

An appeal

- by -

Dollars & Cents Stores Inc.
("the employer")

- 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: Lorne D. Collingwood

FILE No.: 2002/597

DATE OF DECISION: May 14, 2003

DECISION

OVERVIEW

Dollars & Cents Stores Inc. (referred to as “the Appellant” and “the employer” in this decision) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued on November 8, 2002 by a delegate of the Director of Employment Standards (“the Director”). The employer, by that Determination, is ordered to pay Tyler Craig, a former employee, \$3,629.74 in wages and interest.

The delegate has decided that Mr. Craig is entitled to overtime pay and statutory holiday pay because he was not a manager as that term is defined in the *Employment Standards Regulation* (“the Regulation”).

The employer, on appeal, claims that the delegate is wrong on the facts and that there is evidence to support a finding that the employee was a manager because his primary duties consisted of supervising and directing other employees.

I have decided to confirm the Determination. I am not shown that there is an error or errors which call for the Determination to be varied or cancelled, or a matter or matters referred back the Director. The Determination is reasonable and consistent with the leading decision of the Tribunal on factors to consider in deciding whether a person is or is not a manager as the term “manager” is used in the *Regulation*.

An oral hearing was held in this case, on March 26, 2003. A hearing was to have been held on February 27, 2003 but that hearing was postponed when it was discovered that Mr. Craig could not attend the hearing for medical reasons.

APPEARANCES:

Salim Dhanani, Shabniz Dhanani & Aryn Rajan For the employer

Tyler Craig On his own behalf

ISSUES

The facts are said to be an issue.

The issue is the matter of whether the employee, when employed by the Appellant, can or cannot be considered to be a “manager” as that term is defined in the *Regulation*. The employer is not claiming, on appeal, that Mr. Craig was employed in an executive capacity but only that his primary duties were to supervise and direct other employees. In doing so, the Appellant relies on *Mandair Distributors Ltd. and 444 Flowers Flowers Ltd. operating as Flowers Flowers & Florimport*, BCEST No. D344/01.

FACTS

The employer has three ‘dollar stores’. The employee was ‘manager’ of the employer’s main Surrey store, at least he had the title of manager.

The position of the employer is set out in the Determination. The delegate understood the position of the employer to be as follows:

- “1. Craig was paid an hourly wage plus a performance bonus; a benefit available to only Managers, Assistant Managers and Senior Sales people.
2. Craig was responsible for supervising and training staff on his shift; he could have as many as 5 staff reporting to him during the busiest times.
3. Craig was responsible, within limits, for disciplining staff.
4. Craig attended senior management meetings.
5. Craig was responsible for the day-to-day operations of his store during his shift, including serving customers, stocking shelves, re-arranging products, purchasing product directly from specified suppliers, as well as supervising employees.
6. Craig was responsible (when scheduled) for opening and closing the store and doing the cash balancing.”

The delegate also found that the employer and employee agreed on certain matters. Those matters are as follows:

- “1. Craig did not hire, fire or schedule employees, although in emergencies, for instance when employees did not come in, or called in sick, he could change the schedule to provide proper coverage; however Craig could not schedule or approve hours that would result in overtime for employees.
2. Craig could discipline employees, but not to the point of dismissal, and the employer preferred all of its managers and assistant managers not work alone when providing discipline.
3. Craig only ordered product from certain, pre-approved suppliers, such as soft drink vendors, to keep adequate supplies in the store. Other senior sales staff could do this as well. Craig could not order new product lines or make decisions about what product would be carried in his store.”

The delegate found that the employer did not outline the duties of a managers but issued detailed instructions on how they were to carry out their duties (notes from management meetings).

The delegate has decided that while Mr. Craig held the title of manager he was not a manager as the term “manager” is used in the *Regulation*. The delegate found that Mr. Craig’s primary employment duties were not to supervise and direct employees. Her conclusion is not based on analysis of the amount of time that the employee performed supervisory duties but the nature of the duties that he performed when employed by the employer. The delegate’s analysis of matters is as follows:

“The employer agrees that Craig did not have the authority to hire, fire or schedule employees. Typically, a manager has power of independent action, autonomy and discretion; he has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees. Generally a manager would have the final authority to make decisions about such matters as hiring, firing, disciplining, training, authorizing overtime, calling employees into work, altering or establishing work processes, etc. In addition to the fact that Craig had no

authority to hire, fire or schedule employees, a review of the employer's directions to Craig (and other managers) at the management meetings ... show that the employer was very specific in how Craig was supposed to operate his stores, deal with employees, training, overtime, merchandising, and so forth, really leaving Craig very little room to exercise autonomy and discretion."

The employer, on appeal, claims that the delegate is wrong on facts and that there are facts to show that Mr. Craig was primarily concerned with the supervision and direction of employees. It claims that it is not 5 employees that reported to Mr. Craig in the busiest times of the year but more than twice that number. The employer suggests, moreover, that the duties of the employee are not as set out in the Determination but as follows:

- Open the store and close the store;
- Make sure that the store was clean and tidy and that shelves were properly stocked;
- Decide what to stock, where to put things in the store and who would do the stocking;
- Receive shipments, checking both for damage and the quantity shipped;
- Log-in the shipments;
- Check cash register floats;
- Show employees how to go about stocking shelves and check on whether it was done properly;
- Make bank deposits;
- Do change orders at bank;
- Buy coinage from the bank;
- Decide whether he should ask for permission to increase or decrease amount of money in safe;
- Decide whether to increase or decrease the amount of the float;
- Decide on who would be the cashier(s) ["who was a good cashier"];
- Set up merchandising templates and teach other employees how to set up merchandising templates;
- Answer the questions of employees;
- Deal with the public;
- Decide whether a customer should be given a refund;
- Decide what was hot;
- Decide on the amount of pop, batteries and chips to order;
- Decide on whether the store should send product over to another store,
- Train employees;
- Decide whether something should be written off or not;
- Alter the employer's work schedules in emergencies;
- Discipline employees;
- Terminate employees;
- Initial "earlys", "lates" and overtime,
- Make recommendations regarding work schedules;

- Decide on budgets for gift certificates and charities;
- Balancing the cash;
- Decide on whether a customer should receive a refund;
- Handle belligerent customers, counterfeit and other security issues,
- Motivate staff;
- Give out gift certificates;
- Authorise overtime in the exceptional event that there was a need to work overtime (the employer has a policy against overtime);
- Make recommendations on what to buy;
- See that the store was operating smoothly and efficiently; and
- Conduct staff meetings.

I find that if the employee had a power to terminate employees, it was in theory only. He did not know that he had such power. Most importantly, he did not exercise such power.

I find that the employee had a certain power to discipline employees. The employer kept a record of misconduct and, as a manager, Craig was expected to “write-up” misconduct. But that required two managers. Craig could not act alone. I find, moreover, that Craig was only involved in the writing-up of one single employee.

I find that outside of on-the-job training, Mr. Craig had no hand in training. Shabniz Dhanani conducted the training courses and that was without Craig’s assistance.

I am satisfied that it was the employee’s job to keep an eye on employees and the store for the employer and notify the employer of any problems. The employee did “merchandising” in the main, setting up templates for displays which junior employees would then fill (i.e. stock the shelves according to the template).

The employer claims, on appeal, that it is not 5 workers that reported to the manager in busy times but many more than that. While the employer does not produce an analysis of payroll records to show exactly how many people reported to Mr. Craig, and the employer is rather vague on this point [The manager at various times has said that the number of people reporting to the manager is 5 or 6 (at the investigative stage), 12 to 35 staff per store (the employer’s claim, page 2 of written submission dated December 2, 2002), 11 and as many as 21 (December 2, 2002 submission)], I am prepared to accept that, in the busiest of shopping periods, that being the Christmas shopping period, it is not 5 employees that reported to the manager but about twice that number. The delegate does not argue the point and the employee did not object to what the employer suggests. Mr. Craig’s position is that the store rarely had that number of workers.

I have had the benefit of hearing from the two Assistant Managers that worked alongside the employee. I am led by their testimony to believe that it was often the case that there was no one working in the store outside of the manager and his two Assistant Managers and that, commonly, there were less than 5 workers on the job at any one time, outside of the Manager.

ARGUMENT & ANALYSIS

The question in this case is, Was Craig a “manager” as that term is defined in the *Regulation* when he worked for the employer? If he was a manager, he is not entitled to overtime pay, nor statutory holiday pay. If he was not, he is entitled to overtime like most other employees. [Part 4 of the *Act* calls for the payment of overtime pay. But section 34 (1) (f) of the *Regulation* provides that Part 4 of the *Act* does not apply to a manager.]

The term “manager” is defined in section 1 (1) the *Regulation*. The definition is as follows:

“**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 employer in this case is arguing that Mr. Craig’s primary employment duties were to supervise and direct other employees and it relies on *Mandair Distributors Ltd. and 444 Flowers Flowers Ltd. operating as Flowers Flowers & Florimport*, BCEST No. D344/01.

The leading decision of the Tribunal on the matter of factors to consider in deciding whether a person did or did not work as a “manager” as that term is defined in the *Regulation* is *Director of Employment Standards*, BCEST No. D479/97 (Reconsideration of BCEST No. D170/97). I prefer that decision over the *Mandair* decision. *Mandair* is inconsistent with decisions of the Supreme Court of Canada, *Machtinger v. HOF Industries Ltd.* (1992 91 D.L.R. (4th) 491 (S.C.C.) and *Rizzo & Rizzo Shoes Ltd.*, (1998) 154 D.L.R. (4th) 193. Those decisions call for the *Act* to be interpreted in a broad and generous manner. Exceptions are to be given a narrow interpretation.

The *Regulation* does not remove the obligation to pay overtime and statutory holiday pay from anyone whose primary employment duties consist of supervising and directing employees, line supervisors for example. It refers to “managers” and my reading of the definition of “manager” is that it is intended to distinguish between executives and the common garden variety of employee and also between managers who are primarily concerned with supervising and directing employees from other kinds of managers, IT and other equipment managers for example.

In *Director of Employment Standards*, BCEST No. D479/97 the Tribunal had to following to say:

“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. That point was made by the Tribunal in *Anducci’s Pasta Bar Ltd.*:

“Many of the duties to which the employer pointed as evidence of Lum’s managerial status did not address the definition of manager in the *Regulation*. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees.”

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterisation 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."

The panel went on to decide that there are objective factors which are important to deciding whether a person is or is not a manager for the purposes of the *Act*. The factors are as follows:

- (1) the power of independent action, autonomy and discretion;
- (2) the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business; and
- (3) making final judgements about such matters as hiring, firing, authorising overtime, time-off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering work schedules, and training the employees, and
- (4) that the person's job description include some reference to managing or the supervision and direction of employees.

All of the above factors need not be present but it must be shown that the person actually wields what is true managerial authority. Deciding whether a person is or is not a manager is, moreover, a question of degree: What amount of managerial power and authority is exercised? That to some extent will depend on the person's daily activities and the significance of their decision making.

The delegate has in this case found that the employee is not a manager whose primary employment duties consist of supervising and directing employees because he had no authority to hire, fire or schedule employees and "little room to exercise autonomy and discretion". I agree with that conclusion.

A great many of the duties of the employee, while important, have nothing at all to do with supervising and directing employees. I refer to tasks like opening and closing the store, ordering merchandise, logging in deliveries, dealing with the bank, checking on and determining the size of floats, balancing cash received, dealing with customers and setting up templates.

Mr. Craig spent little time supervising and directing employees and, to the extent that he did supervise and direct employees, he did not have or exercise a power or authority which is typical of a manager. He little power outside of a power to make recommendations and suggestions. The significant control over employees lay not with the employee but senior officers of the employer.

The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated November 8, 2002 be confirmed in the amount of \$3,629.74 and to that amount I add whatever further interest is owed pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal