Employment Standards TRIBUNAL

An appeal

- by -

Mandair Distributors Ltd. and 444 Flowers Flowers Ltd.operating as Flowers Flowers & Florimport

- 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: John M. Orr

FILE No.: 2001/181

DATE OF DECISION: June 26, 2001

DECISION

OVERVIEW

This is an appeal by Mandair Distributors Ltd. and 444 Flowers Flowers Ltd. operating as Flowers Flowers & Florimport (hereinafter referred to as "Mandair") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination (File No.060-249) dated February 7, 2001 by the Director of Employment Standards (the "Director").

The Tribunal decided that it was fair and reasonable in this case that the appeal be heard by way of written submissions.

Mandair operated a busy flower sales and distribution business in which he had three employment positions designated as managers. The three employees who occupied those positions separately filed claims under the *Act* for overtime and other benefits. The issue to be decided by the Director was whether or not these three employees were "managers" as defined by the *Employment Standards Regulation* ("the *Regulation*"). A delegate of the Director determined that they were not managers and therefore they were entitled to additional wages that totalled $7,715.03.

Mandair appeals this decision on the grounds that the Director was wrong in law in finding that the employees were not managers. Mandair also submits that 444 Flowers Ltd. had no part in the ownership or operation of the business.

ISSUE TO BE DECIDED

The issues to be decided on this appeal are:

1. whether the delegate made an error of law in finding that the three employees were not managers as defined in the *Regulation*.

2. whether 444 Flowers Ltd. was properly identified and named in the determination.

ANALYSIS

I have reviewed the determination carefully and the written submissions made on this appeal and I am satisfied that there are significant errors of law in the determination that lead me to the conclusion that the determination must be cancelled.

The issue that had to be decided for all complainants was whether their employment duties met the definition of "manager" under the *Regulation* and therefore excluded from Parts 4 (Hours of

Work and Overtime) and 5 (Statutory Holiday Pay) of the *Act*. The relevant definition is contained in the *Regulation* as follows:

> "**manager**" means
>
> (a) a person whose primary employment duties consist of supervising and directing other employees …

This definition is clear and simple but the Director's delegate applied a significant overlay that belied the simplicity of the definition. The delegate states as follows:

> "To determine if an employee is a manager, the Director considers:
>
> - The amount of time spent supervising and directing other employees,
> - The nature and amount of the persons other (non-supervisory) duties,
> - The degree to which the person exercises the kind of power and authority typical of a manager,
> - The reason for the employment; and
> - The nature and size of the business."

This list of items may be helpful guidelines to determine if a person's primary employment duty consists of supervising and directing other employees but they are not criteria set out in the Regulation and should not be so rigidly applied as to derogate from the definition itself. As I will indicate further in this decision, if the delegate had gone no further than to apply this criteria she could have come to no other conclusion than that the employees were managers. However, in my opinion, the delegate fell into error when she applied her own definition of manager as follows:

> "Typically, managers have a power of independent action, autonomy and discretion, having the power to make the final decisions relating to the supervising and directing employees, or to the conduct of the business. Managers also make final judgments about
>
> - Hiring and firing staff
> - Disciplining staff
> - Authorising overtime, time off or leaves of absence,
> - Calling employees into work

- Laying them off
- Altering work processes
- Training employees"

This set of criteria has no basis in the legislation. The definition of manager in the *Regulation* is not open-ended. It quite clearly states that a "*manager*" means…. That is, the definition is self-contained. None of the latter criteria has any application to determining whether a person is a manager. The definition is quite simple – a person is a manger if their primary employment duties consist of supervising and directing other employees. Supervising and directing does not mean hiring, firing or laying off; it does not mean disciplining or training; it does not mean altering work processes. Supervising and directing simply means being in charge and overseeing other employees to ensure that they are performing their work duties. That is not to say, of course, that a manager might not **also** do many of the things in the above list but they are surplus to the definition as provided in the *Regulation*.

The term "primary" in relation to the employment duties indicates that it is the most important aspect of their job. It may not necessarily be the most in terms of time in relation to other duties. In fact many good managers spend little time supervising and directing. It is the quality of that supervision that matters in many cases. So "primary" should be interpreted as the first priority of the position, the most important aspect of the job.

In conclusion on this point, I am satisfied that the delegate failed to apply the definition of manager as provided in the *Regulation*. The overlay of additional requirements to the definition is not appropriate and has led to error.

I have also reviewed the evidentiary basis upon which the delegate based her conclusions and find that there is considerable error in the manner in which the delegate treats the evidence. She has accepted completely the evidence of the employees but has failed to take into account a considerable body of evidence presented by the employer. She refers to letters sent to her by other current and former employees as "having little evidentiary value in this matter". She says that she attempted to contact one of the writers only. This is clearly an insufficient manner in which to treat the evidence presented. There is an overwhelming body of evidence, which is simply ignored by the delegate, that the most important aspect of the positions occupied by these three employees was the supervising and directing of the other employees. It may have occupied a small or large amount of their time and they may have performed many other duties but their first priority was clearly the supervision of the other employees. There was no other manager on site and the owner was absent much of the time. He clearly entrusted the supervision and direction of the employees to these three individuals.

The delegate became so focused on such issues as "hiring and firing" and the other aspects of the expanded definition, which she chose to use, that she failed to examine the evidence presented by the employer adequately.

I am satisfied that Mandair has met the onus of persuading me that the determination is wrong and that, applying the evidence presented to the definition as contained in the Regulation, there could be no other conclusion than that these three employees were indeed "managers". As managers they are excluded from Part 4 and Part 5 of the *Act* upon which the award in the determination is based.

In light of this finding I do not have to address the second issue on this appeal.

ORDER

I order, under Section 115 of the *Act*, that the determination is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal