determination dated January 6, 1998. It is that Determination which is the subject of this appeal by Prins.

A hearing was held on March 10, 1998 in Abbotsford, BC at which time evidence was given under oath by Peter Reus, Art Olsthoorn and Kevin G. Hilliard.

**ISSUES TO BE DECIDED**

1. During his employment by Prins Greenhouses Ltd. was Kevin Hilliard a “manager” for purposes of the *Act* and *Regulation*?
2. If he was not a “manager”, is he entitled to overtime wages and vacation pay as set out in the Determination dated January 6, 1998?

**ANALYSIS**

*Statutory Framework*

Section 1 of the Regulation defines a “manager” as:

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

Section 34(1)(f) of the *Regulation* excludes a “manager” from Part 4 of the *Act* (Hours of Work and Overtime).

Counsel for Prins acknowledged in his closing remarks that Mr. Hilliard was not employed in “an executive capacity” and, therefore, the relevant test to be applied is whether his “primary employment duties” consisted of supervising or directing other employees.

The Determination under appeal contained as an attachment a 4-page “Reason Schedule”. It also contained as an Exhibit, a “Foreman” job description dated December 28, 1995. The “Reason Schedule” contains a lengthy recitation of the facts and arguments which the Director’s delegate considered in making his Determination. However, as will become evident below, the “Reason Schedule” did not address all issues in dispute. I have reviewed and considered the “Reason Schedule” carefully in making this decision. I have also reviewed and considered the evidence which was put before me at the hearing on March 10, 1997.

The Tribunal’s views about the meaning to be given to “supervising and directing employees” were set out in the following terms in a recent decision *Director of Employment Standards -and- Amelia Street Bistro* (BCEST# D479/97):

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 or identified by other employees 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.

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 judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, alerting work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion about all of these matters. 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 a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

*Undisputed Facts*

There is no dispute about certain key facts, as follows:

- Prins is in the business of building commercial “turn-key” green houses in British Columbia, Alberta, Washington, Oregon and California.
- During 1996, Prins employed between 15 and 25 employees. Hilliard listed his occupation as “foreman” when he submitted his written complaint on March 10, 1997.
- Prins described Hilliard’s occupation as a “foreman” on the Record of Employment (ROE) which it issued to him.
- Hilliard was employed from January 2, 1996 to March 10, 1997 when his employment was terminated without notice by Prins. He was paid one month’s salary at that time.
- Hilliard’s last day of work was November 22, 1996 at which time he injured himself at work and received WCB wage loss benefits effective November 23, 1996.

*Foreman job description*

Mr. Hilliard testified at the hearing that he had not seen the “foreman” job description (Exhibit #1) prior to it being disclosed to him by the Tribunal as part of this appeal

process. He also testified that it was not that particular job description which he had seen when he was interviewed for employment by Peter Reus and Art Olsthoorn. On the balance of probabilities, I find that Mr. Hilliard's evidence was mistaken on this point. He was unable to produce a copy of any other job description and, as demonstrated in cross-examination had not referred to the existence of another job description prior to the hearing on March 10th. The principal duties in the "foreman" description are as follows:

Maintaining a good relationship with customers, by being polite, but firm, in all discussions. Any problems with this relationship, should be reported immediately to the office, before there is any chance that such problems escalate.

Overseeing projects (large or small), from start to finish, to ensure a timely completion.

Occasionally working odd hours, if needed to complete a specific phase.

Working with a variety of materials.

On larger projects, following a work schedule, provided by the office, and reporting immediately, any signs that work is getting behind. This will enable Art Olsthoorn (Project Co-ordinator) to take the necessary steps needed to get the project back on track.

Making verbal reports to Art Olsthoorn, daily.

Making written reports, as requested, to the office.

Taking responsibility for the workforce assigned to a specific project.

- getting maximum performance from these workers, while maintaining harmony on the job site.
- checking the workers' timecards, at each pay period ending, before they are turned in to the office for processing, (specifically checking the job costing breakdown, and the hours reported).

However, I should hasten to add that the real issue in dispute in this appeal is not the contents of the "foreman" job description. Rather, the dispute centres around what actual duties and responsibilities were assigned to Hilliard during his employment with Prins.

It is useful to note, again, the point made above in the excerpt from *Amelia Street Bistro*:

It is irrelevant...that a person is described by the employer or identified by other employees 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.

*What were Mr. Hilliard's primary employment duties? Did his "primary employment duties consist of supervising and directing other employees"?*

The Director's delegate determined, based on his investigation, that Hilliard "...did not have as his **primary** duties, those of a manager. Thus (Hilliard) is entitled to be paid overtime wages pursuant to Part 4 of the Act." (emphasis in original)

It is trite law that an appellant, Prins in this case, bears the onus of establishing that the Director's delegate erred in making his Determination.

When I review all of the evidence and submissions, both written and oral, I find that Prins has not met the onus of establishing, on the balance of probabilities, that the Director's delegate erred in making his Determination. I make that finding for the following reasons:

1. Mr. Reus testified that Art Olsthoorn was responsible for all aspects of the "field operations" of the business. That is, Mr. Olsthoorn was the superintendent who supervised the work of three foremen: Mr. Hilliard; Mr. Ed Legault and Mr. Joe Legault.
2. Mr. Hilliard was expected to use his carpentry skills and to be a "hands on" supervisor so as to ensure that construction deadlines, as established by Mr. Olsthoorn, were met. As Mr. Reus testified, Hilliard's primary responsibility was to ensure that foundations were built "...plumb, straight, and on time." He carried out those duties with the assistance of up to five labourers.
3. Mr. Reus' testimony and Mr. Hilliard's testimony are corroborative of each other insofar as they recognize that Mr. Hilliard spent a considerable amount of his time becoming familiar with the particular construction techniques used by Prins in its "turn-key" projects.
4. Throughout his employment with Prins, Hilliard was working under Mr. Olsthoorn's supervision, according to Mr. Reus' evidence.
5. Hilliard did not employ or dismiss any employees during his employment with Prins and those responsibilities are contained in the "foreman" job description. Mr. Olsthoorn retained those responsibilities.
6. Hilliard did not control the numbers of hours worked by the construction crews employees with whom he was assigned to work. Many of them submitted their time cards directly to the office and, on many occasions, employees would work with more than one foreman on more than one project during semi-monthly payroll period. Mr. Olsthoorn assigned employees to each project as required.
7. Mr. Olsthoorn assigned employees to particular projects and decided on priorities at the various (up to three) construction sites which were

- in progress at any one time. It was Olsthoorn who would give direction to employees if he decided that work on a particular project was not meeting his expectations.
8. No other employees with carpentry skills were assigned to work with Hilliard. It was, therefore, his responsibility to carry out carpentry tasks associated with building forms for concrete foundations.
  9. Hilliard was not given the responsibility of conducting any of the annual performance evaluations in which all employees were required to participate.
  10. Hilliard was directed to transport other employees to job sites and, therefore, had to maintain the same work schedule as them. All hours of work decisions of any significance were made by Mr. Olsthoorn.

These findings which I have made are consistent with the determination made by the Director’s delegate that Hilliard “...did not have as his primary employment duties, those of a manager.” Counsel for Prins argued eloquently that the facts support a finding that Hilliard was employed with the expectation of being a supervisor and was encouraged from the beginning of his employment to learn more about the construction of “turn-key” greenhouses. He also submitted that a “foreman” can be a “manager” for purposes of the *Act* if managerial responsibilities are assigned by the employer. I agree completely with this latter point (see my comments page 6 and the excerpt from *Amelia Street Bistro*). However, I cannot agree with the submission that the employer’s intentions or expectations should be determinative of a person’s status under the *Act*.

*Calculation of Wages Owing*

The “Calculation Schedule” attached to the Determination shows the following amounts:

Total Wages Earned	\$54,544.65
+ 4% Vacation Pay	\$2,181.79
Sub-total	\$56,726.44
Wages paid	\$43,910.00
Sub-total	\$12,816.44
+ Interest (as of January 6, 1998)	\$505.90
	\$13,322.34

Counsel for Prins submitted that the “Calculation Schedule” contains an error because it does not include in “wages paid” the sum of \$4000.00 which was paid to Mr. Hilliard on March 7, 1997 when his employment was terminated.

With respect, I do not agree with counsel’s submission on this point. It is clear that the \$43,910.00 in “wages paid” is comprised of the following: 3 months @ \$3600.00; 3 months @ \$3800.00; and 5 months @ \$4000.00 plus a payment of \$1710.00 pertaining to the UBC project. That is, the payment made to Mr. Hilliard in March, 1997 is not

included in the amount shown as “wages paid”. However, in my opinion the \$4000.00 payment made in March, 1997 was required, in part, to discharge Prins liability under Section 63 of the *Act*. That liability requires an employer to an employee an amount equal to at least one week’s wages as compensation for length of service unless the employee is given written notice, retires or is dismissed for “just cause”. Prins has not argued, correctly in my view, that it had “just cause” to terminate Mr. Hilliard’s employment. Therefore, it is liable to pay compensation as set out in Section 63 of the *Act*. Mr. Reus, in his oral testimony, declined to describe the payment of \$4000.00 as “severance pay”, preferring to describe it as a payment made *ex gratia* to Mr. Hilliard.

The Director’s delegate did not make a finding, expressly, on the question of Mr. Hilliard’s entitlement to vacation pay. Rather, he calculated vacation pay at 4% of “wages earned”, thereby implying an entitlement to 2 weeks vacation. Mr. Hilliard testified that Mr. Reus promised him one month’s vacation when he was offered employment with Prins. Mr. Reus testified that “...there was not much discussion about vacations” but acknowledged that Hilliard was given permission to “...go on a 3-week cruise” which Mr. Hilliard had planned before he commenced employment. I find, on the balance of probabilities, that Hilliard was entitled to one month’s annual vacation.

For these reasons it is necessary to amend the total amount of wages owing to Hilliard, as follows:

Gross earnings per calculation schedule	\$54,544.65
8% Vacation Pay	\$4365.57
Sub-total	\$58,908.22
Wages paid	\$43,910.00
Difference	\$14,998.22
Payment March, 1997	\$4,000.00
Sub-total	\$10,998.22
+ 1 weeks compensation for length of service (\$4,000x12)/52	\$923.08
	\$11,921.30

**ORDER**

I order, under Section 115 of the *Act*, that the Determination be varied to show that the total amount of wages owing to Mr. Hilliard is \$11,921.30 plus any interest payable in accordance with Section 88 of the *Act*.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**  
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