

**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-

Prints-Charming Framing (1990) Ltd.

(“Prints-Charming” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 97/272

**DATE OF HEARING:** September 30th, 1997

**DATE OF DECISION:** November 21st, 1997

**DECISION**

**APPEARANCES**

Bill Grulkey	for Prints-Charming Framing (1990) Ltd.
Belinda Brubaker	on her own behalf
No appearance	for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Prints-Charming Framing (1990) Ltd. (“Prints-Charming” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on March 26th, 1997 under file number 081-776 (the “Determination”).

The Director determined that Prints-Charming owed its former employee, Belinda Brubaker (“Brubaker”), the sum of \$5,437.90 on account of unpaid overtime pay. The appeal was heard at the Tribunal’s offices in Vancouver on September 30th, 1997 at which time I heard evidence and submissions from Mr. Bill Grulkey, the president/secretary and a director and shareholder of Prints-Charming, and from Mrs. Brubaker. The Director was not represented at the appeal hearing.

**ISSUES TO BE DECIDED**

The employer’s appeal is based on two principal points: first, that the decision to work overtime hours was a voluntary decision taken solely by Brubaker in an effort to increase her regular earnings; second, and in any event, Brubaker was a “manager” as defined in the *Employment Standards Regulation* and, therefore, was not entitled to be paid overtime [see section 34(1)(f) of the *Regulation*].

**FACTS AND ANALYSIS**

Prints-Charming operates a retail and custom picture-framing business. The company now has two stores. Brubaker was originally hired in the spring of 1993 as a framer and sometime in the early fall of 1993 was transferred to the North Vancouver store where, usually, she was the only person on staff. Brubaker worked at the North Vancouver store until it was closed in the fall of 1995. While working at the North Vancouver store, Brubaker opened and closed the premises each day, handled cash and occasionally made deposits, and dealt with customers as required. Mostly, her work entailed doing framing for customers.

The evidence before me is that Brubaker frequently worked weekly overtime hours because she worked a Saturday shift in addition to her normal Monday to Friday work schedule. Brubaker's evidence was that she "knew that Bill [Grulkey] didn't pay overtime" but she asked to work the Saturday shift "because she needed the money" and was concerned about losing her job if she refused to work the Saturday shift. She was paid for her Saturday hours, without apparent complaint, on a "straight-time" basis.

Section 4 of the *Act* is a complete answer to the employer's assertion that Brubaker voluntarily agreed to work the overtime hours on a "straight-time" basis--a nonunion employee simply cannot waive, by contract or conduct, their statutory entitlement to be paid overtime pay. I find that the employer knew that Brubaker was regularly working in excess of 40 hours in a week and was, therefore, entitled to overtime pay. The employer was content to allow Brubaker to work weekly overtime because it thought, incorrectly, that it had a lawful agreement with Brubaker whereby she would only be paid at "straight-time" rates for her overtime hours.

As for the employer's second ground of appeal, namely, that Brubaker was a "manger" and therefore not entitled to overtime pay, I do not agree that Brubaker could properly be characterized as a "manager" as that term is specifically defined in the *Employment Standards Regulation*.

First, there is nothing in the evidence before me to suggest that a regular component of Brubaker's duties was the supervision and direction of other employees. During the vast majority of her employment at the North Vancouver store, she worked alone and on the odd occasion when another employee was also on site, I find that Brubaker was not "supervising" that other employee. I also note that the employer itself did not characterize Brubaker as a manager--the Record of Employment issued by Prints-Charming on June 21st, 1996 described Brubaker as a "picture framer".

Second, I cannot agree with the employer that Brubaker was employed in an "executive capacity"--this firm had, at most, two executives--Mr. Grulkey and his wife. Brubaker carried out *none* of the usual functions ascribed to a senior executive such as hiring and firing staff, strategic planning, making significant operational decisions, financial management etc.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter be confirmed as issued in the amount of \$5,437.90 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

---

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