

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 -

Women Only Fitness and Aerobics Inc.
("Women Only")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Michelle Alman

FILE No.: 20000/230

DATE OF HEARING: June 23, 2000

DATE OF DECISION: July 12, 2000

DECISION

APPEARANCES:

for Women Only Fitness and Aerobics Inc.: John Stanway, Dawn Moyou

for the Director of Employment Standards: Diane MacLean

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Women Only Fitness and Aerobics Inc. ("Women Only") from a Determination issued March 10, 2000 by a delegate of the Director of Employment Standards ("the Director"). The Determination concluded that Women Only had contravened section 40(1) and (2) of the *Act* by failing to pay its employee, Tara Miller ("Miller"), overtime wages. Pursuant to section 79(3) of the *Act*, the Director ordered Women Only to cease contravening the *Act* and pay a total of \$1005.83 (\$878.33 in wages plus \$127.50 in interest to March 10, 2000) owed to Miller. The Determination also dismissed Miller's claim for compensation for length of service because the Director concluded that Miller had given Women Only just cause for her dismissal. As an attachment to the Determination, a second delegate of the Director, pursuant to section 98 of the *Act* and section 29 of the *Regulation*, also issued a \$0.00 penalty against Women Only for its contravention of Part 4 of the *Act*.

Women Only appeals from the Determination, alleging that Miller was a manager within the meaning of the definition in section 1 of the *Employment Standards Regulation* (the "*Regulation*"), and therefore not entitled to overtime wages pursuant to section 34(1)(f) of the *Regulation*.

Despite receipt of notice of the hearing and delivery of written submissions in support of the Director's Determination, Miller did not attend the hearing.

PRELIMINARY ISSUE

A preliminary issue arises in this case. Prior to issuing the Determination on March 10, 2000, the Director's delegate made numerous efforts to obtain from Women Only clarification of the duties performed by Miller. Women Only made limited responses to those efforts. The Determination was therefore based on meager evidence from Women Only, and on information from Miller. On June 9, 2000 Women Only submitted new documentary evidence to the Tribunal which it sought to use at the hearing to bolster its previous assertions that Miller was, in fact, a manager.

To support its right to use the new evidence on appeal, Women Only called as witnesses Ms. Tracey Sami ("Sami") and Ms. Nilu Dadbeh ("Dadbeh"). Sami and Dadbeh are respectively the manager and assistant manager/sales manager at the Women Only location in Metrotown, Burnaby, now operating as a Women Zone Fitness & Aerobics club ("Metrotown Women Zone"). Sami and Dadbeh gave evidence concerning their repeated efforts to locate evidence concerning Miller's work duties prior to the issuance of the Determination. Both witnesses

confirmed that until June 6, 2000 they had not been able to locate more documentation than had been supplied to the Director's delegate before March 10, 2000. The witnesses credibly testified that upon searching for the third time for evidence on June 6, 2000, they discovered new evidence in a box in a relatively inaccessible location at the Metrotown Women Zone. Sami testified that, following her employment as manager in January, 2000, she had ordered renovations to the two storage rooms of the Metrotown Women Zone. She stated that she had located the box by directly climbing on the new shelving to search at the back corner, and that the box had not been visible from below when she had previously looked at the shelves.

The Tribunal has previously ruled that new evidence is not to be admitted at a hearing of an appeal from a Determination if that evidence "should have and could have been given to the delegate in the investigative process." *Tri-West Tractor Ltd.*, BCEST #3268/96; see also *Kaiser Stables Ltd.*, BCEST #D058/97. That principle must, however, "be balanced against the right of the parties to have their rights determined in an administratively fair manner." *Specialty Motor Cars (1970) Ltd.*, BCEST #D570/98. The Tribunal also said in *Specialty Motor Cars, supra*,

There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and...an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure.

The new documentary evidence consisted of excerpts in Miller's handwriting from a "communications book" documenting Miller's supervisory and scheduling comments to staff at Women Only, as well as her firing of one employee and hiring of another; a letter revising the terms of a contract for cards for the business; a faxed thank you note to Dadbeh; copies of invoices for advertising copy orders worth several hundred dollars each; and three reprimand forms completed by Miller for employees at Women Only. These items, when placed in their proper context, were clearly important to supporting Women Only's assertions that Miller was a manager because she spent the majority of her time supervising other employees. I am satisfied that the new documentary evidence here was not available to Women Only prior to the date of the Determination's issuance, despite reasonable efforts to obtain it. The evidence of Sami and Dadbeh leads me to conclude that this is not a case of evidence withheld by an employer who consistently and willfully refused to cooperate with the Director's investigation of a complaint. The new documentary evidence was of great importance to Women Only's case and was shown by the witnesses to have been searched for repeatedly prior to the Determination's issuance. Excluding the new evidence would have resulted in greater prejudice to Women Only than whatever prejudice its admission might cause to either Miller or the Director. I therefore allowed the admission of Women Only's new documentary evidence at the hearing of the appeal, and further allowed Sami and Dadbeh to give additional oral evidence to permit the new documentary evidence to be placed in its proper context.

ISSUE

The issue to be decided is whether Miller was a manager of Women Only within the meaning of the *Regulation* and accordingly disentitled to overtime wages pursuant to the *Act*.

THE FACTS AND ANALYSIS

Women Only is an enterprise operating fitness clubs for women in several locations throughout British Columbia. The owners are Dawn Moyou ("Moyou") and the wife of John Stanway ("Stanway"). In its appeal submissions, Women Only stated that Miller was hired when she answered a help wanted advertisement for a "manager" for Women Only's club in Metrotown, Burnaby ("the Metrotown club"). There is some dispute as to the exact date Miller's employment commenced, but that issue is rendered moot by my decision on the main point.

After giving evidence addressing the preliminary issue, Dadbeh testified that in September, 1997 she worked as the manager of the Park Royal Women Only club ("the Park Royal club"). She stated that Moyou hired Miller to manage the Metrotown club in September, 1997, while Dadbeh was at the facility. Dadbeh testified that because she had considerable experience managing at the Park Royal club, Moyou sent her to train Miller concerning company policies, membership cancellation procedures, advertising, scheduling, staffing, banking procedures, ordering of supplies, and the like. Dadbeh said she or others of her Park Royal club staff also went to help Miller when Miller was short-staffed, sometimes as often as 2 or 3 times a week. Dadbeh identified a fax sent by Miller to thank her, and stated that it was sent because she had gone to help Miller improve in managing the Metrotown club.

Dadbeh gave evidence that she trained Miller to do scheduling for about 20 employees, consisting of about 15 employees working in various capacities in sales, accounts receivables, cleaning, personal training, as well as 5 aerobics instructors. Dadbeh also identified that an aerobics coordinator reported to Miller, and that there could be as many as 10 aerobics instructors to schedule if there were substitutes. Dadbeh also said that Miller was aware that she controlled her staff, that they were to report to her, and that she had the right to hire, fire and discipline her staff independently of the owners. Dadbeh asserted she was sure Miller had fired one employee, and on cross-examination confirmed that Miller had told her about it herself. She was also aware that Miller had hired an assistant manager. Dadbeh also said in her direct testimony that it was her own experience as manager of the Park Royal club was that there were no repercussions if she hired or fired staff. She also said she had authority to set staff wages and did so, and that she spent most, if not all, of her time supervising staff even when occasionally involved in sales or other matters such as ordering purchases.

Dadbeh testified that she was involved independently from the owners in decisions concerning marketing and advertising for her Park Royal club. She also said she suffered no repercussions if she placed any club-related orders without first checking with the owners, and that she would have authority to make large equipment purchases for her club if she thought it feasible. She said she saw the owners only a few times in the five-year period she had been working for them. In describing purchases, Dadbeh only pointed to supplies of relatively inexpensive items.

Sami gave evidence concerning her duties as manager at the Metrotown club since January, 2000. She testified that she did not know Miller, since she was hired long after Miller's dismissal from the facility. Sami stated that she had complete supervisory authority over staff, that she had hired and fired several staff in the few months she had been manager, and that she was able to do so without checking with the Women Only owners. She also gave evidence concerning her ability to make independent purchases for the Metrotown club, and that she had arranged for

renovations without checking with the owners. On cross-examination, Sami stated that the costs of the renovations had been only about \$2,000, and that the items she purchased independently cost in the range of \$1,300. She also said she had independently called in tradespersons to check electrical items and supply services. On cross-examination Sami stated that she was not involved in sales herself, that she set up an annual business plan for the Metrotown club and had her aerobics coordinator do one as well, and she followed a budget that had been previously set.

The documentary evidence found by Women Only in June, 2000 was admitted into evidence by the agreement of the parties present at the hearing. On review of that evidence, it is apparent that the "communications book" was used by Miller to give her club's staff orders concerning tasks to be performed in the club and, by requiring the staff to initial the book, to check that staff were aware of those orders. Miller also used that document to reprimand or praise staff and to discuss staff scheduling. Miller's notes in that document further implied that she herself had done the firing of a receptionist and the hiring of an assistant manager. As well, the three reprimand forms completed by Miller are clearly evidence that she had disciplinary authority over her club's staff and exercised it.

In his argument on behalf of Women Only, Stanway asked that I draw a negative inference concerning the credibility of Miller from the fact that she did not attend the hearing. I find that where evidence has been offered that was in contradiction to the unsworn assertions of Miller in her submissions and complaint, I prefer the hearing witnesses' sworn testimony and the documents entered into evidence at the hearing. This is properly within my discretion to do: *H.B. Kayson Ltd. (c.o.b. Guru Lucky Sweets)*, BCEST #D051/98.

Section 1 of the *Regulation* defines a "manager:"

"manager" means

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

Section 34(1) of the *Regulation* states:

Part 4 of the Act does not apply to any of the following:

...

- (f) *a manager;*

Part 4 of the *Act* addresses hours of work and overtime.

Both Stanway, on behalf of Women Only, and the Director's delegate pointed to the Tribunal's decision in *429485 B.C. Ltd. (c.o.b. Amelia Street Bistro)*, BCEST #D479/97 (Reconsideration of BCEST #D170/97), as the definitive case on determining whether or not an employee is a manager. The case addresses primarily the issue of how to judge whether an employee with some supervisory responsibilities is a manager. The panel of adjudicators said:

The task of determining if a person is a manager must address the definition of manager in the Regulation.

...

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon 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. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager."

The panel also said that a manager:

Typically...has a power of independent action, autonomy and discretion;...the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business.

On the evidence presented to me, I find that Miller had and exercised the powers of a manager in that she was primarily hired to and did act to supervise staff for Women Only's Metrotown club. I find that Miller hired, fired and disciplined her staff, scheduled staff, altered work processes, and trained employees, and that those duties occupied the majority of her time. Having found that Miller was a manager under the supervisory duties provision of the definition of manager in the *Regulation*, there is no need for me to address whether or not she would have been found to be a manager under the executive capacity portion of the definition. It follows from this finding that Miller, as a manager, is not entitled to overtime wages, pursuant to section 34 of the *Regulation*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination and associated Penalty issued March 10, 2000 are hereby cancelled.

Michelle Alman
Adjudicator
Employment Standards Tribunal