

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; Brock Robertson Roofing Company Ltd.;
High View Properties Ltd. Parker Johnston Contracting Ltd.
("Parker, Johnston")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Niki Buchan
FILE No.:	98/295
DATE OF HEARING:	July 13, 1998
DATE OF DECISION:	August 11, 1998

DECISION

APPEARANCES

Dan Parker	for Parker, Johnston
Jim Helps	for Parker, Johnston
Howard B. Allan	for Himself
Lance Grant	Advisor for Howard B. Allan
Gerry Omsted	for the Director
Kim Norbury	Witness
Kris Bate	Witness
Ken Bielert	Witness

OVERVIEW

This is an appeal by Parker, Johnston Limited, Brock Robertson Roofing Company Ltd., High View Properties Ltd. and Parker Johnston Contracting Ltd. (“Parker, Johnston”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards (the “Director”) issued April 28, 1998. In this appeal the employer claims that no overtime wages are owed to Howard B. Allan (“Allan”). Parker, Johnston seeks a reversal of the Determination and order to pay Allan \$5,420.30 consisting of overtime wages, vacation pay plus interest.

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

ISSUE TO BE DECIDED

Whether Allan’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

The Determination found that the companies, known here as Parker, Johnston, are associated corporations as defined by Section 95 of the *Act*. Allan worked for all of these companies and was paid for that work by Parker, Johnston Limited. He filled in his own time sheets, charging his time to the company that required his services. Parker, Johnston Limited then allocated certain charges to the other companies depending on the amount of work Allan did for them.

Allan commenced employment with Parker, Johnston in 1992. He continued to work up to September 9, 1997 when he took a leave for medical reasons. His Record of Employment was issued on December 29, 1997.

Allan was trusted to work flexible hours as required and was responsible for filing his time sheets weekly. He was paid an hourly rate of \$16.50 per hour. He worked overtime hours but was paid a straight time rate for those hours.

Allan was hired as a mechanic and maintenance person to do yard work, equipment repairs, auto repairs and general duties. The majority of his time was spent performing the duties of a mechanic and maintenance person. He had the responsibility for the care, custody and control of most of the equipment. He was assigned a company vehicle and was on call for repairs for all equipment and vehicles. He was usually in the yard early to see that equipment was working and material was prepared for the crews to take to the construction site. If he was not there the crews did proceed under the direction of the foreman or the supervisor, Colin Penny.

Among his other assigned duties, he originated purchase orders for repair and maintenance of equipment and for ordering working materials for the crews. At times he acted as a crew foreman in cases of sickness or holidays and occasionally filled in for Colin Penny, the supervisor, when he was away. He did not attend Thursday management meetings unless specifically required to attend. No evidence was presented to show that he had actually ever attended a Thursday management meeting.

He did hire day labourers on occasion and he apparently supervised them in clean up. At times he sent them home when a job was completed. Colin Penny, the supervisor, assigned these responsibilities to him.

Allan acted as a company representative at industry golf tournaments and attended the management Christmas dinner each year. He also had access to some codes and keys to certain facilities normally provided only to management personnel.

Allan attended safety meetings and took notes on at least one occasion but it was generally the responsibility of the foreman to conduct safety meetings.

A foreman at Parker, Johnston Limited was paid a wage rate of approximately \$22.00 to \$25.00 per hour, considerably more than the rate paid to Allan.

ANALYSIS

To determine whether Allan 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*.

Section 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.

Allan 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.”

Allan spent the majority of his time working alone performing maintenance on equipment and vehicles. He was hired for that reason. On occasions, he took on other responsibilities similar that of the foreman but usually under the direction of the supervisor, Colin Penny. While he did replace foremen and even Colin Perry at times, this was only to allow for vacations or other time off. It was not a part of his normal daily activity. He did at times hire day labourers and direct them in clean up and other related activities - this at the direction of the supervisor.

His access to codes and keys normally provided only to management personnel was mainly because they were required in order that he could fulfill his mechanic and maintenance duties.

While he was a trusted employee of the companies and represented them at golf tournaments and attended the Christmas parties, this did not involve the supervision or direction of employees in their work.

His involvement at safety meetings was similar to all employees; he did not have the sole responsibility of direction and supervision the safety meetings or program.

Allan's pay rate was not even equivalent to that Parker, Johnston Limited paid the foreman.

All in all, Allan's primary duties were not those of supervising and directing other employees as required for him to fall under the definition of "manager" in the Regulations. There was no evidence brought before me to show that the investigator made a wrong decision when he found that Allan was not a manager. His primary duties were that of a mechanic and maintenance person. He entitled to overtime.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated April 28, 1997 and filed under number 019464, be confirmed in the amount of \$5,429.30 payable to Howard B. Allan together with whatever further interest that may have accrued, pursuant to section 88 of the Act, since the date of issuance.

Niki Buchan
Adjudicator
Employment Standards Tribunal