

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-

Colleen A. Fee
(“Fee”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/434
DATES OF HEARING:	October 14th and 16th, 1998; November 4th, 1998
WRITTEN SUBMISSIONS RECEIVED:	November 13th, 1998
DATE OF DECISION:	December 14th, 1998

Fee's principal argument on appeal was that the delegate erred in finding that by reason of her status as a "senior employee" who "worked independently" her claim for overtime and statutory holiday pay ought to have been dismissed in the absence of any evidence that the employer was aware that she was working excess hours.

The employer argued that the delegate erred in concluding that Fee's overtime and statutory holiday pay was not barred by regulation and, in any event, submitted that it did not authorize, nor did Fee actually work, any overtime hours. Fee submitted that the employer was not entitled to argue the "managerial" regulatory exclusion because Equity never appealed the delegate's finding on that issue.

At the appeal hearing, I advised the parties that I wished to hear evidence and argument as to whether or not Fee was a "manager" but that I was reserving my decision on the procedural question of whether or not that issue was properly before me. For the reasons set out below, I am of the view that the employer was properly entitled to argue the managerial exclusion, despite not having filed an appeal on that issue.

CAN THE EMPLOYER ARGUE THE MANAGERIAL EXCLUSION?

Sections 34(1)(f) and 36 of the *Regulation* provide that Part 4 (Hours of Work and Overtime) and Part 5 (Statutory Holidays) of the *Act* do not apply to a "manager". This latter term is defined in section 1 of the *Regulation* as follows:

"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.

If Fee was a "manager" then her entire claim must fail. As noted above, the delegate held that Fee was *not* a manager but nevertheless dismissed her complaint on other grounds. The employer did not appeal the delegate's finding that Fee was not a manager, however, Fee did appeal the dismissal of her complaint. The discrete issue, raised by Fee as a preliminary objection, concerns whether or not the employer is entitled to argue that Fee was a manager in response to Fee's appeal. In my view, and given the unusual circumstances of this case, the employer is entitled to argue that Fee's unpaid wage claim was barred by regulation.

The Determination was issued on June 11th, 1998; the time limit for filing an appeal--set out in the Determination itself--was July 6th, 1998. Fee filed her appeal on July 6th, 1998 and on that same day the Tribunal notified the employer, by mail, of the appeal. Thus, by the time the employer was made aware of Fee's appeal, the time limit governing the employer's appeal had already expired.

In essence, Fee argues that Equity should have filed a timely appeal of the Determination--even though Fee's wage claim was dismissed--in order to preserve its rights to argue the "managerial exclusion" in the event Fee herself decided to appeal. At the very least, Fee submits that when Equity received notice of her appeal, it ought to have filed an appeal with respect to the delegate's finding that Fee was not a manager and, at the same time, an application for an extension of the appeal period [see section 109(1)(b) of the *Act*].

The notion that Equity ought to have filed an appeal with respect to a Determination that, effectively, held in its favour, strikes me as being fundamentally unsound. Had such an appeal been filed, there is a very substantial probability that it would have been dismissed out of hand under section 114(1)(c). Certainly, in my view, it does not serve the interests of fairness and efficiency [see section 2(d) of the *Act*] to require the Tribunal to allocate its scarce resources to disputes that have absolutely no practical significance. Once Fee filed her appeal, however, I suppose it would have been appropriate for the employer to formalize its position by seeking an extension of the appeal period so that it could file its own appeal in order to preserve its right to argue the "managerial exclusion" issue.

Had such an extension application been filed, I, for one, would have been inclined to grant the extension. However, no such extension application was ever filed. This is perhaps a technical oversight but nevertheless, in my view, did not in any way prejudice Fee. The employer has consistently maintained its position that Fee's complaint was barred because she was a manager. As is obvious from the Determination itself, the employer advanced that argument during the investigation and it again consistently raised the issue in its written submissions to the Tribunal. Indeed, the very first written submission of the employer, dated July 27th, 1998 and filed as requested by the Tribunal in its July 6th appeal notification letter to the parties, specifically (at pages 5-6) raised the "managerial exclusion" issue.

This is manifestly not a situation where the employer has attempted to "ambush" the appellant or this Tribunal. There is not a scintilla of evidence before me that suggests Fee was prejudiced by the employer's failure to formally appeal the Determination as to the "managerial exclusion" issue and, in the circumstances of this case, I cannot conclude that the employer ought to have filed an appeal in any event.

Having found that the "managerial exclusion" issue is properly before me, I now turn to the substantive question of whether or not Fee was a manager.

WAS FEE A MANAGER?

Equity's Structure

Equity is an association comprised of some 5,000 members who perform in live theatre, opera and ballet productions throughout English Canada (there is a "sister organization" in Quebec). Although not a certified bargaining agent, Equity negotiates collective agreements on behalf of its members with theatre operators. Although members usually negotiate individual contracts with their "engagers" (*i.e.*, producers), Equity ensures that such agreements conform to the master

collective agreements (and may grant variances or exemptions if they do not) and also arranges for the producers to post performance bonds as security for wages.

According to its constitution Equity's members elect a council that meets not less than 3 times each year. Council members, in turn, elect 5 officers including a president who is styled as the "chief executive officer" of the association. In addition, there are a number of employed staff members including the Executive Director who is styled as the "chief administrative officer" of the association.

Equity has two offices, the main office located in Toronto and the so-called "Western Office" (covering operations in British Columbia, Alberta and the two territories), opened in 1986 and situated in Vancouver.

Throughout most of the relevant period, the Toronto office had a staff of about 17 people while the Vancouver office had only two full-time employees, Fee and Keith Davidson, although other clerical support staff were sometimes called in to work in the Vancouver office on an as-needed basis. Fee left a law practice to join Equity in 1986 as Equity's "Western Business Representative"; she was in charge of the Vancouver office throughout her tenure with Equity.

Fee's Position

As the Western Business Representative, and as described in the job description provided to her at the commencement of her employment, Fee's duties included, *inter alia*:

- "directly responsible for all aspects of the administration of [Equity's] western office and for the maintenance of all bonding, contracting and collective agreement administration procedures for members working in and theatrical managements operating in the area supervised";
- "responsible for generally conducting the Association's affairs as Western Representative in consultation with the national office";
- "responsible for providing assistance in the negotiation of collective agreements as directed by the AED";
- "responsible for conducting a regular and timely review of all productions to ensure that collective agreements are upheld on a production/producer basis; taking requisite action when they do not and follow up same";
- "responsible, in consultation with the AED and/or the Comptroller, for the maintenance and up-keep of the office space, the equipment and furniture and other of [Equity's] possessions";
- "responsible for the administration of a general account and a bonding account for which orderly records are to be kept and which are accounted for to the comptroller on a monthly basis";

- “responsible for the supervision of the Western administrative assistant ensuring that the work required is achieved in a timely and accurate manner, preparing and explaining job description to staff member, evaluating performance and recommending improvements where necessary”.

Certainly, the above components of her work as Western Business Representative, and in particular, the last noted such component, clearly imply that Fee had supervisory responsibilities. Further, Fee’s own characterization of her duties--as set out in her Statement of Claim dated February 17, 1997 in which she alleges that she was “constructively dismissed” by Equity--also, in my view, clearly supports the employer’s assertion that Fee was a “manager” as defined in the Regulation. I might add that Fee’s evidence was that she reviewed and approved this document before it was filed with the B.C. Supreme Court. In her Statement of Claim, Fee described her duties in the following terms:

“5. As Western Business Representative and Western Regional Representative, [Fee] reported directly to the Executive Director of [Equity]. [Fee] was [Equity’s] senior employee and representative in Western Canada, and as such exercised considerable independence and judgment in fulfilling the following duties and responsibilities under the Employment Contract:

- (a) administering and managing the Western Office;
- (b) supervising the Western Office staff, including the Western Administrative Assistant and subsequently the Western Business Representative;
- (c) conducting [Equity’s] affairs in the Western Region (British Columbia, Alberta, Yukon, and Northwest Territories);
- (d) overseeing the Western Region’s bonding, RRSP, insurance, and membership business;
- (e) negotiating and administering collective agreements on behalf of [Equity];
- (f) providing [Equity’s] members with assistance in interpreting various collective agreements and other contracts;
- (g) representing [Equity’s] members in labour disputes with engagers;
- (h) processing concession requests; and
- (i) representing [Equity] in the Western Region.

During the course of her testimony before me, Fee acknowledged that she *never* submitted a formal particularized overtime claim to Equity (although she had done so for her subordinate, Keith Davidson) until after her employment ended. Fee also testified that she “never sought authority or

approval to work extra hours". She testified that she exercised "considerable independence" in carrying out her duties. She hired Davidson as well as casual clerical staff as needed. She evaluated Davidson's performance and generally supervised his work activities.

Although Fee, during her testimony before me, attempted to minimize the scope of her supervisory authority, Fee's own memorandum in December 1995 stated that: "I supervise the work of Keith Davidson and our part time helper"; "I supervise the physical operations of the Western Office"; "I also determine and supervise our office practice"; and that she "represent[s] [Equity] and lobb[ies] with governments". In April 1991, Fee wrote a memorandum to Equity's Executive Director in which she admitted she had failed to properly supervise Davidson and would henceforth "review" all correspondence sent out by him. At the same time she wrote a memo to Davidson in which she confirmed several "instructions" and advised that she "did not give you [Davidson] proper instructions or provide you with sufficient supervision and assistance".

Fee submitted a budget request each year and was subsequently responsible for ensuring that the expenditures of the Western Office were in accordance with that budget. Fee did not require any expenditure approval so long as the particular expenditure was within her budget. Although Fee claimed that her responsibilities were significantly "stripped away" in an April 1996 re-organization, an organizational chart issued at that time placed Fee among only 5 designated "senior staff"; Davidson was included in a 8-person "middle staff" category above a 7-person "support staff" category.

Conclusion

In my view, Fee, a former lawyer who dealt with labour issues on behalf of Equity (including acting as counsel in an arbitration under one of Equity's collective agreements), never--during the more than ten years of her employment--submitted a claim for overtime pay because she believed herself to hold a managerial position with Equity. In my view, the delegate erred in his conclusion that Fee was not a manager as defined in the *Regulation*--see *Choi*, BC EST Decision No. D066/96 and *Sunshine Coast Publishers*, BC EST Decision No. D244/96.

In the latter case, I relied on the following definitions in an effort to better understand the term "executive capacity" which appears in the second branch of the definition of "manager" contained in section 1 of 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'."

In my opinion, based on the evidence before me, Fee clearly exercised both executive and supervisory authority with respect to the operations of Equity's western office; she considered herself to be and was, in turn, considered by Equity to be, a member of Equity's senior management group.

Fee's status as a senior staff member was exemplified by her autonomy with respect to the western office; Fee was, in effect, and as she herself testified, Equity's face and voice in the western region. She was among the highest paid staff members and had many of the perquisites associated with senior management such as an expense account and credit card, cheque signing authority and spending authority. In summary, in my view, the evidence overwhelmingly shows that Fee was employed by Equity in a supervisory as well as an executive capacity.

THE OVERTIME CLAIM

For the sake of completeness, I should add that although I have found that Fee was a "manager" and therefore not entitled to overtime or statutory holiday pay, even if I had not so characterized Fee's status, I would nonetheless have dismissed her appeal.

The preponderance of evidence shows that Fee rarely, if at all, worked more than 8 hours in a day or 40 hours in a week. I accept Davidson's evidence regarding Fee's typical work day (9:20 to 9:30 A.M. to 5:00 P.M. with a daily 1 hour lunch break) and that there was no need for overtime to be worked because the volume of work handled by the western office could be comfortably completed within a normal workday. In March of 1987 Fee wrote to Equity's Executive Director complaining about her compensation and stating that she "will accept the salary for the 87 fiscal year provided it is clear that my work is limited to the 35 hour week--9 am to 5 pm (1 hr. lunch) Mon. - Fri." The evidence before me shows that Fee maintained that work schedule (and often even fewer hours) throughout her entire tenure with Equity.

I completely reject Fee's assertion that she was "working" while attending evening theatre performances. These attendances, using complimentary tickets provided by producers, were viewed by Fee as a "perk" of her job and there is absolutely no evidence before me to suggest that Fee was directed to attend such performances as part of her usual job duties (nor was Davidson who also occasionally attended performances using complimentary tickets). Indeed, Ron Haney, who is Equity's "number 2 executive" and the senior business representative in the Toronto office (essentially, Fee's counterpart in the Toronto office), testified that he was not required to attend theatre performances and rarely did so, with no apparent negative repercussions for his career. Haney testified that attending theatre performances was a purely voluntary matter and derisively referred to the practice as "schmoozing and wanking"; Haney's uncontradicted evidence is that he never directed Fee to attend a theatre or other live performance outside normal working hours.

I am not satisfied that Fee worked anywhere near the overtime hours she indicated in her claim and, in any event, in order to be compensable, Fee must have been required, either directly or indirectly, to work such overtime hours by her employer (see section 35 of the *Act* and *Lavery*, BCEST Decision No. D100/98). Fee has not met her evidentiary burden in this latter regard.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed to the extent that Fee's complaint was properly dismissed. I would, however, vary the Determination inasmuch as I have found that Fee's claim for overtime and statutory holiday pay was barred by reason of her status as a "manager".

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal