Employment Standards TRIBUNAL

An appeal

- by -

Sound Waves Entertainment Network Ltd.
operating as Showtime Convention and Display Services
("Showtime")

- 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: Cindy J. Lombard

FILE No.: 2003A/61

DATE OF HEARING: May 1, 2003

DATE OF DECISION: May 27, 2003

DECISION

APPEARANCES:

Calvin McCartney ("McCartney") and Grant Mackney ("Mackney"), both principles of Sound Waves Entertainment Network Ltd. operating as Showtime Convention and Display Services ("Showtime") appeared on behalf of the Appellant.

Ira Couch appeared on his own behalf. As well witnesses subpoenaed by him, namely, Shain Demoskoff and Sue Stanton also gave evidence.

OVERVIEW

This is an appeal by the employer, Showtime, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a determination of the Director of Employment Standards (the "Director") issued on January 15, 2003.

The determination was issued following a complaint by Ira Couch ("Couch"), a former employee of Showtime, after leaving the employment of Showtime alleging that he had not been paid overtime wages due to him.

After investigating the complaint, the Director issued a determination that Showtime owed Couch $8,860.26 in over time wages plus interest to the date of the determination pursuant to section 88 of the *Act* in the amount of $261.68 for a total owing of $9,121.94

ISSUES TO BE DECIDED

Showtime's appeal is based on an assertion that no overtime wages are owed to Couch because he was a manager and consequently is not covered by the overtime provisions of the *Act*. Thus the sole issue on this appeal is whether Couch was a manager.

FACTS AND ANALYSIS

Showtime operates a business which does display work for various business conventions. McCartney is primarily involved in soliciting the work; while Mackney is responsible for carrying out the job of display set up at the convention.

Couch was hired in January, 1999 and worked for Showtime until May 6, 2002. Couch worked in the display set up aspect of the business. When Couch left Showtime he was being paid $20.00 per hour. Overtime was recorded and banked and paid out as regular wages.

The definition of "manager" is set out in section 1 to the Regulations to the *Act* and describes a "manager" as follows:

> (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
>
> (b) a person employed in an executive capacity

The delegate in the Determination concluded that Couch was not a manager, his job duties not falling under (a) or (b) above.

In the case of this appeal the onus is on the appellant, Showtime, to show on a balance of probabilities that, according to section 112(1) of the *Act*:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available which was not available at the time the determination was being made.

Showtime says that the delegate erred in law in that she applied too narrow of an interpretation to the facts of this case. This argument has merit for the following reasons:

> (a) the determination quotes a definition of "manager" which was repealed and replaced with the language quoted in this decision on November 30, 2002.
>
> (b) the effect of the amendment to the definition of manager was to expand the definition to those persons who supervise not only other employees but resources as well.

In addition, the appellant, Showtime asserts the delegate did not observe the principles of natural justice in that she did not provide a copy of all correspondence from the employee, Couch, in order that they could respond to the allegations contained in the letters.

Error of Law

The Tribunal has concluded that it is not necessary on the facts of this case to decide which definition of manager is applicable nor whether the amended definition is more expansive that its predecessor. We have concluded that the Determination was correct in its conclusion that Couch was not a manager no matter which definition is applied and applying the widest interpretation of the new definition.

The onus of proving that Couch is excluded from the operation of the *Act* by virtue of being a manager is on Showtime. Showtime has not discharged that onus for the following reasons:

1. Couch was not in charge of supervising or directing other employees.

   In the case of each trade show set up, it was Mr. McCarthy who was in charge. In consultation with Couch, McCarthy would decide how many other workers to call in. Couch did not decide on who or call them in. He did have some limited authority to oversee those workers in directing them as to what work to perform for the set up based on plans provided by McCarthy. The ultimate authority however rested with Mr. McCarthy who was on site at least during the show hours. Couch's description of his duties as being that of a working foreman best describes his

duties and authority. We accept Couch's evidence that he worked alongside the other workers performing the physical labor and that the time spent overseeing others was minimal.

Couch did not have the authority to hire or fire. Mr. McCarthy on one occasion did not ask someone back to work on the recommendation of Couch.

There was just one other fulltime employee, Gary Zellerman. We accept the evidence of Couch that he had no significant authority over Mr. Zellerman. For example, he did not discipline him nor could Couch make decisions about when and if Mr. Zellerman could take time off work.

2. Nor was Couch a manager on the basis that he was directing or supervising "other resources".

   While on the odd occasion Couch might purchase supplies for the set up of trade show booths, he did not order the vast majority. Based on the plans provided by McCarthy, he would tell McCarthy what he needed and it would be provided.

3. Showtime acknowledged in its own records that overtime was worked and payable albeit at regular wages. The idea in doing so was to manage the employer's costs and to provide a more even income to the employee as it is the nature of the business that during the time a contract is being carried out, long hours are necessary with few hours of work required in between jobs. However, in order to be able to bank hours in this manner and pay them out at regular wages, a written contract between Showtime and its employee is required by Section 42 of the *Act*. We acknowledge that Couch was in agreement with this arrangement for many years on an informal basis and only pressed the issue of overtime being paid at the rate prescribed by the *Act* when he became disenchanted with Showtime and left.

Natural Justice

We agree with Showtime that it should have been provided with the original complaint and have been given an opportunity to respond to allegations in writing by Couch. It is not, however, necessary to determine whether these omissions in fact occurred because such an omission by the Delegate does not change the outcome of this appeal on the facts, that is, that Couch was not a manager as defined by the *Act*.

For the foregoing reasons, the Appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $9,121.94 together with whatever further interest that may have accrued pursuant to Section 88 of the *Act* since the date of its issue.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal