

An appeal

- by -

Nevison Holdings Ltd operating as
Main & Mountain Fuel Centre and Capilano Service Centre
("Nevison")

- 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: Carol L. Roberts

FILE No.: 2001/280

DATE OF HEARING: June 25, 2001

DATE OF DECISION: July 9, 2001

DECISION

APPEARANCES:

On behalf of Nevison Holdings Ltd.:	Tom Nevison
On behalf of the Director:	No one appeared
On behalf of Angela Bates:	Herself

OVERVIEW

This is an appeal by Nevison Holdings Ltd. operating as Main & Mountain Fuel Centre and Capilano Service Centre ("Nevison"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 15, 2001. The Director found that Nevison contravened Section 40(1) of the Act in failing to pay Angela Bates ("Bates") overtime wages, and Ordered that it pay \$5,034.13 to the Director on Bates' behalf for overtime wages and interest.

ISSUE TO BE DECIDED

Whether the Director's delegate erred in concluding that Bates was not a manager, and therefore entitled to overtime wages.

FACTS

The facts, as set out by the Director's delegate, and not disputed by Mr. Nevison are as follows.

Nevison operates two gasoline service stations in North Vancouver, Capilano Service Centre ("Capilano") and Main and Mountain Fuel Centre ("Main"). Ms. Bates was employed at both locations as a cashier/team leader between January 1, 1999 and June 23, 2000. From January 1, 1999 she worked at Capilano as a guest service attendant. In August 1999, she was made an assistant manager at Main, and in February 2000, she was transferred to Capilano as manager.

Ms. Bates was given the authority to place and receive orders, talking with sales people, doing inventory count, and dealing with guest and equipment problems. Although Ms. Bates had considerable responsibility, she did not make any final decisions regarding the hiring, firing and disciplining of employees, authorizing overtime, time off and leaves, or work schedules. Although she was asked for her input into these decisions, Mr. Nevison always had the final authority. This was so, in his own admission, because Petro Canada held him responsible for the final decisions made at the sites.

After reviewing Ms. Bates' job duties and authority, the delegate concluded that Ms. Bates was not a manager. He concluded, after reviewing all the facts, that Ms. Bates did not exercise the discretion and autonomy given to a manager, and determined that she was entitled to overtime as provided in the *Act*:

Typically, a manager has a power of independent action, autonomy and discretion. A manager has the authority to make final decisions, not simply 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 in to work, or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded to a manager.

The amount of time an employee spends on supervising and directing other employees is an important factor in determining whether the employee falls within the definition of manager although it is not the determinative and only factor to be considered.

In applying the definition to the complainant, I am unable to reach the conclusion that she was manager. The complainant might have been a capable, hardworking, knowledgeable, assertive and respected employee but that does not fit her into the definition of a manager. There is no dispute about the nature of the complainant's duties. The employee claims that "supervision and coaching" was required of the complainant for the entire time she was there. The complainant, however, maintains that she only spent 2 to 3 hours daily on such supervision duties. Taking into consideration the complainant's other duties, I am convinced that supervision and direction of other employees was not her primary employment duties although she might have some leadership or managerial role as argued by the employer.

ARGUMENT

Although Mr. Nevison did not dispute any findings of fact, he disagreed with the delegate's conclusions on those facts. He seeks, as he states in his letter of appeal, "a different interpretation of the facts."

Mr. Nevison argued that, because the gas stations were open 24 hours a day, 7 days a week, it was impossible for him to be in 2 places at once, and he relied on staff to manage the stations when he was not there. He contended that Ms. Bates was one of those staff.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am not persuaded that the Director erred.

The position title and job description given to an employee is irrelevant to a consideration of whether that employee is a manager for the purposes of the *Act*. A person's status will be determined by law, and includes a consideration of a number of factors, including whether the person exercises substantial authority in decisions affecting the business, or whether the duties of the person actively involve that person in the control, supervision and administration of the business affairs. It is not sufficient to say that the person has authority, but it must be shown to have been exercised by that person. The delegate correctly set out that test in the determination.

The *Employment Standards Regulation* define manager as

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

In 429485 B.C. Ltd operating. Amelia Street Bistro BC EST #D479/97 the Tribunal said:

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 a hiring, firing, disciplining, authorising overtime, time off or leaves of absences, calling employees in to work or laying them off, altering work processes, establishing or altering schedules and training employees is typical of the responsibility and discretion afforded a manager.

In order to be a manager, the management function must be the employee's primary responsibility. (see Munday BC EST #D326/96).

Sections 1(a) and (b) were comprehensively considered in *Sunshine Coast Publishers* BC EST #D244/96 and *Northland Properties Ltd.* BC EST #D423/98. To be considered employed in an executive capacity the employee must exercise substantial authority in decisions that affect the business and or other duties that involve active participation in the control, supervision and administration of the business.

There is simply no evidence that Ms. Bates had any involvement in financial management of the company, or any authority over hiring, firing disciplining employees, or establishing work schedules.

There is also no evidence that Ms. Bates could be considered one of the "directing minds" of the enterprise - i.e., she did not determine what kind of product the business sold and at what price, how many employees would be hired, or how the business would be financed. There is no evidence she could take time off without Mr. Nevison's approval.

Businesses could not operate without delegating some discretion to one or more employees. As the delegate noted with respect to Ms. Bates, many employees have responsible jobs and exercise a significant degree of discretion from time to time. However, that discretion does not make these employees managers under the *Act*. That discretion must be exercised on a regular basis, and it must be in relation to company policies and operation.

I find no basis on which to interfere with the delegate's conclusion.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated March 15, 2001 be confirmed, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal