

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 -

Bi-Rite Furniture Warehouse Ltd.
("Bi-Rite")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr
FILE NO.: 1999/354
DATE OF HEARING: October 6, 1999
DATE OF DECISION: November 10, 1999

DECISION

APPEARANCES

Surwan Singh (Servy) Powar on behalf of Bi-Rite Furniture Warehouse Ltd.
Wayne Couture on his own behalf

OVERVIEW

This is an appeal by Bi-Rite Furniture Warehouse Ltd. (“Bi-Rite”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated May 13, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Bi-Rite alleges that the delegate of the Director erred in the Determination by concluding that Wayne Couture (“Couture”) was not a manager as defined by the *Act* and further concluding that Couture was owed overtime wages in the total amount of \$3,874.86 (includes interest)

ISSUES

The issues to be decided in this appeal are:

1. Did the delegate of the Director err in determining that Couture was not a manager ?
2. If Couture is not a manager, are wages owed as calculated by the delegate of the Director ?
3. Should the furniture received by Couture be considered in the calculation of wages owing ?

FACTS

The following facts are not in dispute:

- Couture was employed at Bi-Rite’s location in Smithers;
- Couture was initially paid a salary of \$1,600.00 per month and received raises which brought his salary to \$1,700.00 per month at the time his employment terminated;
- Couture was one of two regular employees at the Smithers location with the other employee being the deliveryman;

Surwan Singh (Servy) Powar (“Powar”) testified on behalf of Bi-Rite. I also reviewed the submissions provided on behalf of Bi-Rite. In some respects the information provided in the submissions was in conflict with the evidence of Powar. Where such conflict existed, I prefer the evidence of Powar. I will only summarize the relevant evidence on behalf of Bi-Rite which was as follows:

- Couture was hired to start April 15, 1994;
- Couture was told that the Smithers store was a 2 man job, Couture and a deliveryman;
- Couture was hired as the Branch Manager even though he had no relevant experience;
- Couture had full control at the store;
- Couture suggested keeping the store open 6 days a week so he could take extra time off in the summer for the extra hours worked;
- If I knew overtime would have to be paid for the extra hours worked, I would have told him to shut the store rather than work the overtime;
- all the Branch Managers have to get my permission for overtime work;
- Powar wanted the store to stay open until 6 p.m. but Couture only was willing to work till 5:30 p.m. as he wanted to do other things;
- in 1996 Couture provided a list of overtime hours and suggested that he would take some furniture in lieu for the overtime;
- Couture did take some furniture for the overtime hours worked;
- Couture was told that he should have asked before he worked overtime and also that he should close the store on Mondays and also close the store to take his lunch if the deliveryman was not available;
- Couture was told in July 1996 that Bi-Rite could not afford to pay him overtime;
- Couture was responsible for hiring a deliveryman and also for firing a deliveryman;
- Couture was responsible for hiring part time help as required to help with deliveries;
- feel that Couture should have asked for the overtime each month instead of waiting for so long;
- Couture referred to himself as the “store manager”;
- while the major advertising was done from Prince George, Couture has some ability to use the petty cash as he saw fit;
- Powar decided to take the VCR’s and TV’s out of the Smithers store as they were not making enough money on those items;
- Couture wanted to fire the deliveryman and finally Powar said it was up to Couture to decide;
- when Couture did fire the deliveryman, it was not properly done and Powar had to make arrangements with the Employment Standards Branch about severance pay;

- when a warehouse collapsed, Couture hired someone to start the demolition process even though the insurance agent was to do so;
- prices of the furniture and appliances were set in accordance with a formula produced by Powar;
- there was an error in law by the delegate of the Director failing to provide copies of all information provided by Couture and this was also a breach of Section 77 of the *Act* ;
- there was an error in fact in the calculation of overtime wages owing to Couture;
- there was an error in law in that the delegate failed to consider the “true market value” of the furniture purchased by Couture;
- there was a failure by the delegate of the Director to deal with the complaint in an expeditious manner.

In response to cross examination by Couture, Powar agreed that:

- Couture wanted to set the store hours the same as the local competition and Powar said whatever Couture wanted was OK;
- he told Couture that if Couture wanted to open store 6 days a week, he didn't mind;
- he agreed that Couture gave a record of overtime hours to Dave (Powar's son);
- Couture may have given him a list of overtime hours in early 1997 but he can't recall for sure;
- Couture did not have a budget only the petty cash each month;
- Couture did not have cheque signing authority;
- Couture was not involved in attending trade shows;
- while a bonus system was discussed, nothing was ever put into place;
- Couture was involved in certain store decisions, however Powar retained the right to make the important decisions;
- the Record of Employment listed Couture as “salesman” but that was the only bookkeeper's category;
- he recalls receiving a fax dated July 12, 1996 about taking furniture instead of overtime but can't recall if he replied to it;
- he did not ask Couture to return the furniture on his next visit as it wasn't a hot issue at that time;
- it is possible that Couture faxed monthly summaries of overtime hours in Nov/Dec 1995 but he does not recall;
- he received a full summary of overtime hours worked and furniture purchased in Jan 1997;
- he gave Couture a raise of \$25.00 per month in Jan 1997;

In response to questions from the panel, Powar stated:

- Couture was not required to provide a daily record of hours worked;
- wage statements were only issued when a change in wage rate occurred;
- wage statements when issued did not contain information with respect to the hours worked;
- Couture hired a deliveryman E. Marco, part time employees Scott Taylor and Doug Duplisea;
- Couture fired a deliveryman M. Mellace;
- Couture hired all casual labour and paid them from petty cash;
- Couture was instructed by Powar to hire casual labour as required;
- Couture also handled all bank deposits for the store;
- Powar made monthly trips to Smithers in the summer and every 2 - 3 months in the winter.

Couture testified that:

- he received direction from Powar in regard to all important decisions affecting the Smithers store;
- Scott Taylor was hired by Powar's son Dave;
- M. Mellace was only fired after a lot of discussion with Powar and Powar, after discussing this with his son had his son call back and say it was OK to fire Mellace;
- he was the only salesman at the store so when he was having his lunch even if the deliveryman was there, all customer questions were directed to him;
- the only time he took a specific lunch break was after March 1, 1997 when the store was closed at lunch time;
- E. Marco was only hired after consultation with and approval by Powar;
- the agreement with respect to overtime was that Couture would be able to take time off during the summer for the overtime hours worked;
- he submitted an update of overtime summaries in November and December 1995 to Powar;
- he discontinued submitting overtime summaries as he was tired of always arguing with Powar;
- in July 1996 he purchased some furniture in lieu of overtime wages as he was concerned that the total of overtime was getting very high and he didn't want to lose out on being compensated for his overtime;
- he sent a fax to Powar on July 12, 1996 suggesting that he be permitted to purchase some furniture equal in value to overtime hours worked;
- Powar did not respond to the July 12, 1996 fax so Couture assumed everything was OK;
- Powar did not raise the issue of the furniture purchase at later meetings in Smithers;
- he kept a detailed journal of the hours worked each day and the work performed;

- he sent a letter to Powar dated February 20, 1997 requesting time off in the summer in lieu for the overtime hours worked;
- Powar replied to this letter by stating that the request for time off was not acceptable and further directing Couture as to the new store hours effective March 1, 1997;
- the Record of Employment identifies his occupation as “salesman”;

The delegate of the Director in the Determination and a submission to the Tribunal states:

- the question in regard to Couture’s status as a manager was discussed with Bi-Rite in the fall of 1997;
- information was provided to Bi-Rite with respect to earlier Tribunal decisions about manager status and after some discussion, Bi-Rite acknowledged that Couture probably did not fall within the manager category;
- the matter of Couture’s status as a manager was not raised again and the focus was on the question of the number of overtime hours alleged to have been worked;
- at no point during the investigation did Bi-Rite or Couture request, either verbally or in writing, copies of all information provided by the other party;
- the length of time taken was unfortunate but in part due to various attempts in 1998 to effect a resolution of the issues between the parties;
- after investigating this matter, the delegate concluded that Couture was not a manager within the meaning of the *Act*;
- Bi-Rite initially took the position that it had no records for 1995 yet subsequently was able to provide some record;
- the records provided by Bi-Rite changed in some minor ways during the course of the investigation;
- Couture provided detailed daily journals of the hours worked and the work performed;
- with respect to the issue of the furniture, it was felt that as Couture initiated the purchase of this furniture with no objection at the time from Bi-Rite, this amount would be deducted from wages owing.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Bi-Rite.

The Employment Standards Regulation (the “*Regulation*”) defines ‘manager’ as:

"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 here is whether Couture is a manager as defined in the *Regulation*. The task of determining if a person is a manager must address the definition of manager in the *Regulation*.

Typically, a manager has a power of independent action, autonomy and discretion; he 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 judgments 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 a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. 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 a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

The evidence was that Couture was classified as “store manager” although his principal duties were to function as a salesman. Couture was the only salesman at the Smithers store. Couture priced furniture and appliances in accordance with a formula produced by Bi-Rite.

The evidence with respect to hiring and firing of employees indicates that Couture did not make the final decisions rather, he made recommendations to Powar who would then give the final OK. Powar’s evidence was that he gave Couture permission to hire casual labour as required and pay them from the petty cash although Powar further stated that he retained the right to make the important decisions.

The evidence further disclosed that all advertising decisions were made by Powar from Prince George. While Powar states that Couture had authority to spend petty cash for local advertising, no evidence was provided that this ever happened.

The evidence was that although Couture performed *some* managerial duties, ie. arranging deliveries with the deliveryman, hiring casual help for the deliveryman, opening and closing the store, his primary function was that of a salesman.

Based on the evidence provided and on the balance of probabilities, I conclude that Couture was not a manager as defined in the *Regulation*.

Having concluded that Couture was not a manager, I must now consider whether Couture is owed wages for overtime work.

The *Act* sets forth a number of requirements to be met by an employer. Among those is the requirement to keep payroll records. Section 28 of the *Act* provides:

Section 28, Payroll records

(1) *For each employee, an employer must keep records of the following information:*

- (a) the employee's name, date of birth, occupation, telephone number and residential address;*
- (b) the date employment began;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;***
- (e) the benefits paid to the employee by the employer;*
- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;*
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*

(2) *Payroll records must*

- (a) be in English,*
- (b) be kept at the employer's principal place of business in British Columbia, and*
- (c) be retained by the employer for 7 years after the employment terminates.*

(emphasis added)

The evidence is that the only payroll records kept by Bi-Rite was a summary prepared by Powar based on the hours the store was open. There is no dispute that Couture worked overtime hours. Powar's evidence was that there was a verbal agreement that Couture would take time off for the overtime hours worked. Powar's evidence was also that he kept track of the number of "days" owed to Couture for the overtime.

In the absence of payroll records being kept by Bi-Rite as required by Section 28 of the *Act*, I accept the records kept by Couture in his daily journals as an accurate reflection of the hours worked.

The requirement to pay overtime wages is found in Sections 40(1) and (2) of the *Act* which provides:

40. (1) *An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38*
- (a) *1 1/2 times the employee's regular wage for the time over 8 hours,*
and
(b) *double the employee's regular wage for any time over 11 hours.*
- (2) *An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38*
- (a) *1 1/2 times the employee's regular wage for the time over 40 hours, and*
(b) *double the employee's regular wage for any time over 48 hours.*

Agreements to provide another day off with pay for a day of overtime work is contrary to the provisions of Section 40 *supra* except as allowed under Section 42 of the *Act*.

Based on the evidence provided and on the balance of probabilities, after reviewing the calculations of the delegate of the Director with respect to the amount of wages owing to Couture, I conclude that those calculations are correct.

With respect to the allegation by Bi-Rite that there was an error in law and a breach of Section 77 of the *Act* when the delegate of the Director did not disclose to Bi-Rite all of the information provided by Couture. Section 77 of the *Act* provides:

Section 77, Opportunity to respond

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

There was no evidence provided that Bi-Rite was not given opportunity to respond to the issues in dispute. The evidence is however, that neither Bi-Rite nor Couture requested copies of information provided by the other party. I am unable to conclude that the language of Section 77 confers an obligation upon the Director to **automatically** disclose, during the investigation, copies of information received to all parties. That would result, in my view, in an unnecessarily cumbersome, protracted and costly process which would be contrary to the intent of the *Act* as set forth in Section 2 (d) to “*provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.*”

Bi-Rite provided no evidence or argument at the hearing with respect to the alleged error in law.

For the above reasons, I conclude that there was no error in law or breach of Section 77 by the delegate of the Director.

During the course of the hearing Powar and Couture agreed that the value of the furniture obtained by Couture in lieu of overtime wages was no longer in dispute. It was accepted that the value of that furniture would be as set forth in the Determination and considered as wages received by Couture.

In their appeal, Bi-Rite raised as an issue the length of time taken by the delegate of the Director to deal with this matter. Bi-Rite however, provided no evidence during the hearing nor did they make any argument with respect to this issue. I therefore decline to make any conclusions with respect to this issue.

The appeal by the Employer is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 13, 1999 be confirmed in all respects in the total amount of \$3,874.86 together with whatever further interest has accrued pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal