

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 -

Robert L. Letourneau
(" Letourneau ")

-and-

Fastrac Mail Services Ltd.
(" Fastrac ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/290 and 2000/295

DATE OF HEARING: August 30, 2000

DATE OF DECISION: September 15, 2000

DECISION

APPEARANCES:

For the Employee	Robert Letourneau
For the Employer	Greg Hawes and Zeny Hawes
For the Director	No one appeared

OVERVIEW

The Employee, Robert Letourneau, (“Letourneau”) and the Employer, Fastrac Mail Services Ltd., (“Fastrac”) each appealed Determination ER #: 073-880 issued on March 23, 2000.

1. Letourneau appealed the Director’s finding that he was employed as a manager under the *Employment Standards Act* and was therefore not entitled to his full claim for overtime worked.
2. Fastrac appealed the Director’s finding that Letourneau worked overtime beyond the normal workday in the office.

ISSUE TO BE DECIDED

The issue to be determined in Letourneau’s appeal is whether the Director erred in finding that Letourneau was a manager within the meaning of the *Act*.

The issue to be determined in Fastrac’s appeal is whether the Director erred in finding that Letourneau worked overtime beyond the normal hours of work in the office.

FACTS

Most of the facts are not in dispute. The facts in dispute relate to the number of hours worked by Letourneau outside the office. Letourneau responded to an advertisement for a Dispatcher in the newspaper in September 1994. On September 26, 1994 he started working for Fastrac. Fastrac operated a mail service with 4 employees and a courier service with one employee, the dispatcher, and 4 independent contracted courier drivers plus a cyclist. Letourneau was hired as a dispatcher and grew into the position of manager of courier operations. As Letourneau demonstrated competence Greg Hawes, the President of Fastrac, delegated more work and responsibilities to him. Letourneau left Fastrac on October 13, 1995. On December 8, 1995 he filed a complaint with the Director of Employment Standards claiming unpaid overtime.

Letourneau had a number of years of dispatcher experience prior to working for Fastrac. He thought he negotiated a starting salary was to be \$9.50 per hour but his first pay cheque said he earned \$9.36 per hour over a 40 hour week for a total salary of \$748.80 biweekly. His salary remained at this level until January 1995. Letourneau's responsibilities increased shortly after he started and he spoke to the manager Greg Hawes about his salary. In January 1995 Letourneau's salary was increased to \$9.58 per hour over a 40 hour week for a total salary of \$797.06 bi weekly. His salary remained at this level until he left Fastrac.

From the commencement of his employment until it ended Letourneau was expected to work overtime every day. There was no planned lunch time relief for him. He was expected to work from 8 AM to 6 PM and reduced those hours to 8:30 AM to 6 PM when he had commuting problems. When he arrived at 8:30 no one had routinely covered the telephones which started ringing at 8AM.

Fastrac did not keep a record of employee hours worked. Fastrac did not keep a record of Letourneau's smoke breaks and both parties accepted the Delegate's calculations allowing ½ hour break each 8 hour shift. The length of the break is not disputed. Fastrac does not dispute the total number of overtime hours at the office during these hours or the pay resulting from these hours, as they kept no record of their own.

In addition to the office hours Letourneau took work home. He transferred files from the office computer on discs to his home computer and brought his from home back on the same discs. He had several major assignments to do with courier rates and the Motor Carrier Commission's anticipated audit. Fastrac's rates and filings with the Commission were not in compliance with the regulations for the courier industry. Letourneau did most of the problem solving at home. He kept a tally of his hours based on the computer entries of time work was done. These records were filed with his complaint. Fastrac denies any knowledge of the overtime and disputes the accuracy of the records Letourneau produced.

Letourneau did not seek authorization for working overtime. He decided when to work overtime and how much overtime to do. He started and ended when he wished. He decided whether to work at the office or at home. He produced the results of his work and expected Fastrac management to realize the amount of work required for Fastrac to successfully complete the audit and restructuring of their courier rates. On occasion Greg Hawes helped Letourneau load his car with material he needed to work on at home. Letourneau is certain he told Greg Hawes that he was keeping track of his extra hours of work. Greg Hawes does not remember the conversations or the work going home.

Letourneau never asked for compensation for this work. He did not show the records to Fastrac. On the basis of these records Letourneau worked statutory holidays and during his vacation but only claimed overtime after he left Fastrac.

The Determination found that Letourneau was a manager because he worked in an executive capacity. As a result of finding that he was a manager the calculation of overtime was based on regular hourly rates not overtime rates of pay. Letourneau argued

that he was entitled to Part 4 benefits because he was not a manager and Fastrac argued that the rates were correct if any overtime was worked at home.

LAW AND ANALYSIS

The onus is on an appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law.

Manager – Letourneau Appeal

The Determination found that Letourneau was a manager working in an executive capacity as defined in *Employment Standards Regulations*

Section 1(1) of the Employment Standards Regulations defines “manager”:

1. (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.*

Letourneau argued that he was not a manager. He stated that he had no final decision making power and was primarily an employee working under the supervision and direction of the President of Fastrac, Greg Hawes. His authority was limited to making recommendations.

The dispatcher was the sole employee in the courier side of Fastrac. The dispatcher directed the work from pick up to drop of by the independently contracted couriers. There were no ‘employees’ to supervise as all the couriers and cyclists were independent contractors. If the couriers were employees, Letourneau could have fallen within the definition of a manager based on his primary duty of supervising the couriers.

The Director found that Letourneau worked in an ‘executive capacity’. The Delegate based this conclusion on a number of factors. He interviewed 3 employees who all agreed that Letourneau ‘ran the show’ and his role was of an ‘executive nature’.

Letourneau took initiative and developed direction for the courier business in preparing the company for the Motor Carrier Commission audit. He developed and introduced profitable restructured rates for services. He prepared revenue, expense and job costing reports, negotiated contracts with clients and prepared all the driver payroll records. He did his work without supervision or direction on the computer software program and

reported outcomes to the company president, Greg Hawes. Letourneau was the company representative with the clients of the courier business. Staff and management considered him the manager of the courier business.

There was nothing in Letourneau's evidence, which substantially disputed the conclusions in the Determination. It was the very fact that Letourneau was in a management role that allowed him to set his own hours of work, which led to the overtime claim. He was able to take work home without consulting his supervisor.

The definition of manager was considered by an Adjudicator and was reconsidered by three adjudicators in *429485 B.C. Limited Operating Amelia Street Bistro* ("Amelia Street Bistro") BC EST #D479/97. They discussed a number of previous cases and concluded as follows.

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

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person."

Many of the aspects of work done by Letourneau are contained in this definition. The evidence about the manager of operations position is that it contained elements of management and executive decision making in strategizing a business plan to keep the courier side of the business viable. No one else at Fastrac did this work. During the 13 months Letourneau was in the position the whole of the courier business was under review and an overhaul. When the President of Fastrac questioned the viability of the courier side of the business, Letourneau took on the analysis. Letourneau was charged with determining how the courier business could comply with the industry regulations and be profitable. This type of work was of an executive level not normally given to an employee to work out alone.

Letourneau did not feel he could bind the company but he made commitments to clients each day. He kept courier manifests that generated payrolls. He made strategic shifts in rates and methods of operation. The other employees and management relied on his judgement. He took on greater overall responsibilities than his predecessors did and

those that followed were not faced with the level of change he managed during his employment.

There was nothing in Letourneau's evidence, which substantially disputed the conclusions in the Determination. It was the very fact that Letourneau was in a management role that allowed him to set his hours of work and to take work home. I do not find sufficient evidence that the Director erred in concluding that Letourneau was a manager within the meaning of the *Act*. Letourneau's appeal is denied.

Under section 34 of *Employment Standards Regulations*, Part 4 of the *Act*, which sets out the calculation of overtime does not apply to an employee who is a manager. A manager is paid for hours worked but not at overtime rates.

Unpaid Hours of Work – Fastrac Appeal

Fastrac's appeal challenges the Director's finding that Letourneau worked hours for which he was not paid. Fastrac accepts responsibility for the hours worked during the normal hours of business and disputes the hours claimed after these hours. Fastrac argues that they did not authorize any work beyond the normal workday.

Letourneau's evidence is that he found he could not complete the work assigned in his regular workday. Greg Hawes ("Hawes") denies being aware of this problem. Hawes' evidence is that the courier business was small, only 4 couriers and a cyclist. Letourneau had previous experience as a dispatcher for 50 couriers. Hawes expected the additional tasks assigned to Letourneau to be done as part of the regular workday because the dispatcher position was not full time without them. Hawes' evidence is that additional tasks had been done by Letourneau's predecessors. Hawes denies authorizing any work outside the office during Letourneau's employment.

Fastrac attacks some of the evidence produced by Letourneau. They argue the business was small and could not sustain overtime costs. If they had known that Letourneau was working overtime they would have stopped him. For example, they would not have allowed Letourneau to work for 13 hours on January 1, 1995.

Fastrac's position was that there was not enough work to justify the number of hours claimed. They sought clarification of the two forms used to calculate hours. The Delegate explained that the originals were supplied by Letourneau with the complaint. The Delegate then compared the forms before drawing his conclusions. Letourneau's original listings match the computer records. His computer records are from home and include items in the directories for periods outside the relevant period. The data for inside the relevant period was unchallenged by Fastrac.

Letourneau showed that he claimed for hours worked which were supported by the computer entries for courier services or time spent on his home computer working on projects assigned. Fastrac argued that these records could have been created after the fact. Letourneau showed that the records correlated with time sensitive information for courier services. He pointed out that if the data was altered he could not patch the

material from his home computer back into the database in the office each day when he brought back the discs.

Based on the evidence it appears that Fastrac management was not paying much attention to the courier operations during Letourneau's period of employment. The operation was basically left to Letourneau to manage in whichever way he could. Letourneau could not meet the needs of the business in the regular workday. Letourneau decided to try and make the operation more efficient by introducing a computer program, which required a great deal of time to develop. Greg Hawes was aware that Letourneau wanted to implement this type of software and he told Letourneau to go ahead if he wanted. He did not monitor what the time commitment was to make this work. He knew the work for the audit and revising the rate schedules was ongoing. He did not inquire what additional hours were needed for these projects. An employer must pay and employee for hours actually worked.

In *Re Kaycan Ltée/Ltd.* BC EST #D606/97 the employer specifically told the employee not to work during the lunch hour and the employee continued to work part of his lunch hour to provide customer service. The employer told the employee not to work on the lunch hour and when he persisted the employer wrote to the employee telling him not to work the lunch hour. Adjudicator Love found that the employer was not responsible for the overtime worked during the lunch hour after he had written to the employee. He did find the employer liable for overtime for worked lunch hours before the written prohibition.

Some nights Letourneau stayed after 6 PM working. If Fastrac did not want Letourneau to incur overtime costs then there should have been a directive not to work overtime.

Fastrac had to have been aware that Letourneau was extending his work for the audit, the revision of the rates and the computer program. Fastrac did not ask about the hours and did not forbid Letourneau from performing work outside the 9½ hour day.

Section 35 of the *Act* sets out a test for whether employees should be paid for hours claimed. The section states 'An employer must . . . [pay] . . . if the employer requires or, directly or indirectly, allows an employee to work'. Fastrac was aware of the unusual pressures for change of practices on the courier business. It was logical that additional work was necessary. Fastrac indirectly allowed Letourneau to work the hours claimed.

Fastrac had no evidence to refute the hours documented and claimed by Letourneau. Fastrac stated that they had not analyzed the evidence provided until after the Determination. This complaint was filed with the Director in December 1995. Fastrac did not refute Letourneau's documented hours of work during the investigation.

There is ample evidence to support the findings in the Determination that the hours were worked. Fastrac has failed to meet the evidentiary burden to support a successful appeal. I find that there is no error in fact or law in the Determination. The appeal is denied.

ORDER

Pursuant to section 114 (1)(a) of the *Act* Robert L Letourneau's appeal is dismissed and Fastrac Mail Services Ltd.'s appeal is dismissed

Pursuant to section 115 of the *Act*, Determination ER: 073-880 dated March 23, 2000 which requires Fastrac Mail Services Ltd. to pay Letourneau \$6,623.47 is confirmed. Fastrac Mail Services Ltd. must pay any additional interest due from the date of the Determination under Section 88 of the *Act*.

April D. Katz
Adjudicator
Employment Standards Tribunal