

An appeal

- by -

John Lioudakis
("Lioudakis")

- 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: Carol L. Roberts

FILE No.: 2001/663

DATE OF HEARING: April 9, 2002

DATE OF DECISION: April 19, 2002

DECISION

APPEARANCES

John Lioudakis	On his own behalf
Roger Bockstael	On behalf of Westfair Foods Ltd.

OVERVIEW

This is an appeal by John Lioudakis, pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued September 6, 2001. The Director dismissed Mr. Lioudakis' complaint that he was owed a bonus, or, alternatively, overtime wages. The Director concluded that Mr. Lioudakis was a manger, and not entitled to overtime wages.

ISSUE TO BE DECIDED

Whether the Director's delegate erred in concluding that Mr. Lioudakis was a manager, and therefore disentitled to overtime wages.

FACTS

Mr. Lioudakis worked for Westfair Foods Ltd. ("Westfair"), a wholesale and retail food distribution company, from September 21, 1999 to June 23, 2000.

On November 7, 1999, Mr. Lioudakis was promoted to the position of shipping supervisor, a position he held at the end of his employment. Upon receiving this promotion, Mr. Lioudakis signed a document identified as "Terms and Conditions: Westfair Management Discretionary Participation Plan - New Members- Operations", the stated purpose of which was "to establish certain agreed upon terms and conditions of employment for management staff at Westfair Foods Ltd. that will apply if you sign this agreement and accept a position which includes a discretionary participation plan." Clause 1 of the document read as follows:

The Employee and the Employer acknowledge that given the nature of your management position the hours worked by the Employee will vary from week to week and may routinely exceed 40 hours per week and that the salary paid to the Employee is in recognition of such variance.

Claus 2 set out the discretionary participation plan.

At the conclusion of Mr. Lioudakis' employment, he claimed that Westfair had promised him a bonus pursuant to the discretionary payment plan, and then withdrew that promise. When Westfair withdrew the bonus payment, he filed his claim for overtime.

Westfair owns and operates the Real Canadian Superstores, Extra Food Stores, and the Distribution Center. The Distribution Center in which Mr. Lioudakis worked supplies all the food and some general merchandise to Westfair's retail stores and some independent customers. The Center has approximately 360 bargaining unit employees. Department Supervisors are excluded from the bargaining unit by virtue of a Labour Relations Board decision.

Mr. Lioudakis contended that he did not fall within the Act's definition of manager since the majority of his job duties were not of a managerial nature. He stated that he did not have control or input into the direction or goals of Westfair, or act in any executive capacity. Mr. Lioudakis advised the delegate that his main duty was to ensure that all ordered product was loaded into its designated trailer, and that the trailer left the warehouse on time. He acknowledged that although he was not a member of the bargaining unit, he performed the work that members of the bargaining unit performed. He often had to back fill their jobs when they were absent for any number of reasons. Mr. Lioudakis advised the delegate that he often performed manual labour for long hours, beyond a normal eight hour day.

Westfair contended that Mr. Lioudakis interviewed and hired new employees for his department, issued discipline when employees had performance or attendance issues, was responsible for "overseeing the opening and closing of shifts requiring him to direct the approximately 80 shipping employees towards departmental goals of achieving high productivity with low costs", that when he was promoted from an hourly rated position in the bargaining unit to one of management, he endorsed Westfair's Terms and Conditions. Further, Westfair contended that Mr. Lioudakis was aware that the bonus program was discretionary, and that the bonus was dependent on departmental performance. Westfair advised the delegate that none of the 6 shipping supervisors received a discretionary bonus during the 17 review periods in the 7 months that Mr. Lioudakis was a shipping supervisor.

The delegate reviewed the Labour Relations Board decisions BCLRB No. B217/95 and B28/97. These decisions dealt with the exclusion of shipping supervisor positions from the bargaining unit. Both of the decisions identify the shipping supervisor positions as management positions based on a number of factors, but primarily because the positions carried with them responsibilities for discipline and discharge, labour relations input, hiring, promotion and demotions.

After considering the evidence of the parties on the nature and scope of Mr. Lioudakis' duties, the delegate concluded, on a balance of probabilities, that his position as Shipping supervisor was excluded from coverage by the *Act*, since he performed duties of a manager:

.... I find that the claimant was employed as a Shipping Supervisor with primary responsibilities that included supervising and directing employees and therefore is excluded from the hours of work and overtime requirements of the Act as a manager....

The Delegate determined that the *Act* had not been contravened, and ceased his investigation.

ARGUMENT

Mr. Lioudakis argues that the delegate erred in law by failing to properly consider all relevant factors in arriving at his conclusion, including internal Employment Standards Branch (ESB) policies, directives and adjudicative precedents.

Mr. Lioudakis relies on the Tribunal decision in *Amelia Street Bistro* (BC EST D#479/97) in support of his argument that the amount of time an employee spends on supervising and directing other employees is an important factor to consider. Mr. Lioudakis says that his main duty was to ensure that product was loaded into a designated trailer and that he trailer departed to the warehouse on scheduled time. He submits that the primary concern of his employment environment was the timely and smooth flow of trucks and product to and from our facility. Managing these logistics is not focused mainly on supervising people. These in addition to the managerial tasks I have stipulated to were part of my role at the time.

In other words, Mr. Lioudakis contends that the majority of his duties were not supervisory, since he often filled "hard labour" functions when employees he supervised failed to show up for work, and that he performed these functions well beyond an eight hour shift. He argues that the delegate erred in failing to determine to what extent his supervisory functions were a part of his actual job. He submitted that the bulk of his duties were directed toward ensuring that trucks were loaded and moved to their destinations on time, and other non-supervisory functions, and that the supervisory part of his job was secondary. Thus, he argues, the delegate erred in concluding that he was a manager.

Mr. Lioudakis denies that he hired, fired, or disciplined employees, and that the delegate had no evidence to arrive at the conclusion that he did so. He also denies that he had any responsibility for budgeting, or any power to "direct" employees.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I find that the Delegate erred in concluding that Mr. Lioudakis was a manger.

Section 34(1)(f) of the *Regulation* provides that part 4 of the *Act* (that part relating to overtime wages) does not apply to a manager.

Manager is defined in section 1 of the *Regulation* as:

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

There is no dispute that Mr. Lioudakis was not employed in an executive capacity. Therefore, the issue for the Delegate was whether Mr. Lioudakis' primary employment duties consisted of supervising and directing other employees. (my emphasis).

This question was addressed by the Tribunal in *429485 B.C. Ltd (c.o.b. Amelia Street Bistro)(Re)*. (see also *Northland Properties Ltd*. BC EST #D423/98, in which sections 1(a) and (b) were comprehensively considered). In *Amelia Street*, the Tribunal said that a conclusion as to whether a person falls within s. 1(a) provisions:

...depends on 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.

I note that the Delegate placed some emphasis on the "terms and conditions of employment for management staff" in determining that Mr. Lioudakis was a manager. As this Tribunal has often stated, how parties define their relationship is only marginally relevant to determining whether or not the employee is a manager. The true test is the actual authority exercised by the employee, not the authority that might be set out in a position description, or indeed, whether that position may be excluded from the bargaining unit by a decision of the Labour Relations Board, since the definition of a manager under the *Labour Relations Code* (S.B.C. 1992, c. 82, s.1) differs from that contained in the *Act*.

The burden of establishing that a person is excluded from the protection of the *Act* or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion. (see *Northlands*).

Westfair contended that Mr. Lioudakis was not entitled to any compensation on the basis that he was a manager. Westfair submitted that Mr. Lioudakis scheduled employees to fill shifts, reviewed tasks to be performed and assigned employees to perform certain functions, oversaw opening and closing shifts, and directed employees to achieve goals of high productivity.

Mr. Lioudakis contended that the "production" he was responsible to oversee was getting trucks loaded and shipped. In order to reach those productivity goals, Mr. Lioudakis ensured that shifts were covered when some employees were absent, gave employees an orientation to their duties, and generally dealt with issues such as broken eggs, incorrect supplies, or missing pallets.

Contrary to Westfair's assertion, there is no evidence that Mr. Lioudakis hired, fired or disciplined any other employee during the period of time he was shipping supervisor. The evidence provided to the Delegate in support of Westfair's submissions consisted of seven "Notes to File" completed by Mr. Lioudakis. These notes contained an employee's name, a date of incident, and notes detailing the incident. Mr. Lioudakis' evidence was that he prepared these notes, and placed them in the employee's personnel file. He stated that he did not conduct the disciplinary meeting or decide what disciplinary action was required in the circumstances. The notes were provided to the individual responsible for administering discipline. Mr. Bockstael did not dispute this evidence.

Also enclosed with Westfair's submission was a completed "Employee Discipline Form", which set out the name of an employee, the discipline being administered, and the reason for the discipline. The person administering the discipline was a person other than Mr. Lioudakis. Mr. Lioudakis was identified as the witness. Mr. Lioudakis testified that the individual administering the discipline was his superior, and that he was never given the authority to do so. Mr. Bockstael conceded that Mr. Lioudakis would not have been given the responsibility to discipline for some time into his employment, but was unable to state what that probationary period was. There was no evidence that Mr. Lioudakis hired or fired any employee, and Mr. Lioudakis denied that he did so.

There is no dispute that Mr. Lioudakis had no involvement in budgeting or setting goals or directions for Westfair, nor did he have any ability to make final decisions about the conduct of the business.

While Mr. Lioudakis did perform some scheduling tasks, I accept that it took up a very small amount of his time. I also accept that the time Mr. Lioudakis spent "directing" employees was very limited, as the tasks were not complex and did not require extensive training. All the employees' efforts were directed to getting the trucks loaded as quickly and accurately as possible.

Finally, Mr. Lioudakis contended that he had very limited autonomy to make decisions. Most of the decisions were made by his superior, or by Mr. Lioudakis after checking with his superior. There was also no dispute to Mr. Lioudakis' evidence in this respect.

Having regard to all of the evidence, I accept that Mr. Lioudakis' primary employment duties did not consist of supervising and directing other employees. There is no evidence Mr. Lioudakis exercised anything more than limited authority over other employees, or made decisions of any significance. If Mr. Lioudakis' employment duties included supervising and directing other employees, I accept that constituted a small percentage of his employment duties.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 6, 2001 be referred back to the Delegate to determine what overtime wages, if any, are owed to Mr. Lioudakis.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal