

An appeal

- by -

Zellers Inc.
("Zellers")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/140

DATE OF HEARING: July 14, August 13 and 21, 2002

DATE OF DECISION: September 19, 2002

DECISION

APPEARANCES:

on behalf of Zellers Inc.

Enid Marion, Esq.

on behalf of the individual

Mr. Al Strachan

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Zellers Inc. (“Zellers”) of a Determination that was issued on February 26, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Zellers had contravened Part 4, Sections 31, 32, 35 and 40 of the *Act* in respect of the employment of Wes Woo (“Woo”) and ordered Zellers to cease contravening and to comply with the *Act* and to pay an amount of \$54,766.48.

Zellers has appealed the Determination. The appeal sets out the following grounds of appeal:

1. The Delegate erred in identifying and applying the applicable legal test.
2. The Delegate erred in failing to have regard to or harmonize relevant legislation.
3. The Delegate erred in his findings of fact and denied the Employer a fair investigation by failing to interview relevant witnesses and by failing to reconcile conflicting information.
4. The Delegate erred in concluding that Mr. Woo took no meal breaks.

A hearing was held on the appeal. I heard evidence from Betty Anne Mercer, an employee of Zellers who worked with Woo for a period of time, William Broderick, Zellers’ Trail Store Manager, and Shauna Pinchbeck, the Trail Store Human Resources Manager, on behalf of Zellers. Woo testified on his own behalf.

ISSUE

The issue in this appeal is whether Zellers has shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to cancel or vary the Determination, or to refer it back to the Director. More specifically, the questions to be addressed are whether Zellers has shown the conclusion that Woo was not a manager for the purposes of the *Act* was wrong, whether Zellers was denied a fair hearing and, additionally and alternatively whether some of the factual conclusions made the Director relating to the amount of wages owed by Zellers to Woo were wrong.

THE FACTS

The appropriate starting point for any factual analysis is the Determination. The Determination set out the following background information:

Zellers Inc. operates a number of retail department stores in the province of British Columbia. The stores within the province are under the jurisdiction of the Act. Wes Woo commenced work for the company in 1994. His complaint was filed with our branch on June 15, 2001. At the time Mr. Woo filed his complaint, he was employed as the Pharmacy Manager, and was on medical leave. The complaint was filed in the time period allowed under the Act.

The representatives for the company and Mr. Woo have provided detailed written submissions regarding this matter. These have been very helpful in outlining the parties positions regarding the issues, relevant facts and application of the legislation. The submissions have been attached to the Determination as exhibits.

The Determination noted that the main issue in dispute was whether Woo was a manager under the *Act*. It also noted an issue relating to lunch breaks and a dispute concerning an annual performance bonus for the year 2000.

The findings of fact set out in the Determination are extensive and I do not intend to set them out in their entirety, but I will summarize them. On the primary issue, the Determination noted the following findings:

- Woo was employed as Pharmacy Manager within the pharmacy located in the Zellers Trail store;
- he reported to the Store Manager, Mr. Broderick, with some functional reporting to the Regional Pharmacy Manager;
- there were no pharmacists, pharmacy technicians or pharmacy salespersons reporting to Woo;
- during the relevant period (the period covered by the complaint) there were two pharmacy helpers (store cashiers) working part-time in the pharmacy;
- both helpers were also part-time employees in the store and did not work exclusively in the pharmacy;
- Woo's authority to hire and assign hours of work were fettered by his superiors;
- Woo had some involvement in evaluating the performance of employees, but performed only one performance evaluation during the relevant period;
- there was no evidence Woo hired or fired employees;
- the part-time employees were effectively assigned to the pharmacy;
- Woo supervised and directed the day to day activities of the part-time employees while they worked in the pharmacy;
- Woo performed the usual duties of a pharmacist and performed various merchandising and administrative functions relating to the operation of the pharmacy;
- Woo was responsible for operating the pharmacy within the Trail Zellers store;
- his decision making authority was limited to the Trail Zellers store pharmacy and within that arena of authority was required to operate within numerous policies, constraints and guidelines established by Zellers; and
- he did not have a significant amount of control, or key decision making authority, for the company as a whole.

The Determination concluded Woo's primary employment duties, both in terms of importance and time spent, consisted of dispensing prescriptions and generally administrating the operation of the pharmacy. The Determination concluded that supervising and directing employees were not his primary employment duties. The Determination also concluded Woo was not employed in an executive capacity for Zellers. The argument made by Zellers, that a finding on whether Woo was employed in an executive capacity should give consideration, and effect, to the legislative provisions of the *Pharmacists, Pharmacy Operations and Drug Scheduling Act* (the "*Pharmacy Act*") and the Bylaws of the Council of the College of Pharmacists of British Columbia (the "Bylaws"), was not accepted.

At the hearing, the following facts were provided on the manager issue:

- the salary and benefits received by Woo were equal to or greater than those provided to other managers and/or supervisors in the Trail store;
- the pharmacy had its own budget, which Woo, with Mr. Broderick's support, administered, and that budget was set by Zellers head office;
- it was Woo's responsibility to schedule employees, but he failed and/or refused to do it, except on one or two occasions in mid 2000;
- Woo had the keys to the pharmacy and only he had the authority to open and close the pharmacy;
- Woo had some authority to set pricing in respect of 'local purchases' and had authority to fill special orders for customers and set the price on those;
- Woo was consulted when the support staff for the pharmacy were hired;
- Woo had some discretion to match pricing on over the counter pharmaceutical products with local competitors' prices; and
- Woo had discretionary authority, along with Mr. Broderick, over a small budget of 'promotional' dollars.

Woo agreed he was licenced as a Pharmacy Manager under the *Pharmacy Act* and had made several renewal applications representing he held that designation.

Overall, on the manager issue there were no new facts added to the substantial amount of material that had been provided by the parties during the investigation.

On the issue of lunch breaks, I heard evidence, substantially uncontradicted by Woo, that he normally took a ½ hour lunch break in the pharmacy, that he told the support staff he should not be interrupted and that he took some steps to ensure his privacy, by placing a piece of cardboard in front of his eating place. Mr. Broderick and Mrs. Pinchbeck testified that Woo was paid for every hour he worked, albeit at straight time, and that included being paid for his lunch breaks. In his evidence, Woo agreed that he was paid for all the hours he worked and that probably included being paid for his meal breaks.

ARGUMENT AND ANALYSIS

I shall first address the issue of the meal breaks. Section 32 of the *Act* states:

32. (1) An employer must ensure
- (a) that no employee works more than 5 consecutive hours without a meal break, and
 - (b) that each meal break lasts at least ½ hour.
- (2) an employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

The Determination made two key findings of fact that were not affected by the evidence at the appeal hearing: first, the pharmacy was not scheduled to be closed to provide Woo with a meal break away from his work site; and second, Woo took his meal break at the work site and was often interrupted during his break. I have carefully reviewed the evidence given by Mrs. Mercer relating to the meal break, but, on balance, do not find it sufficient to overcome the finding made in the Determination. Mrs. Mercer provided a statement during the investigation as well as giving evidence. In that statement, she said that during the time she worked in the pharmacy, which she identified as a five month period, from September, 2000 to January 2001, Woo “would take 20 minutes to ½ hour for lunch, at which time customers would not be served by having their prescriptions filled.” She said much the same thing in her evidence. The difficulty, of course is that Mrs. Mercer made her observations for only five months of the two year period covered by the claim, did not identify how frequently during that time she was able to make her assessments - whether it was five times a week, more than that, or less; acknowledged that Woo took meal breaks which were less than ½ hour in duration without identifying the frequency of that and without explaining in what circumstances he would do that; and did not identify how these observations were made and how her conclusions were reached. Overall, Zellers has not shown any error in the conclusion they failed to comply with the requirements of Section 32.

On the other hand, I accept that Woo was paid for all the hours he claimed on his time sheets and that he claimed the ‘meal break’ as hours worked. The material included a substantial number of Woo’s time sheets for the period of the claim. They typically showed Woo recording a nine hour day, from 9:00 am to 6:00 pm. The material also contained a summary of the hours for which he was paid. The hours claimed and paid appear to be the same. I was not directed to any document showing the hours claimed by Woo were adjusted downward by ½ hour. I find the Determination wrongly concluded Zellers deducted meal breaks from the wages owed to Woo. The Determination identified this amount as \$13,982.05, plus annual vacation pay and interest on that amount, and will be varied and reduced accordingly.

I turn now to the manager issue.

The definition of manager is found in Section 1 of the *Employment Standards Regulation* (the “*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.

In their arguments, the parties referred me to several of the Tribunal's decisions on the scope of the managerial exclusion found in Section 34 of the *Regulation*, including *429485 B.C. Limited., operating Amelia Street Bistro*, BC EST #D479/97, in which the following statement is found:

Any conclusion about whether the primary employment duties of a person consists 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 that the person is described by the employer or identified by other employees 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 the perception of some third party.

I have no difficulty in finding Zellers has not shown the Determination was wrong in concluding Woo was not "*a person whose primary employment duties*" consisted of supervising and directing other employees. There is simply no doubt that Woo's primary employment duties were as found in the Determination: "dispensing prescriptions, along with general administrative duties relating to the operation of the pharmacy". In this context, whether Woo held the title of Pharmacy Manager for the purposes of the *Pharmacy Act* is entirely irrelevant. The Tribunal has stated on many occasions that it is the nature of the duties being performed by the individual in question that will be brought to bear on the issue, not the title held. Contrary to the submission of counsel for Zellers, the statutory provisions of the *Pharmacy Act* do not dictate factual conclusions for the purposes of the *Act*. As counsel acknowledged, the definition of manager in the *Pharmacy Act* is different than that found in the *Act*. It states:

"manager" means a pharmacist who is designated in a pharmacy licence as manager of a pharmacy.

The Bylaws outline the responsibilities of a pharmacy manager. They include matters relating to supervising and directing other employees, such as requiring active participation in the day-to-day management of the pharmacy, ensuring staffing levels are commensurate with workload and patient care requirements, establishing policies and procedures to specify the duties for support persons and implementing a management program that monitors, among other things, staff performance. There are, however, two points to be made. First, the evidence did not show Woo performed all of the responsibilities imposed by the Bylaws. Second, the matters relating to supervising and directing other employees set out in the Bylaws were not framed in the context of whether they were the 'primary employment duties' of a pharmacy manager. I do not agree with the submission by counsel for Zellers that I should accept the requirements of the Bylaws as matters of 'fact' and presume those 'facts' should dictate a conclusion for the purposes of the *Act*. Such a suggestion runs counter to the comments in *Amelia Street Bistro, supra*, where the Tribunal cautioned against putting form over substance. It may be that the facts in some cases will compel a conclusion that the primary employment duties of a pharmacy manager involve supervising and directing other employees. In other cases it will not. In all cases that will be a question of fact, and the facts in this case support the conclusion found in the Determination.

The question of whether Woo was “a person employed in an executive capacity” is only marginally more difficult to address.

In argument, both parties referred to several decisions which have considered that part of the definition of manager. The decisions conclude that the concept of a person employed in an executive capacity connotes a person with real and recognizable authority relating to the conduct of the business. In *Sunshine Coast Publishers Inc.*, BC EST #D142/98, which was referred to in argument, the Tribunal stated:

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#D124/98), 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*, (BC EST #D479/97), reconsideration of BC EST#D170/97), that the remedial nature of the Act and the purposes of the Act are proper considerations. As stated by the panel in *Amelia 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.

In argument, counsel for Zellers referred to several sources defining the term ‘executive’, noting the Tribunal has adopted the following in a number of cases:

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.”

There is very little evidence that Woo actively participated in “control, supervision and management” of the business of the Zellers pharmacy in Trail. Counsel for Zellers argued that Woo had final decision making authority on most matters concerning the management of the pharmacy. That assertion was not borne out by the evidence and material on file. She pointed out that from the perspective of his position on the store hierarchy, Woo appeared to be on an equal footing to Mr. Broderick, with similar benefits and a higher annual wage. The fact that an employee receives the same benefits and an equivalent, or higher, salary than a person who might be excluded from Part 4 of the *Act* under the definition of ‘manager’ does not determine the status of that individual for the purposes of the *Act* any more than the title given to that employee does. Regardless of an employee’s salary, the question of whether he or she is a manager for the purposes of the *Act* requires an analysis of the facts and a conclusion about the “total characterization” of the primary employment duties of that employee. The salary of an employee may be a factor when considering the question, but it is by no means determinative. She also pointed out that Woo had some authority and discretion in product pricing, product selection, local marketing initiatives, negotiating with local suppliers and profitability. While I agree, as the Determination did, that Woo had some authority and discretion on certain matters relating to the running of the pharmacy, such an argument fails to take into account Woo’s position within the business as a whole. As noted in the Determination:

Zellers Inc. is a Canadian retail chain. Zellers is part of the Hudson’s Bay Company Family of stores. . . . there are approximately 39 Zellers stores, and 18 The Bay stores, located in British Columbia.

Counsel argued that Woo’s decision making authority and discretion should be considered only in the context of the Zellers pharmacy in Trail. I cannot agree with that argument. Such an argument in effect asks me to ignore a significant body of evidence showing quite clearly that substantially all of the key decisions affecting the operation of the business of the pharmacy were made by or were issued through Zellers corporate head office. Most of the pricing for the products sold in the pharmacy was done in the corporate head office. The evidence showed that Woo had little control over pricing. Mr. Broderick stated that to his knowledge Woo had never, either temporarily or permanently, changed product prices set by the corporate head office, although he and Woo had petitioned to the corporate head office, or “to anyone who would listen”, to lower prices on some over the counter products. It was Mr. Broderick’s evidence that the budget for the pharmacy was set by the corporate head office and was based on corporate criteria into which Woo had no input; that staffing levels were controlled by the corporate head office and were also based on formula established by the corporate head office; Woo had no input into that formula. Even where Woo dealt with local suppliers, the local suppliers with whom he could deal were either decided by or approved by the corporate head office.

Mr. Broderick suggested Woo set his own hours, but also conceded that the pharmacy’s hours of operation were set by Zellers and Woo was, as a term of his employment, required to be at the pharmacy during the hours of operation. Woo said he had no input into the pharmacy’s hours of operation. They were set by Bob Sibb, who I understood was Regional Pharmacy Manager at the time Woo was hired. Even in respect of scheduling the employees working in the pharmacy, the evidence is that Woo’s effort to design a shift schedule for those employees was rejected by Mrs. Pinchbeck as unworkable (from a budgetary perspective). There is also some correspondence in the file where Woo was told by Mr. Broderick that he could have no additional hours for employees in the pharmacy and that if he wished to schedule the pharmacy employee (there was only one at that time) to come in on Saturday, her hours on other days would have to be adjusted downward to allow that. There was a small budget for local

marketing and Mr. Broderick said that budget was administered by he and Woo. Most of the marketing was done by or through the corporate office and did not involve Woo.

Zellers has failed to show an error in the conclusion that Woo did not fall within the definition of manager in the *Regulations*.

The final aspect of the appeal on the manager issue is based on what is referred to as the failure of the delegate to have regard to and harmonize the provisions of the *Pharmacy Act* with those of the *Act*, or vice-versa. First, it cannot be said there was a failure to have regard to that question. The Determination noted the argument and provided the following comment on it:

I have considered the argument that consideration should be given to the “pharmacy manager” requirements as set out in the Pharmacists governing legislation. However, I do not find this legislation alters my finding under the *Employment Standards Act*. The two pieces of legislation are for different purposes and have different requirements. The *Act* specifically defines what is a manager, and this must be applied in these circumstances.

Secondly, the provisions of the *Pharmacy Act* and the *Act* would only need to be ‘harmonized’ if the definition of ‘manager’ in the *Pharmacy Act* was found to be exhaustive or the provisions of the two pieces of legislation overlap and conflict.

I can find no indication in the *Pharmacy Act* that the definition of pharmacy manager was meant to be exhaustive. There is nothing in the *Pharmacy Act* or the Bylaws, for example, that indicates a pharmacy manager is, as a consequence of his or her performing the responsibilities or satisfying the obligations identified in the Bylaws, a person whose primary employment duties is to supervise and direct other employees or a person who employed in an executive capacity.

Nor am I am persuaded there is any conflict between the *Act* and the *Pharmacy Act* on the question of whether Woo is a manager for the purposes of the *Act*. I can find no contradiction between the respective definitions of ‘manager’ or that both cannot be applied to the same set of facts. As indicated in the Determination, the two pieces of legislation have different purposes and there is nothing in the scheme or wording of either piece of legislation, or in their underlying policies, to indicate that one was to preclude the operation of the other.

The courts have repeatedly held that provisions do not conflict simply because they deal differently with the same facts. A conflict arises only if it would be impossible or contradictory to apply them together. There is nothing problematic, inappropriate, or even unusual in attaching more than one legal effect to a fact or a set of facts.

Zellers has not shown any error in the conclusion that Woo was not a manager for the purposes of the *Act* and this ground of appeal is dismissed.

Zellers has not shown it was denied a fair hearing and this ground of appeal is also dismissed.

The appeal is allowed in part.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 26, 2002 be varied by deducting amount of \$13,982.05 plus the annual vacation pay and interest applied to that amount. The balance of the Determination is confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal