

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 -

Alex Munro operating Sooter Studio 25
("Munro")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 98/246

DATE OF HEARING: June 22, 1998

SUBMISSIONS: June 26, 1998

DATE OF DECISION: July 13, 1998

DECISION

APPEARANCES

Alex Munro on behalf of Alex Munro operating Sooter Studios 25
Barb Munro observer
Rita Harvey on her own behalf

OVERVIEW

This is an appeal by Alex Munro operating Sooter Studio 25 (“Munro”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated March 31, 1998 issued by a delegate of the Director of Employment Standards (the “Director”). Munro alleges that the delegate of the Director erred in the Determination by concluding that Rita Harvey (“Harvey”) was owed wages, compensation for length of service and statutory holiday pay in the amount of \$2,237.04 plus interest for a total of \$2,340.14.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Is Harvey owed wages by Munro for December 1996 ?
2. Was Harvey a ‘manager’ as defined by the Employment Standards Regulations (the “*Regulations*”) ?
3. If Harvey was a ‘manager’ is Harvey owed for statutory holiday pay?
4. Is Harvey entitled to compensation for length of service?

FACTS

The following facts are not in dispute:

- Harvey was employed by Sooter Studios Limited (outlet #25) commencing April 22, 1994;
- Munro purchased outlet #25 in December 1996;
- Harvey continued to be employed by Munro until May 3, 1997;
- Harvey did not receive wages for part of December 1996;

Munro agrees that if Harvey is found to not be a manager, statutory holiday pay is owing.

Munro testified and stated that:

- she did not “take over” outlet #25 until after December 13, 1996;
- Harvey purported to be an experienced manager yet she called 5 - 6 times each day for direction;
- Harvey did all of the day to day paperwork, banking etc. at the outlet;
- there was no contract of employment between Harvey and Munro;
- Harvey had hired/fired an employee during the period Munro owned the outlet;
- only Harvey had cheque signing authority although Munro could withdraw funds using a bank card;
- Harvey authorized time off for employees and utilized employees as required;
- the responsibility for Harvey’s wages for the early part of December 1996 is entirely that of Sooter Studios Limited;
- bank deposits were only made to Munro’s account after purchase closed December 13, 1996;
- she wrote a letter dated April 24, 1997 and believes it was given to Harvey that day when she and a prospective purchaser of the outlet (“Penny”) visited the outlet;
- the Record of Employment (“ROE”) was issued April 28, 1997 and indicates that April 30, 1997 was anticipated as the last day of employment;
- the ROE indicates “A” -shortage of work as the reason for issuing;
- no compensation for length of service is owed as Harvey’s employment contract terminated on April 30, 1997.

A subsequent submission from Munro indicates that the date of providing the notice letter to Harvey was likely April 25, 1997 not April 24, 1997.

Harvey testified and stated that:

- Munro and Penny visited the outlet on April 28, 1997;
- the rent for the month of December 1996 was paid by Munro;
- she first became aware of the prospective purchase by Munro on December 7, 1996 as at that time she was told by Sooter Studios Limited to “hold” the receipts due to the pending purchase;
- while employed by Sooter Studios Limited she was paid statutory holiday pay and overtime pay as required;
- she did hire employees but only during the time that Sooter Studios Limited was her employer and only with their approval;
- she worked for Munro on May 1, 2 and 3, 1997;
- she did not consider herself a ‘manager’ as, pursuant to the contract of employment, her primary function was not to supervise and direct other

employees and furthermore, she had to obtain approval from the owners prior to making any decisions with respect to the business.

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with Munro.

1. Is Harvey owed wages by Munro for December 1996 ?

There is no dispute that Harvey's employment continued after the purchase of outlet #25 by Munro. The ROE issued by Munro clearly indicates that Harvey commenced employment with her on December 1, 1996. The "Interim Sales Agreement" between Sooter Studios Limited and Munro contains the requirement that "the buyer shall pay for all ongoing expenses commencing December 1, 1996....".

Based on the evidence provided and on the balance of probabilities, I conclude that Harvey is owed wages by Munro for December 1996 . I am satisfied that the calculation of wages for December as set forth in the Determination is correct in all respects.

2. Was Harvey a 'manager' as defined by the Employment Standards Regulations (the "Regulations") ?

The *Regulations* define 'manager' as:

"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;"*

Previous decisions of the Tribunal, most notably BC EST #D479/97 have taken the position that :

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simple recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgements about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering schedules and training employees is typical of the responsibility and discretion accorded a manager.

The contract of employment signed by Harvey with Sooter Studios Limited and not changed by Munro clearly indicates that Harvey may make recommendations but is not permitted to make any final decisions with respect to any aspect of the business.

The evidence of Harvey was that other than the change in ownership, her responsibilities did not change significantly after the purchase by Munro.

Based on the evidence provided and on the balance of probabilities, I conclude that Harvey was not a manager as defined by the *Regulations*.

3. If Harvey was a ‘manager’ is Harvey owed for statutory holiday pay?

As Munro has already agreed, if Harvey was found to not be a manager, Harvey is owed for statutory holiday pay. I am satisfied that the amount of statutory holiday pay calculated by the delegate of the Director and set forth in the Determination is correct.

4. Is Harvey entitled to compensation for length of service?

The obligation of an employer to pay compensation for length of service is set forth in Section 63 of the *Act* which provides:

63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

The evidence was that the employment agreement originally signed by Harvey and Sooter Studios Limited and left unchanged by Munro was reviewed and revised on an annual basis since Harvey's employment commenced. This year to year continuation of employment is indicative of a long term employment relationship as opposed to one where the relationship is expected to and actually is terminated at the expiry of the contract.

There was no substantive evidence offered that Munro actually presented the notice letter to Harvey.

Based on the evidence provided and on the balance of probabilities, I conclude that Harvey is owed compensation for length of service.

The appeal by Munro is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated March 31, 1998 be confirmed in the amount of **\$2,340.14** together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal