

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Sunshine Coast Publishers Inc.

(“Sunshine”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/200

DATE OF HEARING: August 29, 1996

DATE OF DECISION: September 12, 1996

DECISION

APPEARANCES

M.E. Currie for Sunshine Coast Publishers Inc.

D.C. McCormick on his own behalf

G. MacGregor for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Sunshine Coast Publishers Inc (“Sunshine”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 001314 issued by the Director of Employment Standards (the “Director”) on February 26, 1996. The Director determined that Sunshine owed Daniel C. McCormick (“McCormick”), a former employee, the sum of \$9,841.32 (including interest) on account of unpaid overtime hours worked during the period April 30th, 1995 and October 15th, 1995.

Sunshine maintains that McCormick was a “manager” throughout the period in question and was, therefore, excluded by section 34(1)(f) of the Employment Standards Regulation from the hours of work and overtime provisions (and in particular, section 40) of the Act. Sunshine also says, in any event, that not all of the overtime hours claimed to have been worked were, in fact, worked. In the event that I conclude McCormick was excluded from the overtime provisions of the Act (i.e., that he was a “manager”), I need not consider whether or not the overtime hours claimed represent a true and accurate record.

PRELIMINARY ORDERS

The Determination names Sunshine Publishers Inc. as the employer; in fact, the proper corporate name of the employer is Sunshine Coast Publishers Inc. and, accordingly, at the outset of the appeal hearing, I ordered that the Determination be amended to reflect the actual corporate name of the employer.

I also ordered, pursuant to section 109(1)(b) of the Act, that the time for requesting an appeal be extended to Noon on March 21, 1996. The appeal was filed with the Tribunal at 11:50 AM on March 21, 1996. However, Sunshine was served with a copy of the Determination, by certified mail, on February 26, 1996 and was, therefore, deemed to have been served on March 5, 1996 [see section 122(2) of the Act] and thus had until March 20, 1996 to file its appeal. In these circumstances, where the Appeal was filed one-half day late, I ordered the appeal period extended to Noon, March 21, 1996.

ISSUES TO BE DECIDED

As noted above, there are two issues before me:

- first, whether or not McCormick was a “manager” and therefore not entitled to claim overtime pay; and
- second, assuming he is not a manager, whether or not the overtime hours claimed to have been worked were, in fact, worked.

If I find that McCormick was, during the relevant period, a “manager”, the second issue is moot.

FACTS

Although the appeal hearing occupied one full day, I heard testimony from only two witnesses: Terrance Clements on behalf of Sunshine and McCormick on his own behalf.

During the relevant period Sunshine published two community newspapers, the *Gibson's Outlook* and the *Sechelt Press*. Another publication, known as *Coastlife*, was inserted as a supplement to each of the two community papers. During the period in question, McCormick was the editor of *Coastlife*. The other two papers also had an editor. Each of the three papers also had a “publisher” who, in each case, as I understood the evidence, was primarily responsible for sales and marketing functions. The job of the editors was to, in effect, take responsibility for the news and editorial content of their respective papers. Mr. Clements was the “chief executive officer” of Sunshine, holding the title “General Manager”. Mr.

Clements retained the “final say” in all operational aspects of Sunshine’s business affairs.

McCormick testified that he first worked for Sunshine as a photographer and was paid on an independent contractor basis. Although he did not have any prior editorial experience, Mr. Clements offered McCormick the job as editor of *Coastlife* when that publication commenced operations in the spring of 1995.

McCormick’s testimony was that during his tenure as editor he took photographs, attended events, wrote feature stories, rewrote press releases, was responsible for the paper’s layout, assigned reporters and columnists to cover stories, reviewed stories that were submitted for publication, made contacts with columnists and ensured that their columns were submitted in order to meet publication deadlines. In short, McCormick characterized his duties as having two primary components: “gathering news” and “putting the paper together”. In cross-examination, McCormick testified that he had the “final say” in all *Coastlife* editorial matters.

For the most part, there is little conflict between McCormick and Clements as to the former’s duties when he was the editor of *Coastlife*. It is clear that McCormick did not carry out some of the functions normally ascribed to a manager, for example, performance appraisal and hiring and firing. In part, the former can be attributed to the fact that this relatively small community newspaper did not have in place a formal appraisal system. As for hiring and firing, Clements testified that he held the “final say” on such matters but that he did solicit input from the editors upon which he relied in making final decisions. On this latter point, McCormick’s evidence was that he did not have the sort of input described by Clements.

McCormick’s position, and that of the investigating employment standards officer, was that he was not a “manager” because he did not regularly direct other employees nor was he employed in an executive capacity. Of course, Sunshine’s position is that McCormick was a manager and that he regularly exercised managerial authority in all matters relating to the publication of *Coastlife*.

ANALYSIS

During the course of the hearing, I heard a good deal of evidence concerning McCormick’s *bona fides* concerning his overtime claim and whether or not he was merely a “disgruntled former employee” now seeking further compensation. It is

clear that McCormick did not advance any claim for overtime during his employment.

In my view, however, it is also clear that McCormick's motive in filing his complaint is irrelevant. There is a simple and discrete question before me--was McCormick a manager during his tenure as editor of *Coastlife*?

Section 40 of the Act provides that all employees are entitled to overtime pay after a certain number of hours worked in a day or a week. Despite the all-inclusive language of section 40, however, some employees are not entitled to claim overtime--they are excluded, by regulation, from the hours of work and overtime provisions of the Act.

In section 34(1)(f) of the Regulations, a "manager" is specifically excluded from the overtime pay provisions of the Act. "Manager" is defined in section 1 of the Regulations 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;

On the basis of the evidence before me, I am unable to conclude that McCormick's *primary employment duties* consisted of *supervising and directing* other *Coastlife* employees. The simple truth is that there were only a few employees at *Coastlife* and they worked, for the most part, quite independently as one would expect competent professionals to do. On the other hand, there is also no doubt that some aspects of McCormick's job as editor called on him to direct other employees such as reporters, columnists, typesetters etc.

If "manager" was defined solely in terms to the first branch of the definition that appears in the Regulations, many senior executives (such as CEOs) would probably fall outside its purview as such individuals rarely occupy themselves with close supervisory functions. The first branch of the definition fits reasonably closely to the job functions of first-level or middle-level managers; it does not fit so well in the case of senior executive personnel. Typically, senior executives do little in the way of direct supervision--their function is more policy-oriented and their primary duties lie in meeting with peers or other persons (often people outside their own

firm) over whom they exercise little, if any, direct supervisory authority. In light of such realities, the definition of manager also includes those who exercise an “executive” function.

There is, in my mind, no question but that McCormick was, and perceived himself to be, part of Sunshine’s management team. He occupied a senior position in the management hierarchy at Sunshine. For example, he attended the weekly editorial meetings involving all three editors, he was the “face” of *Coastlife* in the community, he made story assignments and, above all other Sunshine employees, generally ensured that a quality newspaper, namely *Coastlife*, was produced each week.

In my view, McCormick could properly be characterized as being in an “executive capacity”. This latter term is not specifically defined in the Regulations. The *Oxford Dictionary* defines an “executive” as:

“n. a person or group that has administrative or managerial powers in a business or commercial organization, or with authority to put the laws or agreements etc. of a government into effect.---adj. having the powers to execute plans or to put laws or agreements etc. into effect.

Black’s Law Dictionary defines “executive capacity” as “Duties in such capacity relate to active participation in control, supervision, and management of business”.

In an “editor’s checklist” prepared by McCormick for the benefit of his successor (Exhibit 5), he set out some of the “things that the *Coastlife* editor is required to do” including: “carry the flag”; stay on top of the columnists”; “provide the photographer with assignments”; “ensure that production has all it needs editorially to produce the paper”; “provide writers with assignments”; “ensure that someone is covering court news, crime file, SCRD and municipal meetings”; “return [reporters’ stories] marked up...to make changes”; and “make final selection of photos”. Taken collectively, these tasks constitute, in my opinion, the functions of a senior executive charged with the ultimate responsibility to see to it that a quality paper was produced by deadline each week.

In my view, McCormick was employed in an “executive capacity” and, therefore, fell within the definition of “manager” set out in the Regulations.

I would parenthetically note that, in a remarkably similar fact pattern arising in Ontario, the adjudicator also held that an editor of a small community newspaper

was excluded from the overtime provisions of the Ontario employment standards legislation because her work was (as defined by Regulation) “supervisory or managerial in character” [see *Kennedy v. William C. Cavell Enterprises Ltd.*, (1987) 18 C.C.E.L. 52 (O.S.C.)]

It follows from this finding that McCormick was excluded from the overtime provisions of the Act and, therefore, I need not examine the question of whether or not the number of overtime hours claimed to have been worked is, in fact, accurate.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 001314 be cancelled.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal