

**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-

A.E.M. VIDEO ONLY, INC. operating as Video Only  
(" Video Only ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	C. L. Roberts
<b>FILE No.:</b>	97/499
<b>DATE OF DECISION:</b>	August 21, 1997

## DECISION

### OVERVIEW

This is an appeal by A.E.M. VIDEO ONLY, INC. operating as Video Only ("Video Only"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued June 10, 1997. The Director found that Video Only contravened Sections 17, 18 and 40 of the Act in failing to pay David Kyle Patching ("Patching") wages for work performed, and ordered that Video Only pay \$2744.72 to the Director on behalf of Patching. This is a decision based on written submissions by Jerold McGlothlin, Sales/Operations Manager of Video Only.

### ISSUE TO BE DECIDED

Whether the Director correctly determined that Patching was not a manager, and that he was therefore not exempt from the overtime and statutory holiday provisions of the Act.

### FACTS

Patching was employed at Video Only's retail outlet from February 20, 1995 to August 7, 1995, inclusive. Patching was a 'salesperson' from February 20, and a 'sales manager' from February 27 to the last day of his employment. His rate of pay was based on a commission or minimum wage, (whichever was greater) for the time period he was a salesperson, and a commission plus bonus based on the profitability of the store, or the minimum wage, (whichever was greater), for the time period he was a 'sales manager'.

Patching claimed that he had not been paid for the actual hours he worked, which were greater than that recorded and paid by Video Only.

The Director reviewed the evidence, including submissions from Video Only, Patching, and another Video Only employee, Simon Wei Kitnikone, and determined that Patching was not a manager based on the fact that he did not supervise staff, and reported to another individual at the store. The Director also determined that Patching could not be said to be employed in an executive capacity.

The Director preferred the record of hours worked provided by Patching, which was consistent with both the hours of the store and with statements made by Patching's supervisor, over the record provided by Video Only. Based on this record, the Director found that wages in the amount of \$2744.72 were owing.

### ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Video Only contends that Patching was employed as a manager, and was therefore exempt from the overtime provisions of the Act. Video Only relies on the assertion that Patching signed on as a

sales manager, and accepted the job and responsibilities that went with it. Video One also contends that Patching accepted the keys, was paid as a manager, signed a document saying he would be promoted to a manager, and would be held accountable as a manager.

Employment status is determined by a review of the facts, not a position title assigned by either party.

A manager is defined in the *Employment Standards Regulations* as

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

There is no evidence supporting Video Only's contention that Patching was a manager. Although Video Only contended that Patching was "...part of a 2 person management team as well as 2 salespeople at most times that he was to train on sales", no evidence supporting this contention was provided, either to me nor apparently to the Director. The Director found that there were two people in the store on most occasions, being Patching and his supervisor, and there was no evidence to show this finding was in error. Although there may have been other sales staff, no evidence was presented that those employees reported to Patching, not that he had any responsibility to hire or fire them. There was also no evidence that Patching had executive responsibilities such as the exercise of authority in decisions affecting the business.

Consequently, on the evidence presented, I deny the appeal.

**ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination be confirmed.



**Carol Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**