

**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 -

Parker, Johnston Limited  
("Parker, Johnston")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Niki Buchan  
**FILE NO.:** 98/179  
**DATE OF HEARING:** June 1, 1998  
**DATE OF DECISION:** June 23, 1998

**DECISION**

**APPEARANCES**

Dan Parker	For Parker, Johnston Limited
Ken N. Bielert	For Himself
Gerry Omstead	For the Director
Karen Lutmer	Observer
Jim Helps	Witness
Chris Bate	Witness
Howard Allan	Witness

**OVERVIEW**

This is an appeal by Parker, Johnstone Limited (“Parker, Johnstone”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued on March 3, 1998. In this appeal the employer claims that no overtime wages and statutory holiday pay are owed to Ken N. Bielert (“Bielert”). The employer further requests a suspension of the Determination pursuant to Section 113 of the *Act* with respect to the order to pay Bielert \$11,935.46 for overtime wages, statutory holiday pay and interest.

Parker, Johnstone argues that Bielert was employed and paid as a manager; therefore, he is not entitled to overtime wages and statutory holiday pay.

**ISSUES TO BE DECIDED**

Whether Bielert’s primary employment duties brought him within paragraph 1(1)(a) of the definition of “manager” in the *Employment Standards Regulations* (the “Regulations”) to the *Act*?

**FACTS**

Parker, Johnston is a roofing company in Victoria that does work on Vancouver Island. Dan Parker, the CEO of the company, listed the areas of management in the company as sales and marketing, installation and operations. Vice presidents assist him. Colin Penny is at the vice president level of management: He oversees the labour force. Under him were the foremen/supervisors of the roofing crews. He was the supervisor over the Bielert crew.

There are usually 2 crews but there can be more, as business requires. The crews range in size from 6 persons to 25 persons depending on the project. Apprentices are frequently on crews but do not always work with the same crew. They are assisted and instructed by a certified roofer when on the site.

Bielert, a certified roofer, worked as a roofing foreman/supervisor for Parker, Johnston from April 1994 to September 12, 1997. His initial wage rate was \$25.00 per hour. This was approximately 25% more than the highest paid member of his crew. He also received performance bonuses for his management ability when he brought a job in on or below budget

Approximately 95% of Bielerts time was spent at "hands on" roofing. The remainder of his time involved administrative and clerical related duties. This sworn evidence came from Bielert and two witnesses at the hearing. A number of other employees submitted signed statements saying that Bielert spent anywhere from 80 to 95% of his time actually roofing.

Parker, Johnston claims that Bielert had the following responsibilities:

- Assigning crew tasks at the job site,
- Training apprentices,
- Crew safety procedures,
- Crew safety training on site,
- Administration, reporting and recording of any first aid requirements,
- Recording and reporting any WCB injuries,
- Suspending any crew member who violates WCB regulations,
- Controlling coffee and lunch breaks,
- Recording hours of work for each employee and submitting a daily progress report,
- Receiving materials at the job site,
- Laying off crew members due to shortage of work,
- Hiring and firing crew members when required,
- Complete responsibility for the roofing crew at the construction site
- Responsibility for the technical interpretation of work order and site plans,
- Responsibility for quality of workmanship and when required coordination with inspection authorities,
- Authority to terminate work for weather reasons, and
- Authority to set hours of work for crews according to the progress of the job.

Bielert denies he had authority of independent action on many of the above listed responsibilities. He says he answered to Colin Penny, on all issues. Colin Penny visited the work sites on a daily basis when he was in town. He issued work orders and set the number of employees for the crew on each job.

Bielert did recommend who to hire and fire and was able to refuse to have certain employees on his crew. He would terminate work for weather reasons, usually after consulting Colin Penny.

Only on rare occasions when he was working outside the Victoria area did he actually hire, fire or layoff employees. On these occasions he had complete control of the job site. Bielert did lay off employees when a job such as stripping was completed before the end of a shift. In this way he set hours of work for crews according to the progress of the job.

As foreman, Bielert did interpret the work orders and site plans and was responsible for the quality of workmanship, safety on the site as well as some training. He had independent authority for assigning crew tasks at the job site, recording hours of work for each employee and submitting a daily progress report.

Safety meetings were held at the job site every two weeks as required at which time all employees were involved. Bielert was not a safety monitor.

Bielert did not have many of the benefits other managers had at the company. He did not have a company truck, purchase order book, office or desk, keys to the main office or washroom, did not know the alarm codes, did not attend Thursday morning management team meeting, did no job estimating and was not invited to the management Christmas party.

## ANALYSIS

To determine whether Bielert was a manager for the purposes of the *Act* one must address the definition of “manager” in Section 1(1) of the *Regulations to the Act*:

(1) *In this Regulation:*

“**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.

Bielert was not employed in an executive capacity; therefore, to be considered a manager his primary duties must consist of supervising and directing other employees.

The Tribunal has addressed the issue of primary duties in *The Director of Employment Standards* (BCEST No.D479/97). The Reconsideration panel states at p. 6:

“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 a 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 the law, not by the title chosen by the employer or understood by some third party.”

Bielert spent 95% of his time “hands on” roofing. During this time he was obviously leading by example as argued by Dan Parker but his main job was the same as other members of the crew. While there were apprentices on roofing crew they could be directed and supervised by any one of the certified roofers on the job. They were not assigned to one journeyman or crew. Bielert essentially did the same job as other certified roofers with he added responsibilities for some administration and clerical work. His primary employment duties were not supervision and direction of employees. He did not have the power of independent action and discretion required to place him within the definition of “manager”. The majority of decisions re hiring, firing, determining the number of employees for a job, and establishing work schedules were performed by Colin Penny. I am satisfied that Colin Penny was the real manager and Bielert carried out the instructions issued by him.

There has been no evidence brought before me to show that the investigator made a wrong decision when he found the degree or power and authority given to Bielert is minimum and does not qualify him to be termed a manager for the purpose of the *Act*.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 3, 1998 and filed under number 019464, be confirmed in the amount of \$11,935.46 payable to Ken N. Bielert together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

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**Niki Buchan**  
**Adjudicator**  
**Employment Standards Tribunal**