EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Ravens Agri-Services & Products Inc.

("Ravens")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/552

DATE OF HEARING: December 9th, 1996

DATE OF DECISION: December 23rd, 1996

DECISION

APPEARANCES

Robert & Carrie Johns	for Ravens Agri-Services & Products Inc.
Patrick S. Downton	on his own behalf
Lynne L. Egan	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Ravens Agri-Services & Products Inc. ("Ravens") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 003812 issued by the Director of Employment Standards (the "Director") on August 27th, 1996.

The Director determined that Ravens owed its former employee, Patrick S. Downton ("Downton"), the sum of $1,784.32 on account of unpaid overtime pay (section 40), termination pay (section 63), an adjustment for vacation pay (section 58) and interest (section 88).

Ravens' principal grounds of appeal are that first, Downton was a "manager" and, therefore, not entitled to overtime pay under the Act; and second, that Ravens had just cause to terminate Downton and, therefore, is not obliged to pay him any compensation for length of service.

An oral hearing in this matter was conducted at Surrey, B.C. on December 9th, 1996. I heard evidence and submissions from Carrie Johns on behalf of Ravens and from Downton. The Director elected not to call any evidence.

PRELIMINARY ISSUE AND ORDER

Although the Determination was issued against Ravens, the appeal was filed by "Robert and Carrie Johns", the latter being the only two directors, officers and shareholders of Ravens. Nevertheless, the appeal is technically a nullity as these

two individuals have no status to appeal in their own right. Accordingly, and in the absence of any prejudice to Downton or to the Director (I raised this issue at the outset of the hearing), I directed Ravens to file an appeal forthwith and I granted a time extension (to December 10th, 1996) pursuant to section 109(1)(b) of the Act so that Ravens' appeal would be regular on its face. Ravens' appeal form was filed on December 9th, 1996.

FACTS

Ravens is a small Fraser Valley firm that provides, primarily, greenhouse glass cleaning services but also other maintenance services, to greenhouse farmers in the Lower Mainland and on Vancouver Island. The firm was started by Robert and Carrie Johns in 1995 and currently employs about eight employees; the company also makes use of short-term "contract labour" from time to time.

Downton was hired in May 1995 and, at first, worked part-time but became a full-time employee in October of that same year. Ravens maintains that in early December 1995 Downton first began working as a "supervisor" responsible for managing a two-man crew (himself and one other individual). Ravens says that Downton also had responsibility for any other job that might be ongoing at the same time and kept in touch with the other crew (which was headed by a person styled "team leader") by way of a cellular phone. In January 1996 Downton was given further responsibility in the area of job-price estimating.

Downton appeared to be quite a satisfactory employee until early 1996 when Ravens alleges that it began to get a stream of customer complaints regarding Downton's quality of work and on-the-job behaviour. In light of these various problems, on February 26th, 1996, the Johns told Downton that he was being placed "on probation" for one month. The very next day, however, the Johns received other customer complaints and, accordingly, on February 28th, 1996 at approximately 5:30 P.M., Downton's employment was terminated without notice or severance pay in lieu of notice. Ravens alleges that it terminated Downton with just cause. At the time of his termination, Downton's was being paid $11.00 per hour.

ISSUES TO BE DECIDED

Two issues need to be addressed:

> First, was Downton a "manager" as defined in the ESA Regulation and, therefore, not entitled to overtime pay?; and
>
> Second, was Downton discharged for cause [(section 63(3)(c)] and, therefore, not entitled to termination pay?

I will deal with each of these two issues in turn.

ANALYSIS

Was Downton a "manager"?

"Manager" is defined in section 1 of the ESA Regulation 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...

Ravens does not allege (and properly so) that Downton was "employed in an executive capacity", however, Ravens does assert that Downton's primary duties consisted of supervising and directing other employees. If Ravens' assertion is correct, then Downton does not have any statutory entitlement to overtime pay by reason of section 34(1)(f) of the ESA Regulation.

The evidence before me is that Downton sometimes worked alone and on other occasions worked with from one to three other persons. Typically, a job called for Downton and one other individual, who may have been an employee or a short-term "contract labourer", to work at a particular job site for one day to two weeks. Undoubtedly, when Downton worked with at least one other person, Downton was "in charge" of the job. However, I do not think that it necessarily follows that because Downton was the person "in charge" at the site, he was a "manager". When Downton worked with another employee he was part of a "working crew"; he did not supervise the job, rather, he, along with whomever else was working at the job site, did the work together.

It is natural that Downton would give some direction, as he would be the most experienced person on the job and the longest serving company employee. However, the key elements of supervision and direction are missing in this case-- Downton had no power to hire, fire, discipline or appraise any of the employees with whom he worked. Downton did not set pay rates or award bonuses or pay increases. Further, Robert Johns was very frequently on the job sites and, indeed, part of the employer's case with respect to cause is that Downton refused to follow the direction and instruction of Robert Johns. Such direction would have been unnecessary, or least much less frequent, if Downton was, in fact, an autonomous manager.

To summarize, Downton may have exercised some limited supervisory authority but I would characterize that authority as being incidental to his primary function as a labourer. Therefore, Downton was entitled to be paid overtime wages in accordance with the provisions of section 40 of the Act.

Ravens also alleges that even if Downton was not a "manager", the overtime award set out in the Determination is in error. The Director held that Downton's work day began when he picked up a company vehicle from the Johns' residence, rather than when Downton actually arrived at the particular job site. The Director referred to a Ravens memo dated December 14th, 1995 which, in essence, directed Downton to attend at the Johns' residence to pick up one of two company vehicles each morning and to return the vehicle at the end of the day. At the beginning of each job, Downton had to transport the glass cleaning machine (and related pumping equipment) to the job site and, on other days, he often picked up supplies prior to arriving at the job site. In light of this evidence, I entirely agree with the Director's interpretation of the matter.

Did Ravens have just cause to terminate Downton on February 28th, 1996?

The Director held that Ravens did not have just cause to terminate Downton. The Director acknowledged that there were some problems with Downton's work performance in the month prior to his termination. These problems led to Ravens placing Downton "on probation" for one month commencing February 26th, 1996. For his part, Downton does not deny that there were performance problems (his evidence was that his "work performance deteriorated to a point"), that he was placed on probation and that Ravens clearly indicated that his continued employment was at risk.

Although the matters discussed during the February 26th meeting (which lasted at least one-half hour) were not reduced to writing and Downton was never given a formal "written warning", it is my view that such actions on the part of the employer are not invariably required. We are dealing with a small firm that has no formal human resources department. In my opinion, the key issue is not whether the warning was verbal or written but whether or not the employer was justified in terminating Downton after having made it abundantly clear to him that further work-related problems would result in termination.

I believe that the employer would have been justified in terminating Downton on February 26th, not for poor work performance *per se*, but for insubordination (telling Mr. Johns to "get the hell off" a particular job site), dishonesty, persistent tardiness and inappropriate behaviour towards customers. However, Ravens opted to give Downton a further opportunity to salvage the situation and he failed miserably. On February 27th he did not carry out a work order as directed, he damaged both a customer's and the company's property and when confronted, denied doing so; he damaged property again on the 28th and then, again, lied about it. During this period, the employer also learned that Downton was not regularly attending a supervisory course for which Ravens had paid the tuition. These latter incidents were not denied by Downton. Considered together, I am satisfied that Ravens had just cause to terminate Downton on February 28th, 1996 and, accordingly, Downton is not entitled to any termination pay.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003812 be varied and that a new determination be issued reflecting Downton's entitlement to only overtime pay and concomitant vacation pay and interest.

I have calculated Downton's entitlement, exclusive of interest, as follows:

Overtime pay:	$1,220.32 (as per Determination)
Vacation pay (at 4%):	$ 48.81
Total:	$1,269.13

Downton is awarded the sum of $1,269.13 together with interest to be calculated by the Director in accordance with section 88 of the Act.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal