

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 -

Terri McConkey
(the “Employee”)

- and -

Gary McConkey
(the “Employee”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/402 and 1999/403
HEARING DATE:	September 8, 1999
DECISION DATE:	October 19, 1999

DECISION

APPEARANCES

Ms. Terri McConkey	on behalf of herself
Mr. Gary McConkey	on behalf of himself
Ms. Marianna Fedoryshyn	on behalf of the Employer

OVERVIEW

This is an appeal by the Employees pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations of the Director of Employment Standards (the “Director”) issued on June 3, 1999 which determined that Terri McConkey and Gary McConkey were managers under the Act and, in the result, not entitled to overtime and statutory holiday pay as per the Act.

The Determinations provide the background for these appeals:

- The Employer is 263110 Manitoba Ltd., operating as I.C. Computers. The Employer sells computers hardware and software in Manitoba. Prior to opening the store in Surrey, the Employer operated only in Manitoba. The Employer claims that the McConkeys were hired as managers to open the Surrey store and to develop the new market.
- Terri McConkey was sales manager from August 20, 1998 until November 18, 1998. Her husband, Gary McConchie, was service manager during that same time.
- The complaint form and the ROE stated that the McConkeys were employed as sales manager and service manager, respectively.
- Terri McConkey’s and Gary McConkey’s rate of pay was \$2,250 per month.
- The business was located in The Bay in Surrey Place Mall and was required to be kept open 65.5 hours per week. The Employer stated to the delegate that the McConkeys were required to schedule and coordinate their hours to a maximum of 40 hours per week each.
- The McConkeys were the only employees at the Surrey mall. The Employer stated to the delegate that once the business of the store was built up, the McConkeys had the authority to select and hire staff.
- The McConkeys did not keep records of the actual hours worked and, generally, claim that they worked the same hours as the Bay’s opening hours.

The McConkeys argue that the delegate erred when he determined that they were managers and not employees under the Act.

FACTS AND ANALYSIS

The appellants have the burden to show that the Determination is wrong. For the reasons set out below, I conclude that they have not met that burden.

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 McConkeys argue that they are not managers under the definition of “manager” either in Section 1(a) or (b).

Turning to the first point, it is not in dispute that the McConkeys did not actually supervise any other employee during their employment with the Employer. The Employer explained to the delegate, and re-iterated at the hearing, that the intention was for the McConkeys to start up the business on its behalf in the new market in British Columbia, starting with the store in Surrey. The McConkeys do not disagree with that. They had run their own successful business back in Winnipeg and they agreed that they moved to Surrey from Winnipeg to open up the business for the Employer. There is some disagreement between the parties--which in my view is of limited relevance--as to how this came about: did they contact the Employer to propose this arrangement or did the Employer contact them. There is no dispute that this was a new business opportunity for the Employer and that the McConkeys were hired to set up the store. Terri McConkey agreed that they came to Surrey to “set up the store” and that they “helped design it”. The Employer explained that it was its expectation that the McConkeys after getting the business organized and built up, staffing requirements were to be reviewed, and that they could hire staff. The Employer stated that they were to “run it as their own business”. Terri McConkey agreed that in time they would be “responsible” for such things as hiring (but says that at the material time they were not). Gary McConkey explained that they were to be responsible for setting up the store in Surrey and once that had been accomplished, they were would continue to open outlets in other Bay stores and that they would be in charge of those other outlets in British Columbia. Gary McConkey stated the “we were going to be managers down the line”. The McConkeys prepared a draft employment contract where they described themselves as managers. There is little doubt in my mind that the intention of both parties at the time they entered into the agreement was that the McConkeys were to be managers and that one of the primary duties was to direct and supervise other employees in the immediate future, once the business “got going”. Is that sufficient to meet the managerial exclusion of “manager” under Section 1(a)?

In the circumstances, I need not decide that point. In my opinion, the McConkeys were employed in an “executive capacity”. In that regard, I refer to my comments in Sunshine Coast Publishers Inc., BCEST #D142/98, reconsideration of BCEST #D552/97.

The term “executive capacity” is not defined in the legislation. It has not received a great deal of consideration in earlier decisions of the Tribunal. I agree with the Adjudicator in this case that being employed in an “executive capacity” requires the person to perform duties in such capacity as “relate to active participation in control, supervision and management of business”. In O’Hara, BC EST #D122/98, I noted, at page 8:

“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 *Amelia Street Bistro*, <BCEST # D479/97, reconsideration of BCEST #D170/574>, 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 <of a manager> 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”. However, mere active participation is insufficient. The concepts of “control, supervision and management” implies the exercise of the power and authority typical of a manager, though not necessarily in regards to supervision and direction of employees.”

The McConkeys argument essentially boils down to the proposition that they did not exercise any power and authority typical of a manager. I disagree. It is clear that they moved to Surrey from Winnipeg to open a new store in a new market, to set up the first store and then later, other stores. They were to manage the first store and, later, assume responsibility for other stores and their employees. The parties clearly contemplated that the McConkeys would be able to hire and supervise employees. The McConkeys were involved in discussions with the principals of the Employer with respect to the direction of the store, for example, advertising strategy. They were similarly involved in discussions concerning the set up and design of the store. The Employers evidence was that they could have set up the store in a manner convenient to their needs. The fact that the Employer did not always agree with their proposals is not material for the present purposes. On other occasions, however, the Employer did agree with their proposals. For example, they decided that they would build computers in Surrey, as opposed to having them shipped from Manitoba. The Employer agreed. They had authority to mark up certain products. They were responsible for scheduling their own hours of work (to cover the Bay’s 65.5 hours per

week) and they did not submit time cards or schedules to the Employer. In my view, considering the evidence as a whole, I conclude that they were managers. As such, I agree with the delegate.

The delegate largely decided on the basis of the respective credibility of the parties, the McConkeys' and the Employer'. She preferred the Employer's evidence. She is entitled to exercise that judgement. One of the matters she considered was the fact that the McConkeys had submitted the draft employment contract, which they had originally submitted to the Employer, and which the Employer had rejected, to the Royal Bank in support of a mortgage application as evidence of their financial circumstances. The contract purported to bear the signature of Don Cairns, the principal of the Employer. The McConkeys did not deny having submitted the contract to the bank. Gary McConkey explained that he had done so with Don Cairns' consent. The Employer denied this (though Cairns did not testify at the hearing). While I find it unlikely that the Employer would allow the Employees to forge the signature of a principal of the company, in view of the facts, I do not need to decide the case on that basis. In my view, there is sufficient facts before me to support a conclusion that the McConkeys were employed in a management capacity.

The appellants have not persuaded me that the appeal can succeed.

ORDER

I order that the Determinations in this matter, dated June 3, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal