

An appeal

- by -

Common Ground Publishing Corp.  
("Common Ground")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2001/240

**DATE OF HEARING:** June 15, 2001

**DATE OF DECISION:** June 26, 2001

## DECISION

### APPEARANCES:

Joseph Roberts, President  
and Vincent Jonckea, Agent

for Common Ground Publishing Corp.

Lawrence Buser

on his own behalf

### OVERVIEW

This is an appeal brought by Common Ground Publishing Corp. (“Common Ground”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Common Ground appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on March 14th, 2000 under file number ER 050050 (the “Determination”). The Director’s delegate determined that Common Ground owed its former employee, Lawrence Buser (“Buser”), the sum of \$21,240.46 on account of unpaid wages including overtime pay, 2 weeks’ wages as compensation for length of service, vacation pay and interest. The delegate rejected Common Ground’s assertion that Buser was an independent contractor and not an “employee” as defined in section 1 of the Act. The delegate also rejected Common Ground’s position that Buser was a “manager” as defined in section 1 of the *Employment Standards Regulation*; accordingly, Buser was not disentitled to overtime pay by reason of section 34(1)(f) of the *Regulation*. By way of the Determination, a \$0 penalty was also assessed against Common Ground.

### PREVIOUS PROCEEDINGS

I heard Common Ground’s appeal over three days, namely, August 9th, 21st and October 5th, 2000. On October 30th, 2000, I issued reasons for decision (B.C.E.S.T. Decision No. D433/00) varying the Determination as it related to Buser’s unpaid wage claim and confirming the \$0 penalty.

There were three issues raised in the appeal. First, I held that Buser was an “employee” as defined in section 1 of the *Act* and not an independent contractor. Accordingly, the *Act* governed his employment with Common Ground. Second, I held that the delegate erred in awarding Buser overtime pay since Buser was a “manager” as defined in the *Employment Standards Regulation* and thus was excluded from the hours of work and overtime provisions of the *Act* [see *Regulation*, section 34(1)(f)]. In particular, I concluded that Buser had been employed in an “executive capacity”. Third, I concluded that even if there had been some delay in investigating Buser’s complaint, I did not have the authority to reduce the interest that would otherwise be payable under section 88 of the *Act*.

In my October 30th, 2000 decision I summarized my findings and issued an Order as follows:

### **SUMMARY**

The delegate correctly determined that Buser was an “employee” of Common Ground during the relevant period. In my opinion, however, the delegate incorrectly determined that Buser was not a “manager” during his tenure with Common Ground. Accordingly, the Determination must be varied by cancelling the award made in Buser’s favour on account of overtime pay. Common Ground does not challenge the award made in favour of Buser representing 2 weeks’ wages as compensation for length of service and thus that aspect of the Determination stands. Buser is entitled, in addition, to concomitant vacation pay and interest.

### **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be varied to indicate that Buser, during the period of his employment by Common Ground, was a “manager” and, therefore, not entitled to be paid overtime pay under Part 4 of the *Act*. It follows that the Determination must be varied by cancelling the monetary award made in favour of Buser on account of unpaid overtime pay.

As set out in the Determination, Buser is entitled to 2 weeks’ wages as compensation for length of service and concomitant vacation pay and interest and, accordingly, the Determination is confirmed with respect to those matters.

I will leave it to counsel to determine between themselves Buser’s precise monetary entitlement. In the event that counsel are unable to reach such an agreement, I will retain jurisdiction to determine Buser’s entitlement.

Finally, inasmuch as Common Ground does not dispute that it contravened the *Act*, at least with respect to the payment of compensation for length of service, the \$0 monetary penalty is also confirmed.

### **THE CURRENT APPLICATION**

Both Common Ground and Buser were represented by legal counsel at the original appeal hearing. However, neither counsel now represents their former client and both parties are currently unrepresented. The parties have not been able to reach an agreement regarding Buser’s actual monetary entitlement and thus that issue has come back before me for adjudication.

### **BUSER’S UNPAID WAGE ENTITLEMENT**

During his employment Buser issued “invoices” to Common Ground for all of his hours worked. The parties agree that during Buser’s employment (a 2-year period from June 1995 to June 1997)

he issued invoices to Common Ground in the total amount (after some consensual adjustments) of \$66,840.45. These invoices were paid in full.

Not surprisingly, since Common Ground took the position throughout Buser's employment that Buser was an independent contractor rather than an employee, Common Ground did not pay any additional monies to Buser on account of vacation pay (see section 58). However, in light of my finding that Buser was an employee, he is entitled to an additional 4% of wages as vacation pay. The delegate awarded Buser \$3,234.60 as vacation pay payable on his regular wages. However, the delegate also awarded Buser overtime pay and thus the award for vacation pay is too generous to the extent that it included vacation pay on overtime earnings. I ordered that Buser's wage entitlement be reduced to the extent that it included monies on account of overtime pay. Thus, after factoring out the overtime pay award, Buser is entitled to \$2,673.62 (4% x \$66,840.45) on account of vacation pay for his regular wages.

The delegate awarded Buser 2 weeks' wages as compensation for length of service (see section 63) and, as noted above, I confirmed that particular component of the Determination. Accordingly, Buser is entitled to an additional \$1,440 as compensation for length of service plus a further 4% for vacation pay on that latter amount (\$57.60) for a total award under section 63 of \$1,497.60.

Buser's monetary entitlement may thus be summarized as follows:

Vacation pay on regular wages	=	\$ 2,673.62
Compensation for length of service	=	\$ 1,440.00
Vacation pay on C.L.S.	=	\$ 57.60
Subtotal	=	\$ 4,171.22
Plus section 88 interest		To be calculated by delegate

Common Ground asserts that I ought to "reopen" the matter of Buser's invoices in that, according to Common Ground, Buser invoiced Common Ground for hours that he did not actually work--in the main, this aspect of the dispute centers on whether Buser worked during "lunch breaks". I do not consider this latter issue to be properly before me. First, in effect, Common Ground says that even though it paid Buser's invoices without complaint, it now (several years after the fact) believes that it ought not to have done so. In my view, having paid the invoices without any objection, Common Ground accepted its liability for the hours noted therein and is now estopped from raising this issue before the Tribunal. Second, I note that this issue was not raised in Common Ground's appeal documents, nor was it specifically raised before me during Common Ground's counsel's opening or final argument at the appeal hearing. In my view, the present application, which is simply to determine Buser's wage entitlement in accordance with my earlier Order, should not be used as a springboard to introduce an entirely

new ground of attack on the Determination. Third, the adjudicative processes under the *Act* are not designed to be a mechanism for employers to assert claims against employees (in this case Common Ground asserts, at least by implication, that Buser submitted false invoices). To the extent that Common Ground believes that it has a valid claim against Buser (a matter about which I pass no judgment) it ought to pursue that claim in a separate civil proceeding.

## **ORDER**

Pursuant to section 115 of the *Act*, and further to my order issued on October 30th, 2000, I order that the Determination be varied to indicate that Buser, during the period of his employment by Common Ground, was a “manager” and, therefore, not entitled to be paid overtime pay under Part 4 of the *Act*. The Determination must be varied by cancelling the monetary award made in favour of Buser on account of unpaid overtime pay. The Determination is confirmed with respect to the award of 2 weeks’ wages as compensation for length of service. In addition, Buser is entitled to vacation pay and interest payable under sections 58 and 88, respectively, of the *Act*.

Accordingly, the Determination is varied such that Common Ground is ordered to pay Buser the sum of \$4,171.22 together with interest to be calculated by the Director’s delegate in accordance with section 88 of the *Act* as and from July 11th, 1997.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**