

**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 -

F. Butcher Sign & Display Service Ltd.  
operating as Conventions Unlimited  
(“ Conventions Unlimited ”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

**ADJUDICATOR:** C. L. Roberts

**FILE NO.:** 2000/617

**DATE OF DECISION:** November 30, 2000

## DECISION

This is a decision based on written submissions by Bill and Linda Bachman on behalf of F. Butcher Sign & Display Service Ltd. and Diane H. MacLean for the Director of Employment Standards.

### OVERVIEW

This is an appeal by F. Butcher Sign & Display Service Ltd. operating as Conventions Unlimited (“Conventions Unlimited”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued August 14, 2000. The Director found that Conventions Unlimited contravened Sections 18(2) and 40(1) of the Act in failing to pay Scott Greene (“Greene”) overtime wages, and Ordered that it pay \$2,717.06 to the Director on Greene’s behalf for overtime wages and interest.

### ISSUE TO BE DECIDED

Whether the Director’s delegate erred in concluding that Greene was a manager, and therefore entitled to overtime wages.

### FACTS

The facts, as set out by the Director’s delegate, and not disputed by Mr. and Mrs. Bachman are as follows.

Conventions Unlimited is a display contractor operating in the lower mainland of B.C. It is contracted to set up trade show displays, and, to carry out that function, would rent and install pipes, drapes, carpets and custom booths at trade shows. A small portion of the work is the design of floor plans and custom exhibits.

Greene worked as the “sales director” from January 1, 1997 to January 11, 1999, when he quit his job. His duties consisted of getting new business and overseeing existing accounts. He would bid on jobs, following a discussion with the employer, and all submitted bids carried the employer’s signature.

Greene had no involvement in financial management of the company, and although he sat in on job interviews and had input into the discussion, he had no decision making authority. Greene had some authority to change prices on small bids, but none on larger ones. He had some authority to decide whether a customer would pay by credit card, or invoiced, according to company policy. Collections decisions were based on instructions from the owners.

Green filed a complaint of February 11, 1999, claiming payment for banked overtime.

Greene provided a sheet showing the date extra hours were worked, the number of hours, and the reason the extra hours were worked. The sheet showed the number of hours taken off and the number of hours still “banked”. Greene told the delegate that he was informed of the overtime bank

by the Bachmans, and was told if he worked more hours, he was to “take time when available”. He alleged that the policy was common knowledge, and that other employees also took time off after working overtime. He maintained a record of his overtime hours in a computer. He said that he took two weeks vacation and five days of banked time in December 1997. He gave the dates to Linda Bachman who recorded the days on the calendar. He followed the same procedure in 1998, when he took two weeks vacation and some banked time, and had some banked time carried over. When he quit, he asked for his banked days to be paid out, and the company refused.

Conventions Unlimited contended that Greene was working in an “executive capacity” and not entitled to overtime. It also argued that, in any event, it did not have an overtime bank.

Conventions Unlimited’s position was communicated to the delegate through a series of documents. The first was a letter from Convention Unlimited’s controller, Simon Shay. He stated that Green was the sales director, and, although he had no subordinates in the office, he had authority to direct the office staff, including asking the Project Manager to prepare drawings, the Office Manager to type letters, filings, raise invoices and credit notes, the Graphic Designer to design signs, and all of the labour staff to work. Mr. Shay added that Greene sent him a monthly expense voucher, which could cover meals, parking or other purchases, for which he needed no authorization or approval. Greene’s job responsibilities were attached to the response.

Subsequent submissions contended that Greene was operating in an “executive” capacity because, among other things, he had authority to perform job responsibilities on his own, source subcontractors, use confidential information in client files, price contracts, make judgement decisions, resolve problems related to customer service and authority to use the “President’s office computer”.

Conventions Unlimited also took the position that there was no time bank established, and there was no written request from Greene that he would record extra hours. The company further asserted that Greene attended jobs for his own purposes, and had it been aware of the number of hours put in by Greene, it would have established a policy guideline and format to record all times accurately. Conventions Unlimited also alleged that Greene left with hours owing to it for his excessive late arrivals and early departures from work.

Conventions Unlimited agreed that there was no average workweek, and that the time bank was an informal arrangement. It would give extra days off if an employee was working hard, but that it was the employer’s decision to make. It also agreed that Greene never saw the company’s books, could not make big purchases, and all quotes would go through Mr. Bachman’s office.

The Director’s delegate spoke with three of Conventions Unlimited staff; Bob Everett, Murray Armstrong, and Mr. Shay. Mr. Everett’s evidence was that Greene was a salaried employee, with no supervisory duties, he did no hiring or firing, made no capital purchases, and was given the discretion to make quotes on booth displays.

Mr. Armstrong worked closely with Greene and reviewed Greene’s overtime hour claim. He stated there was no formal time bank, but employees had flexibility to work when it was busy and take time off when it was slow.

Mr. Shay’s evidence related to Greene’s hours of work at the office.

The Director's delegate reviewed the parties' evidence and submissions, and concluded that Greene was not a manager. She concluded that, although Green was called a sales director, he was simply a "lead salesman". She found that, while Greene may have had considerable discretion, there was little evidence he had exercised it. She found that the bulk of the work was done in consultation with the other co-workers and the owners, and that, in any event, the work appeared to be "fairly standard with prices varying through a very small range".

She found that his primary duties did not consist of supervising and directing other employees, since there was no evidence he was responsible for hiring, firing, scheduling, evaluation or promotions.

The delegate further concluded that Greene could not be considered one of the "directing minds" of the enterprise - i.e., he did not determine what kind of product the business sold and at what price, where the business would be located, how many employees would be hired, or how the business would be financed. She stated

Every employee will exercise some independent discretion business couldn't operate if it were otherwise. Many employees have very responsible jobs and exercise a significant degree of discretion. This does not make these employees managers under the *Act*. Independent discretion must be exercised on a regular basis and this must be a discretion relating to basic company policies and operation; i.e., making the 'big' decisions on a regular basis.

She continued as follows:

In this case, it is clear that the complainant had considerable discretion in his job. However, I am not convinced that this discretion was over major issues or that the discretion was exercised regularly. The employer says that the complainant had the discretion to change prices. The complainant says that most of the prices were set before he started working for the employer. The employer has provided convincing proof that the complainant set prices. Apparently, this is a competitive industry and the prices don't change much. Instead the competition is on other factors, like service. It does appear that the complainant was given some discretion to discount on prices, but that does not make him a manager. Most salespersons are given some discretion to discount and the complainant was no different.

Having found Greene to be an employee, the delegate then considered the issue of overtime wages.

The delegate reviewed the reliability of Greene's record of hours, and concluded that, in the absence of any reliable evidence from Conventions Unlimited, it was, in the whole, the best evidence, and calculated overtime wages of \$2,459.81.

## **ARGUMENT**

Conventions Unlimited argues that the delegate accepted inaccurate and incorrect evidence in finding that Greene was not employed in an executive capacity. It further alleges that the delegate misunderstood the convention industry and service procedures.

Conventions Unlimited sets out 9 grounds for the appeal, none of which go to the issue of Greene's employee status. They are as follows:

- i) formal time banking never implemented
- ii) inference to a settlement opportunity
- iii) Inaccurate hours submitted
- iv) an expectation of "fair judgement based on both parties facts considered as accurate"
- v) "defend our long standing reputation as employer's (sic)"
- vi) "example used as similar to our industry is questioned as suitable a comparison"
- vii) unnecessary delays - setting up of meeting arrangements and set up exclusions, holidays, availability for call back response
- viii) A bad start with our reprimand may have affected all considerations equally

Not only do these grounds not go to the issue of whether Greene was a manager or not, they do not demonstrate how the delegate erred in arriving at the conclusion she did.

Attached to the letter of appeal are documents previously forwarded to the delegate setting out "Executive Capacity", and overtime wages, correspondence sent to Conventions Unlimited by the delegate, faxes sent by Conventions Unlimited to the delegate, and the Tribunal's decision in *429485 B.C. Ltd (c.o.b. Amelia Street Bistro)(Re)* BC EST #D479/97).

Convention Unlimited's submissions are a reiteration of submissions made to the delegate. It contends that the delegate preferred Greene's evidence over that of their witnesses, and that she did not give "fair consideration" to their evidence.

## **ANALYSIS**

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am not persuaded that the Director erred.

Section 34(1)(f) of the Regulations provides that part 4 of the *Act* (that part relating to overtime wages) does not apply to a manager.

*Manager is defined in section 1 of the Regulations as*

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

At issue in *429485 B.C. Ltd (c.o.b. Amelia Street Bistro)(Re)* was whether the employee was a manager within the meaning of section 1(a). The Bachmans contend that Greene was employed in an executive capacity. Consequently, I find this case of little relevance to the question under appeal, since Conventions Unlimited's argument is that Greene was a manager within the meaning of section 1(b). A more appropriate analysis is that of *Sunshine Coast Publishers BC EST #D244/96*. (see also *Northland Properties Ltd. BC EST #D423/98*, in which sections 1(a) and (b) were comprehensively considered).

How parties define their relationship is only marginally relevant to determining whether the employee is a manager or not, or, more specifically in this case, whether an employee is working in an executive capacity. The test is the actual authority exercised by the employee, not the authority that might be set out in a position description.

Executive capacity includes, but is not limited to, duties that involved participation in the control, supervision and administration of business affairs and the exercise of substantial authority in decisions affecting the business.

The delegate considered Black's Law Dictionary definition of executive capacity which is "duties in such capacity relate to active participation in control supervision and management of business."

The delegate carefully analyzed the evidence of both of the parties in light of this definition. She set out the actual duties Greene performed, and found no evidence that Greene participated in the control, supervision or management of the business. There appears to be no dispute that Greene did not hire, fire or train any employees, and that his supervisory responsibilities were minimal.

Conventions Unlimited argues that Green had, among other things, authority to sign and price contracts, fix prices within a 10% - 40% range, took responsibility for creating prices for special shows, and had some discretion with respect to pricing and purchasing. The delegate found that, although Greene had some discretion, it was not significant, and did not amount to management of the business. There is no evidence Greene had any independent authority relating to the operation of Conventions Unlimited itself. I find no grounds for the argument that she gave insufficient weight to the employer's argument, and find no basis on which to interfere with her conclusion.

The burden of establishing that a person is excluded from the protection of the *Act* or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion. (see *Northlands*).

I shall next address the issue of overtime wages.

Conventions Unlimited argues that Greene was told that the company operated on an honour system, and that, when an employee worked a lot of extra time, "we would be made aware of it and grant time off upon request".

Section 35 of the *Act* provides that an employer must pay overtime wages in accordance with Section 40 if the employer requires or, directly or indirectly, allows an employee to work

- (a) *over 8 hours a day or 40 hours a week...*

Section 40 (1) provides that

*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 ½ times the employee's regular wage for the time over 8 hours, and*

*(b) double the employee's regular wage for the time over 11 hours.*

The delegate determined that Conventions Unlimited did not keep a record of hours Greene worked, despite the requirements of the *Act*. If the employer honestly believed Greene was a manager, it would not have considered it necessary to do so, however, in the absence of any employer records, the delegate must consider the best reliable evidence. She reviewed the evidence and considered Greene's records the best evidence. I find no basis to interfere with this conclusion.

**ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated August 14, 2000 be confirmed, together with whatever interest has accrued since the date of issuance.

***C. L. Roberts***

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**C. L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**