

**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 -

Simoes Enterprises Ltd.  
("Simoes")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Cindy J. Lombard  
**FILE NO.:** 1999/19  
**DATE OF HEARING:** April 14, 1999  
**DATE OF DECISION:** June 9, 1999

**DECISION**

**APPEARANCES**

The Appellant was represented by the owner of Simoes Enterprises Ltd., Joe Simoes, and his counsel, Clay Larson.

Christopher Young appeared on his own behalf via tele-conference.

**OVERVIEW**

This is an appeal by the employer, Simoes Enterprises Ltd., 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 23, 1998.

The determination was issued following a complaint by the former employee, Christopher Young, that he was not paid for over-time hours. Simoes Enterprises Ltd. counters that Young was paid for his work, in the alternative was excluded from over-time in that he was hired as a manager.

After investigating the complaint, the Director issued a determination that Simoes Enterprises Ltd. owed Young \$1,774.98 in over-time.

**ISSUES TO BE DECIDED**

Simoes Enterprises Ltd.’s Appeal is based on the following grounds:

1. Simoes says that Young was a manager, not a salesman and therefore Young is not entitled to overtime under the Act;
2. Simoes says that Young should not be paid for over-time for a trip that he made to Edmonton driving one of the RV’s back to a customer because Young did it as a favour; and
3. Simoes claims a set-off for the amount of long-distance charges made by Young which were personal calls.

## FACTS AND ANALYSIS

### 1. Manager or Salesman

The Appellant was hired by Joe Simoes (“Simoes”), principal shareholder of the limited company, to work for Simoes Enterprises Ltd. which sells recreational vehicles (“RV’s”) in Osoyoos, B.C. Young worked for the company between October 27, 1997, until April 30, 1998.

At the time he was hired, Young and his family were residing in Edmonton, Alberta. Young moved first and then was joined by his family in December, 1997.

Young was told that his position would be that of a sales-manager and sales-person at a salary of \$3,000.00 plus 25% profit on each coach sold.

In November, 1997, Young requested that Simoes raise his income to \$40,000.00 per annum as a draw against commission. The increase was granted on December 1, 1997.

Section 40 of the *Act* provides that an employer must pay an employee who works over eight hours per day or forty hours per week over-time unless that employee is on a flexible work schedule. The *Employment Standards Act Regulations* defines a Manager 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 facts here as outlined do not support a finding that Young was a manager.

In addition to Mr. and Mrs. Simoes, there was just one other employee, Mike Laughton, a salesman. I find that in reality, the facts indicate that Young never was a sales-manager during his period of employment. Young had no authority over Mike Laughton and was given no authority to perform managerial duties. Simoes says that Young was in training for the position of sales-manager; however, I find that Young was not in training. Young was not allowed, for example, to use the Industry Wholesale Book in order to assist in determining the price for a trade-in and any sales had to be approved by Mr. Simoes or his wife. Young signed the contract as a sales-person and in nearly all cases, the acceptance of the contract on behalf of Okanagan R.V. Centre, which is the name that Simoes Enterprises Ltd. operated under, was signed by Simoes or his wife, for example the contracts for Oddie and Hardham.

2. Trip to Edmonton to deliver an R.V.

Young drove an R.V. coach to Edmonton to be delivered to a client. Simoes says that Young at no time suggested that he should be paid for his time in driving it back; rather, that Young wanted to drive it back on his own time.

I accept Young's evidence that there was no advantage to driving the coach back on December 17, 1997, a trip that turned out to be fifteen hours with one stop through a snow storm. In addition, I accept Young's evidence that he spent five hours having the windshield fixed and on that basis is entitled to overtime pay as found by the Director for those hours spent.

3. Long Distance Charges

Young says that Simoes put no restriction on his use of the telephone. The occasions that Young made long-distance calls were rare and occurred during the time that Mrs. Young was still in Edmonton. Young says that those telephone calls involved discussions about the intended move date and rental homes. Simoes says that if Young had asked, he would have said yes in any event.

Section 21 of the Act forbids deductions from an employee's wages for any purpose without his written permission, which was not given in this case.

**SUMMARY**

The only person being excluded from overtime is a manager, which Young was not.

The onus is on the employer to show that the Determination is incorrect. The employer has not satisfied that onus.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to Young be confirmed as issued in the amount of \$1,774.98, 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**