

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 -

Common Ground Publishing Corp.
(“Common Ground” or the “appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/247

DATE OF HEARING: August 9, 21, and October 5, 2000

DATE OF DECISION: October 30, 2000

DECISION

APPEARANCES

Joe Coutts, Barrister & Solicitor	for Common Ground Publishing Corp.
Tina-Marie Bradford, Barrister & Solicitor	for Lawrence Buser
Claire V. Rochefort, E.S.O.	for the Director of Employment Standards (August 9 th , 2000 only)

OVERVIEW

This is an appeal brought by Common Ground Publishing Corp. (“Common Ground” or the “appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 14th, 2000 under file number ER 050050 (the “Determination”).

THE DETERMINATION

The Director’s delegate determined that Common Ground owed its former employee, Lawrence Buser (“Buser”), the sum of \$21,240.46 on account of unpaid wages including overtime pay, 2 weeks wages as compensation for length of service, concomitant vacation pay and interest. The delegate rejected Common Ground’s assertion that Buser was an independent contractor and not an “employee” as defined in section 1 of the *Act*. The delegate also rejected Common Ground’s position that Buser was a “manager” as defined in section 1 of the *Employment Standards Regulation*; accordingly, Buser was not disentitled to overtime pay by reason of section 34(1)(f) of the *Regulation*.

By way of the Determination, a \$0 penalty was also assessed against Common Ground.

ISSUES ON APPEAL

Mr. Coutts, on behalf of Common Ground, says that the delegate erred in several respects. First, Common Ground maintains that Buser was an independent contractor and thus was not entitled to file any claim for unpaid wages under the *Act*. Second, and alternatively, even if Buser was employed by Common Ground, he was employed as a “manager” and thus was not entitled to any overtime pay. Third, Mr. Coutts says that Common Ground should not be held liable for \$3,018.59 in interest (or, at least it should not be held liable for the full amount of the interest award) because the investigation of Buser’s complaint was not conducted in a reasonably expeditious fashion.

ANALYSIS AND FINDINGS

Common Ground publishes a monthly magazine that is distributed, free of charge, mainly in the lower mainland; currently, about 70,000 copies of the magazine are distributed each month through coffee shops, bookstores and other retailers. Since there are no paid subscriptions, Common Ground relies exclusively on advertising revenue. According to its publisher (who is also the sole corporate principal), Joseph Roberts, the magazine itself focuses on issues relating to “personal health, personal growth, ecology, and creativity”.

The material relating to Common Grounds’ appeal includes various documents and written submissions and the testimony of 11 witnesses, some of whom testified in person and others via teleconference. I propose to address each of the issues in turn commencing with the question of Mr. Buser’s status.

Was Buser an Employee or an Independent Contractor?

Buser commenced his association with Common Ground in mid-June 1995; the relationship between the parties ended in mid-July 1997. Buser was identified on the masthead of the July 1995 issue (his first) as one of two “contributing editors”; in the next issue and continuously thereafter until July 1997, Buser was listed on the masthead as the “managing editor”. Buser, as “managing editor”, was listed immediately below the name of Joseph Roberts as “publisher and editor” and above all other magazine writers and office personnel.

As noted above, Common Ground’s position, both before the delegate and on appeal, is that Buser provided services to Common Ground as an independent contractor; Common Ground says that there never was an employment relationship between the two parties. The term “independent contractor”, although well understood in the common law, is not defined in the *Act*. An “employee” is defined in section 1 of the *Act* as follows:

“employee” includes

- (a) *a person, including a deceased person, receiving or entitled to wages for work performed for another,*
- (b) *a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*
- (c) *a person being trained by an employer for the employer’s business...*

[subsections (d) and (e) are not relevant here]

An “employer”:

...includes a person

- (a) *who has or had control or direction of an employee, or*

- (b) *who is or was responsible, directly or indirectly, for the employment of an employee.*

Further, “wages” are defined in section 1 as follows:

“wages” includes

- (a) *salaries, commissions or money paid or payable by an employer to an employee for work,*
- (b) *money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency...*

[subsections (c), (d) and (e) are not relevant here]

Finally, “work” means:

...the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

In light of the foregoing (and interrelated) statutory definitions, I am of the view that the delegate did not err in determining that Buser was an employee of Common Ground.

It is clear that Buser provided labour and services to Common Ground throughout his association with that firm and he was paid a wage—in the form of an agreed hourly rate—for his services. Common Ground reimbursed Buser for any out-of-pocket expenses (including payment for the very occasional use of his own personal computer) he incurred in the course of his duties on behalf of Common Ground. He regularly attended at Common Ground’s office where he had his own desk and a key to the office premises. For the most part, he used Common Ground’s own computer to carry out his duties. Buser was given Common Ground business cards that identified him as the “managing editor”. Buser dealt with, on Common Ground’s behalf, freelance writers and edited their submissions. Buser was intimately involved—and, indeed, primarily responsible for—the production of the magazine and also had other editorial responsibilities.

Although Buser did have, during the relevant period, other sources of income, his income was primarily derived from, and the bulk of his working hours were devoted to, Common Ground. Although he may or may not have had authority to hire or fire (he did carry out at least one termination on instructions from Mr. Roberts)—the evidence is conflicting on this point—he certainly had, and exercised, authority in terms of the assignment of work to regular staff and in “calling in” part-time staff as workloads dictated.

Randy Berg, the former sales manager, testified that he viewed himself and Buser, along with Mr. Roberts, as Common Ground’s “management team”. Jeff Swanson, who did design work and wrote some articles for Common Ground, testified that Buser edited his work; that Buser “supervised and coordinated” certain Common Ground staff and “supervised” part-time people who were called in to work on an *ad hoc* basis. George Koller, a freelance writer, testified that

Buser “supervised” his work, approved proposed article topics, and edited articles that he submitted for publication. Elizabeth Scott testified that Buser hired her for some part-time work and supervised her work on that occasion—“he guided me as to what to do”. Ms. Scott also testified that Buser asked her to submit her invoice to him and that he would “approve” it for payment. Trevor Carolan testified that he “pitched” several story ideas to Buser, some of which were approved by him. Carolan testified that Buser edited his articles and that Buser had “hands on” authority in the office.

I should note that *all of the foregoing witnesses testified on behalf of Common Ground*, not on Buser’s behalf. In my view, these witnesses clearly support the proposition that Buser was an employee and not an independent contractor. Indeed, none of the classic *indicia* of an independent contractor relationship appear to be present in this case. Buser’s contract called for him to be paid by the hour—and only for hours actually worked; Buser’s compensation was in the form of wages, not profits. Common Ground agreed to underwrite his out-of-pocket expenses and thus not only was there no opportunity for profit, Buser did not undertake any risk of loss associated with his work for Common Ground. Buser attended at Common Ground’s offices and while there used its equipment. Common Ground, in the person of Mr. Roberts, retained ultimate control and although Buser did work relatively autonomously, Mr. Roberts always asserted—and frequently exercised—the right to direct Buser in his work activities.

Buser was instructed by Mr. Roberts—some months after his initial engagement—to “invoice” Common Ground for all hours worked (and some time still later, his invoices included GST). This instruction, perhaps, was given so it would appear that Buser was an independent contractor and Common Ground could, therefore, avoid certain payroll taxes and other remittance obligations. Nevertheless, I am entirely satisfied that the *substance* of the relationship between the parties, rather than the superficial *form* of the relationship, was that of employer-employee. Common Ground, through Mr. Roberts, exercised significant direction and control over Buser’s activities even though, in some areas, Buser was delegated a certain amount of discretionary authority. In the language of the *Act*, Buser performed work for wages and was controlled and directed in his wage-earning activities by Mr. Roberts.

Was Buser a “Manager”?

A “manager” is defined in section 1 of the *Regulation* as meaning:

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

Part 4 of the *Act*, which includes the provisions relating to the payment of overtime, do not apply to a person who is a “manager” [see section 34(1)(f) of the *Regulation*]. Not surprisingly, since the bulk of the monies awarded to Buser under the Determination represents overtime pay, Common Ground takes the position that, if Buser was an employee, he was employed as a manager whereas Buser says that although he was an employee, he did not have any managerial responsibilities.

I have already concluded that Buser was a Common Ground employee. Much of the evidence I previously referred to in reaching that conclusion also points to the conclusion that Buser was employed as a manager. Although Buser did exercise some supervisory responsibilities, I cannot find that such responsibilities were his *primary* job function. This latter observation is not all that surprising if one considers that Common Ground's small staff complement worked relatively autonomously since they knew what tasks they had to accomplish and were experienced and competent in completing their assigned tasks.

On the other hand, I am satisfied that Buser was "employed in an executive capacity". It should perhaps be noted that this was also the conclusion of the delegate as set out in her letter to the Common Ground dated October 13th, 1999:

"My interpretation of Mr. Buser's relationship to your company is that of a Manager. There are two criteria for determination of the title of manager, primary duties of supervising staff and acting in an executive capacity. I concluded that Mr. Buser acted in an executive capacity and was, therefore a manager."

This latter initial finding by the delegate is discussed at page 14 of the Determination. Based on the information set out in the Determination—and that is essentially all I have before me since the delegate took no active role in this appeal, neither testifying nor making submissions—the delegate appears to have resiled from her initial position that Buser was a manager based principally on Buser's relatively low wage and the fact that Common Ground was taking the position that Buser was not an employee.

In my view, an executive's absolute level of remuneration is not a relevant factor although perhaps one's comparative compensation within the employer's organization might well be relevant. For example, the senior executive officer of a charitable foundation might earn less than a first-year police constable but nonetheless could be quite properly characterized as an executive. Further, I see nothing inherently probative one way or the other in an investigation where an employer advances the alternative positions that the complainant is not an employee but, if the person is determined to be an employee, the person is a manager. Indeed, it may be theoretically possible for a person to be, concurrently, a true independent contractor and a manager—for example, in the construction industry, an architect or some other engineering professional may be contracted by the landowner—as an independent contractor—to manage a construction project where they will direct and otherwise supervise various other contractors (and their employees).

As I noted in *Sunshine Coast Publishers Inc.* (BC EST #D244/96) since "executive" and "executive capacity" are not defined in the *Regulation*, resort can be had to the Oxford dictionary and to Black's Law Dictionary for guidance. "Executive capacity", as defined in Black's Law Dictionary, means "duties...[that] relate to active participation in control, supervision, and management of business". In a written submission to the delegate dated August 21st, 1997, Buser stated that:

- his "work was an essential and integral part of the day-to-day business of the company";

- he had the authority to call into work on an *ad hoc* basis certain staff (a “paste-up person and sometimes a proofreader or other support person”);
- “my work was tightly integrated into the day-to-day business of the company and it was indispensable to the operation of the company”; and
- he dealt with advertisers and suppliers directly on behalf of Common Ground.

It must be remembered that the business of Common Ground was the production of a monthly magazine. Buser was intimately involved in that process and more than any other employee (other than the business owner, Mr. Roberts), was responsible for ensuring that the magazine went to press and was then distributed each month. While titles are not determinative of one’s status, it should be noted that Buser not only had a “managerial” title, he was also listed on the magazine’s masthead as the “number 2” employee in the organization behind only the publisher, Common Ground’s sole corporate principal and self-styled “CEO”, Joseph Roberts. Mr. Berg saw Buser as part of a 3-person “management team”; other witnesses testified about Buser exercising independent authority in terms of the assignment of stories and the editing of submitted articles; the evidence shows that Buser “hired” employees at least on a short-term *ad hoc* basis and on at least one occasion was involved in the decision to terminate—and actually carried out that termination—a regular employee.

Although Mr. Roberts reserved to himself (and hardly surprisingly given his position), the “final say” in most matters relating to the publication of the magazine, Mr. Buser nonetheless had some considerable discretionary authority in that he (Buser)—and he alone—decided what story ideas, draft articles, letters to the editor etc., would go before Roberts for the latter’s approval. In response to a question from Mr. Coutts, Buser replied that as managing editor he was responsible for “managing the editorial content not for managing people”. I do not doubt that answer to be correct but it must be recalled the *core business* of Common Ground was the production of a monthly magazine. In that context, saying that one managed the editorial content is, in my view, tantamount to saying that one, in effect, managed the entire business. What could be more obviously an executive function? Finally, Buser’s employment relationship with Common Ground evidenced many of the hallmarks typically associated with an executive position—he had his own personal key to the office; he could come and go as he pleased provided the magazine was published by deadline each month; he took his annual leave at times of his own choosing; he was seen as the senior employee in the Common Ground hierarchy; he frequently worked long hours (including evenings and weekends) but, in his own words, never even thought to file a claim for overtime until well after his employment ended.

In my view, the delegate erred in determining that Buser was not a “manager”. Accordingly, it follows that Buser was not entitled to any overtime pay under Part 4 of the *Act*. Since there was no other contractual agreement obliging Common Ground to pay Buser overtime pay, the Determination must be varied by cancelling the entire award made in favour of Buser on account of overtime pay.

Section 88 Interest

Mr. Coutts, on behalf of Common Ground, asserts that it should not be liable to pay interest spanning a period when it was not even aware that a complaint had been filed. In addition, Mr. Coutts says that his client ought not to be penalized by paying interest that accrued over an extended period simply because the investigation did not proceed in a reasonably expeditious fashion.

However, even if this investigation was not carried out with reasonable dispatch—and I do not wish to be taken as accepting that assertion—I do not conceive that I (unlike, say, a judge under the *Court Order Interest Act*) have any discretionary authority with respect to the payment of section 88 interest (see *Insulpro Industries Inc.*, BC EST #D405/98 and *Piney Creek Logging Ltd.*, BC EST #D546/98).

SUMMARY

The delegate correctly determined that Buser was an “employee” of Common Ground during the relevant period. In my opinion, however, the delegate incorrectly determined that Buser was not a “manager” during his tenure with Common Ground. Accordingly, the Determination must be varied by cancelling the award made in Buser’s favour on account of overtime pay. Common Ground does not challenge the award made in favour of Buser representing 2 weeks’ wages as compensation for length of service and thus that aspect of the Determination stands. Buser is entitled, in addition, to concomitant vacation pay and interest.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to indicate that Buser, during the period of his employment by Common Ground, was a “manager” and, therefore, not entitled to be paid overtime pay under Part 4 of the *Act*. It follows that the Determination must be varied by cancelling the monetary award made in favour of Buser on account of unpaid overtime pay.

As set out in the Determination, Buser is entitled to 2 weeks’ wages as compensation for length of service and concomitant vacation pay and interest and, accordingly, the Determination is confirmed with respect to those matters.

I will leave it to counsel to determine between themselves Buser’s precise monetary entitlement. In the event that counsel are unable to reach such an agreement, I will retain jurisdiction to determine Buser’s entitlement.

Finally, inasmuch as Common Ground does not dispute that it contravened the *Act*, at least with respect to the payment of compensation for length of service, the \$0 monetary penalty is also confirmed.

Kenneth Wm. Thornicroft

**Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal**