

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 -

Benny's Bagel's Ltd.
(“Benny's” or the “Employer”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/296
DATE OF HEARING:	August 11, 1998
DATE OF DECISION:	September 10, 1998

the authority to hire and fire. Mbow's evidence was that he spent most of his working hours doing the work of regular employees: cleaning, baking, making cappuccinos, bussing tables etc. He did not tell other employees what to do. At the end of the shift, he explained, he "was responsible for the money." Mbow denied that he received a higher hourly wage due to his supervisory responsibilities.

Between March and July 1997, Benny's had a general manager and, for a period, an assistant manager. Mbow stated that they were always present and were "more in charge." The Employer explained that the managers were not supervising the employees "on the floor" but were dealing with inventory, marketing etc. and, in any event, were only present during the day time.

The Employer's evidence, perhaps due to a lack of preparation for the hearing (which was scheduled over one month ago), or lack of familiarity with the process, was of a fairly general nature and lacked details. The Employer insisted that Mbow's supervisory responsibilities and duties included:

- the authority to fire and discipline (including the use of the so-called "probation form");
- changing employee schedules on an ad hoc basis to send employees home and call them in if required (in that regard, the supervisors received daily document from the Employer reviewing "labour hours");
- dealing with cash at the beginning and end of the shift; and
- directing staff between job functions as required.

In general, and apart from the authority to fire and discipline, this is not inconsistent with Mbow's testimony.

Other supervisors testified with respect to their job duties and responsibilities. Gustafson, who testified on behalf of Mbow, agreed that supervisors exercised some direction regarding employees in the sense of, as he put it, "having general conduct of the ship". Irving explained that she could "ensure that the shift moved along" and that "things were done". Irving testified that she, as a supervisor, had limited authority and did not think she had the power to fire or discipline. She was of the view that she could make recommendations, but she could not think of one that had been followed. Gustafson stated that as far as "operational decisions" within the framework of the shift he could make decisions. In cross examination, he agreed that he had made recommendations for the termination of employees that in most cases had been followed. He did not, however, have the authority to fire: a "firing is not up to us". Gustafson explained that he had not been told to use the form for written discipline, "the probation form", and, in fact, did not know where this form was located. It is clear from the evidence that Mbow and other supervisors exercised some degree of supervisory responsibilities. As well, there may well have been some variation in the degree to which each of the supervisors exercised their duties and responsibilities.

While some of the former and current supervisors testified as to how they performed the duties and responsibilities of their positions, I am mindful of the fact that the Determination at hand deals with Mbow. In general, the former and current supervisors who testified on behalf of Mbow suggested that their authority was quite limited and that they had never been informed that they had the power to fire and discipline while, on the other hand, former and current supervisors who testified on behalf of the Employer indicated that they had the authority and had been told. While this testimony had some relevance from an evidentiary stand point, as they supposedly held similar positions, much of this evidence did not speak directly to the particular circumstances of Mbow's employment.

Gareau, Rino and Brisson testified that they contacted the inquiry telephone line of the Employment Standards Branch (the “Branch”) numerous times and formed the view that Mbow was a manager based on information supplied to them at various times. I do not question the sincerity of that belief.

ARGUMENTS

The arguments may briefly be summarized as follows. Mbow argues that he was not a manager as defined in the *Regulation*. The title “supervisor” did not signify real management responsibilities and authority. The Employer argues that Mbow was a manager because he supervised employees or was employed in an “executive capacity”. His responsibilities and duties were primarily in the direction and supervision of employees. They were “in charge”. The Employer is critical of the Branch and says that it contacted the Branch and determined--in good faith--based on the information supplied that Mbow was a manager. The Employer argues that Mbow is clearly a manager. Otherwise, says the Employer, the definition is ambiguous and grossly unfair. The Employer also suggested that the delegate was unfair and listened more to Mbow than to the Employer.

ANALYSIS

As mentioned above, the Employer argues that Mbow was within the management exclusion with respect to overtime and statutory holidays. Section 1(1) of the *Regulation* of the *Act* defines, inter alia, “manager”:

1. In this Regulation:

“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.

The issue of whether a person is a manager has been addressed in a number of decisions of the Tribunal. In *T & C Ventures Ltd.*, BCEST #D152, the Tribunal stated:

“The issue is whether or not Taylor’s primary employment duties consisted of supervising or directing other employees.”

In *Amelia Street Bistro*, BCEST #D479/97, reconsideration of BCEST #D170/574, the reconsideration panel noted, at page 5:

“... We agree that 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 We do not, however, agree that this factor is determinative or that it is the only factor to be considered. The application of such an interpretation could lead to inconsistent or absurd results.

The task of determining if a person is a manager must address the definition of manager in the *Regulation*. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business....

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment And the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.

We also accept that in determining whether a person is a manager the remedial nature of the *Act* and the purposes of the *Act* are proper considerations.

Typically, a manager has a power of independent action, autonomy and discretion; he or she 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.... It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of manager. It is not sufficient simply to say that a person has that authority. It must be shown to have been exercised by that person."

In all of the circumstances, and on the balance of probabilities, I do not accept that Mbow was a manager as defined in the *Regulation*. While I do not accept Mbow's characterization of his position--in my view, he understated entirely the supervisory aspects of his position--I agree with the delegate that on a "total characterization" of his duties and responsibilities he was not "a person whose primary employment duties consist of supervising and directing other employees". Scheduling employees, calling them in for work and sending them home are supervisory duties. It was clear that Mbow did this. However, there was some direction from the Employer in the form of the document faxed daily regarding labour hours. Moreover, Mbow--and other supervisors-- supervised a limited

number of employees. In some cases the supervisors worked alone. In other cases, the supervisors worked with one or two other employees. In some instances, Mbow simply performed the task himself rather than directing another employee to do it. Mbow stated that he spent, perhaps, 45 minutes of an eight hour shift directing employees. While the time spent on such duties is an important factor, it is not the only or determinative factor. In the case at hand, Mbow spent most of his working shift doing the same work as regular employees. Mbow denied that the Employer told him that he had the authority to hire, fire and discipline when he became a supervisor. The Employer was not able to present any direct evidence to contradict this. Mbow stated that he never received a job description setting out his authority. Similarly, the Employer was not able to present any direct evidence to contradict this. In the result, I am not satisfied that he exercised much, if any, independent authority with respect to discharge or discipline. I am not prepared to accept, on the balance of probabilities, that Mbow exercised the a sufficient degree of managerial authority and that his primary responsibility employment duties consisted of supervising and directing other employees. In reaching this conclusion, I am mindful of the remedial purposes of the *Act*.

That does not conclude the matter. The Employer argues that Mbow was employed in an “executive capacity”. This is neither defined in the legislation nor has it received a great deal of consideration in the decisions of the Tribunal. In *Smedley*, BCEST #D552/97, my colleague dealt with the issue of “executive capacity” under the *Regulation*. He noted:

“The term “executive capacity” is not specifically defined in the Regulation. The Oxford Dictionary defines an “executive” as:

n. a person or group that has administrative or managerial powers in a business or commercial organization, or with authority to put the laws or agreements etc. of a government into effect.---adj. having the powers to execute plans or to put laws or agreements etc. into effect.”

Black’s Law Dictionary defines “executive capacity” as “Duties in such capacity relate to active participation in control, supervision and management of business.”

The legislation makes a distinction between a person who is engaged in the supervision and direction of employees and a person employed in an “executive capacity”. Either may be a manager and, as such, excluded from the overtime provisions in the legislation. In my view, it follows that the latter need not supervise and direct employees. I agree with my colleagues in *Amalia Street Bistro*, above, that the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. As stated by the panel in *Amalia Street*, the degree to which power and authority typical is present and exercised by an employee are necessary considerations to reaching a conclusion about the “total characterization” of the primary employment duties of the employee. In my view, it is not the intent of the definition of “manager” in the legislation to include first line supervisors and foremen who do not frequently exhibit the power and authority typical of a manager. Such authority, which is question of degree, typically includes the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business. The authority must be shown to be exercised by the employee said to be a manager. In order to be employed in an executive capacity, the person must have “duties in such capacity relate to active participation in

control, supervision and management of business". This typically includes the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business.

In my view, there is nothing to support the contention that Mbow worked in an executive capacity for the Employer. While Mbow participated in certain supervisors meetings, there was no evidence that he exercised any power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business. There was no evidence that he had input into management decisions. Mbow had very limited supervisory duties. In my view, Mbow did not have any real management authority. In the result, I conclude that he did not work in an executive capacity.

In the circumstances, I do not accept the Employer's argument that it is entitled to rely on the information received in from the Branch as a defence to Mbow's claim for overtime and statutory holiday pay. My understanding is that the Employer contacted the telephone inquiry number of the Branch--and did so, apparently, on several occasions--and was provided with the definition of "manager". I accept the sincerity of the Employer's belief that Mbow was a manager at the material time. However, the determination of management status under the *Act* and *Regulation* is--as stated above--a matter of a "total characterization" of the particular circumstances of the duties and responsibilities of the employee in question. The Employer's subjective belief is not relevant.

The Employer also suggested that the delegate was unfair and biased in favour of the Employee. There was no evidence before me to support that suggestion.

In the result, I am of the view that this appeal must fail.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated April 20, 1998 be confirmed and the amount paid out together with such interest as may have accrued pursuant to Section 88 of the Act since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal