

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 -

Can Com Electronics Ltd.
("Can Com")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Cindy J. Lombard

FILE NO.: 2000/125

DATE OF HEARING: August 2, 2000

DATE OF DECISION: September 01, 2000

DECISION

APPEARANCES

Carl Sjobisk and David R. Lewis, Sr. appeared on behalf of Can Com Electronics Ltd. together with David Lewis, Jr., Kevin Kam, Tracy Dewalt and Kelly Sarnowski who also gave evidence.

The employee, Don Hinsche, appeared on his own behalf together with his wife Sandy Hinsche.

OVERVIEW

This is an appeal by Can Com Electronics Ltd. (“Can Com”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 7, 2000, under File No. ER74615 (the “Determination”). The Director’s delegate determined that Donald Hinsche (“Hinsche”) was an employee of Can Com and not a manager or executive or supervisor and as such was entitled to overtime and statutory holiday pay plus interest in the total amount of \$15,101.29 for the period of October 13, 1995 to June 27, 1998.

ISSUES TO BE DECIDED

Whether Hinsche, was a manager as defined by the *Regulation* and therefore not entitled to overtime, statutory holiday pay and interest.

FACTS AND ANALYSIS

The employee, Hinsche, worked for Can Com commencing March 13, 1994, and ceased his employment there on either June 27, 1998 (Can Com’s position) or June 30, 1998 (Hinsche’s position). He was paid commission (i.e. 4% of his sales).

Can Com is a computer business, which both sells and services computer equipment. During the time that Hinsche worked there, the business premises were located in a mall in Williams Lake. Can Com’s principal owners are David R. Lewis, Sr. (“Lewis, Sr.”) and Carl Sjobisk (“Sjobisk”) who also own Can Com Electronics Ltd. (“Can Com Electronics”). Can Com Electronics had a different business location than Can Computers, which is a subsidiary of Can Com Electronics. Lewis, Sr. gave evidence that Can Com Computers opened its doors in the mall in approximately 1990 and at that time his son, David Lewis, Jr. was the manager. At the time that Hinsche commenced working at Can Com Computers, Lewis, Jr., was still the manager. In October, 1995, Kelly Sarnowski starting working for Can Com as well. From that date on, the main people working in the

mall location were David Lewis, Jr., Kelly Sarnowski and Hinsche. At the time of Hinsche's departure, the other employees included Tracy Dewalt who answered phones and provided some customer service, and Kevin Kam, a sales person. Generally, David Lewis, Jr., worked ordering computers and parts while Mr. Sarnowski was the computer technician. In the sales area at the front of the store premises were Hinsche, Kevin Kam and Tracy Dewalt.

In determining whether Hinsche was a manager during the period October 13, 1995, to June, 1998, we must look to the definition of manager under the *Regulation* and then analyze what the role and duties of Hinsche were for Can Com Computers. Section 1 of the *Regulation* defines manager to mean:

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

In order to determine whether the overall characterization of one's duties are primarily supervising and directing other employees we look at such factors such as:

- i) the amount of time spent supervising and directing other employees
- ii) the nature of the person's other i.e. non-supervising employment duties
- iii) the degree to which the person exercises the kind of power and authority typical of a manager
- iv) to what element of supervision the power applies
- v) the reason for the employment
- vi) the nature and size of the business.

See: *Amelia Street Bistro* BC EST #D479/97.

Subjective factors, which indicate that a person exercises the kind of power, and authority typical of a manager would include making final judgment about such matters as:

- i) hiring, firing, authorizing overtime, time off and leave of absences, calling employees in to work or laying them off
- ii) power of independent action, autonomy and discretion;
- iii) the authority to make final decisions, not simply recommendations relating to supervising and directing employees or the conduct of the business.

The onus is on the appellant-employer, Can Com Computers, to show that the Director's determination on this issue is wrong.

The evidence from the parties and witnesses is as follows:

1. For the Employee:

Hinsche

Hinsche says that he ran the front end of Can Com Computers, that is sales. In his words, he looked after making the business work. At the time of his departure, he was handling the scheduling of hours for Tracy Dewalt, Kevin Kam, and a part-time employee, Evelyn Russell. Hinsche says though that he was not an over-all manager of the store rather that the store was run like a tribunal i.e. himself, David Lewis, Jr., David Lewis, Sr., and Kelly Sarnowski with respect to major decisions. Hinsche says that he had no authority over David Lewis, Jr., or Kelly Sarnowski. While Hinsche says that he could order product for the store, he says that he had to have approval for orders over \$10,000.00. Furthermore, Hinsche says that he did not have independent power to hire or fire anyone. With respect to the hiring of Tracy Dewalt, Hinsche says that it was suggested to him by Marg Lewis, wife of Lewis, Sr., that "they should hire Tracy ". With respect to Kevin Kam, again Hinsche says that in advance of interviewing him, the need for another sales person was discussed between the tribunal hiring with David Lewis, Jr., Hinsche and Sarnowski. Furthermore, Hinsche says that the majority of his time was spent in computer sales and his supervisory duties i.e. scheduling of hours and supervising the other two employees in the front was minimal. Furthermore, Hinsche says that in the day to day operation of receiving products only David Lewis, Jr., had the authority to sign a cheque for payment of C.O.D. purchases. Hinsche says that he could not set pay rates or approve overtime on his own and as acknowledged by Lewis, Sr., Hinsche had nothing to do with the payroll. Hinsche performed no budgetary accounting, auditing or financial control of any kind.

2. For the Employer:

a) Lewis, Sr.

David Lewis, Sr., says that he, for the most part, left the running of the Can Com Computer store to Hinsche and his son, David Lewis, Jr. With respect to cheque signing authority he agrees that Hinsche did not have signing authority but says that he never asked for it. Lewis, Sr., says that Hinsche had complete freedom to run the store and was responsible for scheduling hours. In the alternative if Hinsche was an employee, Lewis, Sr., says he, Lewis, Jr., and Sarnowski were on equal commission and were instructed not to work beyond 40 hours per week by head office. Lewis, Sr. takes issue with hours of overtime submitted by Hinsche in furtherance of his claim for which he was overtime and statutory holiday pay. Payroll was done by the same bookkeeper who was located in the Can Com Electronics Ltd. Store.

b) Carl Sjobisk

Mr. Sjobisk takes issue with the fact that during the nearly two year period for which Hinsche claimed overtime, that he had never raised this issue prior to leaving the company and secondly, he disputes whether in fact the overtime hours claimed were in fact worked.

c) David Lewis, Jr.

Lewis, Jr., says that while he was manager of the store at one time, he gave up that position to Hinsche in 1995. Lewis, Jr., however, does admit that he was service manager of the back of the store i.e. that department which serviced computers and ordered parts. He worked with Kelly Sarnowski who was a technician. Lewis, Jr., says that while he had the authority to sign cheques for C.O.D. orders that he ordered mainly parts as opposed to the bigger items such as computers which Hinsche took care of.

d) Kelly Sarnowski

Sarnowski was a technician hired in 1995 by Lewis, Sr. He says that when he wished to take time off, he consulted with Hinsche and Lewis, Jr. Sarnowski says that when he was hired in 1995 he had a meeting with Lewis, Sr., Lewis, Jr. and Hinsche. He says that the purpose of the meeting was to discuss what direction the store would take and what his job duties would be. He says that suggestions were made as to how the business could be better run and at the end of the meeting Hinsche said that they needed one person in charge and he wanted to be that person or he would seek employment elsewhere. Since Hinsche was the most qualified and Lewis, Jr. wasn't interested, and Sarnowski didn't want that responsibility, it was agreed that Hinsche would be the manager. Furthermore, Sarnowski says that Hinsche took care of sales, advertising, hiring of front end staff and most of the ordering while Lewis, Jr., took care of most of the in-store repairs, parts, ordering and some sales. Sarnowski says that he took care of in-store repairs, helped cover the front end of the store and did most of the service calls.

Sarnowski says and Lewis, Jr., and Hinsche agree that their ultimate goal was to purchase the business but that there was a falling out between Lewis, Jr. and Hinsche and Hinsche abandoned his idea to purchase the business with Lewis, Jr. and Sarnowski and left in June, 1998, and subsequently made the claim that is the subject matter of this appeal for overtime and statutory holiday pay.

e) Tracy Dewalt

Tracy Dewalt worked for Can Com Computers between March 1997 and June 1998. She says that her duties were receiving goods, answering the telephones and

customer service. Dewalt says that she was hired at the end of her interview with Hinsche by him. She says that Hinsche hired her and scheduled her hours. She says that his business card said that he was the manager and that whenever anyone asked to see the manager, they were referred to him. She says that Lewis, Jr., was in the service department and that he did not oversee her or schedule her hours.

f) Kevin Kam

Mr. Kam was employed by Can Com Computers from August 6, 1997, to June 30, 1998, as a sales person. He, too, states that he was hired by Hinsche but in cross-examination by Hinsche admitted that Hinsche did say to him that he would have to consult with Lewis, Sr., to see if they had the money to bring in another sales person. Kam was paid an hourly wage, he worked full-time and says that if he wanted time off he had to get permission from Hinsche.

The onus is on the employer Can Com to persuade the Tribunal that the Director's determination was wrong. Based on the evidence heard, I am not persuaded that the Appeal can succeed. In particular, I am persuaded by the following conclusions of fact:

1. The amount of time that Hinsche spent supervising and directing other employees was limited. His main function was that of salesman. He spent very little time in his duty of scheduling the working hours of two other employees or supervising them.
2. While Hinsche had some supervising duties, he was not independent in that he had to seek approval from the parent company, Can Com Electronics Ltd. Furthermore, Hinsche did not have supervising authority over the other two of the five main people working in the store i.e. Lewis, Jr., and Kelly Sarnowski.
3. As stated by Carl Sjobisk on behalf of Can Com Electronics, the three, that is David Lewis, Jr., Kelly Sarnowski, and Hinsche were on their own and they ran the business. However, with three people in charge when there only is a total of five in the store, there was not much in the way of supervising to do.
4. As stated by Hinsche, his primary role at Can Com Computers was to produce sales in the process he organized two staff members and made sure that they produced sales because his remuneration was dependent upon that.
5. Hinsche did not have independent authority to hire or fire. Dewlat was hired because Marg Lewis wanted her hired. Kelly Sanrowski's evidence is that Hinsche did not have authority to fire him but only David Lewis Sr. could do so.

With respect to Can Com Electronics' complaint that they do not believe that Hinsche worked the overtime hours claimed, the only time records produced were time records produced by Hinsche that he kept in a computer program during the relevant time. The employer appears to have kept no records and therefore there is no real evidence to contradict that of Hinsche and therefore the Director was correct in determining the the evidence of Hinsche as to time worked should be accepted.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated February 7, 2000, be confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal