

**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 -

Neil's Carpet Services Ltd.

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No.:** 2000/170

**DATE OF HEARING:** August 25, 2000

**DATE OF DECISION:** September 8, 2000

**DECISION**

**APPEARANCES**

Sheerin Kalia	Counsel for Neil’s Carpet Services Ltd.
Robert Bunyan	On his own behalf
Gerry Omstead	Delegate for the Director
Janice McNary	Observer - Employment Standards Branch

**OVERVIEW**

This is an appeal by Neil’s Carpet Services Ltd.(“Neil’s”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination numbered ER# 089937 dated February 28, 2000 by the Director of Employment Standards (the “Director”).

Robert Bunyan (“Bunyan”) was employed by Neil’s from April 15, 1998 to March 12, 1999 to work in their carpet cleaning business. Bunyan worked long hours assisting in the running of the business including a telemarketing division which he set-up to help promote the business. The essential issue was whether Bunyan was a “manager” as defined in the *Act*.

The Director determined that Bunyan’s job title was “operations manager” and that he had certain responsibilities with the business but found that because he did not have the power of independent action he was not a manager and was therefore entitled to overtime, vacation pay and interest in the sum of \$8,016.13

Neil’s appeals on two grounds. Firstly, Neil’s submits that the Director’s delegate misunderstood the nature of the employment relationship and that Bunyan was indeed a manager. Secondly Neil’s disputes the method used by the delegate to compute the hours worked by Bunyan.

**PRELIMINARY ISSUE**

After the appellant’s opening of the hearing the Director’s delegate objected to a number of documents and anticipated evidence to be led by Neil’s at the hearing. The delegate pointed out that Neil’s had the opportunity to provide all of this evidence to the delegate during the investigation. The delegate relied on the decision of this Tribunal in *Tri-West Tractor Ltd* [1996] BC EST #D268/96 and submitted that it is not permissible for the appeal procedure to make the case that should have been made in the investigative process.

Counsel for Neil’s made the point that Neil’s had always maintained that Bunyan was a manager and that they considered at the time that the main issue was what hours he worked. There was

nothing new in the position being taken by Neil's although it was intended to "put more flesh" on the argument at this stage.

I decided to exercise my discretion to hear the evidence, subject to any specific objections to specific documents. In my opinion this was not a case where the employer had ignored the investigation and was attempting to use the appeal process to make their case. It is important for the Tribunal to attempt to deal with the real issues in dispute between the parties and not to become over technical in the application of evidentiary rules.

## ISSUES

There are two issues to be decided in this case. Firstly was Bunyan a "manager as defined by the *Act* and secondly, if not a manager, how much overtime did he work.

## FACTS AND ANALYSIS

Section 34 of the *Employment Standards Regulation* ("*the Regulation*") provides that Part 4 (Wages and Overtime) does not apply to "a manager". That is that managers are not entitled to claim for overtime wages.

The *Regulation* defines a manager as follows:

*"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;*

Neil's did not argue that Bunyan was employed in an executive capacity but submitted that Bunyan's primary employment duties consisted of supervising and directing other employees.

There was no doubt on the evidence before me that Bunyan performed supervisory and managerial duties the question was whether supervising and directing other employees were his "primary duties".

Bunyan stated in his closing submissions that he "felt like a manager" and that he always had the title of operations manager. He agreed that he supervised the other employees. From the evidence of various witnesses and in some cases from Bunyan himself I find the following facts.

Bunyan hired virtually all and fired at least three employees. He had the authority and did discipline employees. He enforced company rules about appearance, dress code, timeliness, and jewellery. He developed rules and procedures for the workplace and had the authority to enforce them. He settled disputes between employees.

Bunyan could set wage rates and set hours of work and could approve overtime without approval of the owner. He directed the working hours and schedules for the other employees. He could schedule employee's vacations and supervise how much vacation time was allowed. He could grant time-off for personal or sick leave. He approved and submitted all time sheets for payroll purposes.

Bunyan also did spot cheques on company vehicles and could direct the employees on safety and cleanliness issues. He had a role in quality control of the work done by the employees. Bunyan set-up the schedules and daily routes for the technicians. He directed the technicians about where and when they were to work.

Bunyan had other duties such as purchasing supplies and monitoring the work orders downloaded to the computer from the Montreal call centre. He handled refund requests. He was in charge of the petty cash. Bunyan was the only management person on site except when the owner was there.

While it is true that the Tribunal takes a strict interpretation of the definition of manager, because it removes rather than grants rights, this case must surely meet even the strictest of interpretations.

There is no doubt in my mind that Bunyan's primary employment duties consisted of supervising and directing other employees. I am satisfied that Neil's has met the onus of persuading me that the Determination is in error in finding that Bunyan was not a manager.

In light of this finding it is not necessary for me to deal with the second issue, as Part 4 does not apply to managers.

**ORDER**

I order, under section 115 of the *Act*, that the Determination is cancelled.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**