

**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 -

Gordon John Smedley  
(“Smedley”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**Adjudicator:** Hans Suhr

**File No.:** 97/715

**Date of Hearing:** November 20, 1997

**Date of Decision:** December 17, 1997

**DECISION**

**APPEARANCES**

Gordon John Smedley	on his own behalf
Joie Warnock	co-counsel for Gordon John Smedley
Jan O'Brien	co-counsel for Gordon John Smedley
Jill Devonshire	on behalf of Gordon John Smedley
Dan McCormick	observer
Heather Till	observer
Brian Farr	on behalf of Sunshine Coast Publishers Inc.

**OVERVIEW**

This is an appeal by Gordon John Smedley, (“Smedley”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated September 5, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Smedley alleges that the delegate of the Director erred in the Determination by concluding that he was employed in an executive capacity which made him a “manager” as defined by the *Employment Standards Regulation* (the “Regulation”) and he therefore was not entitled to be paid overtime rates of pay for overtime hours worked. .

**ISSUES TO BE DECIDED**

The issues to be decided in this appeal are:

1. Was Smedley a “manager” as defined by the *Regulation* ?
2. If Smedley was not a “manager”, are overtime wages owing and, if so, in what amount?

**FACTS**

The following facts are not in dispute:

- Smedley commenced employment with Sunshine Coast Publishers Inc. (“Sunshine”) in March 1994;

- Smedley was initially employed as a “production assistant”;
- Smedley’s duties included building ads as per the instructions from the sales representatives, placing the ads on the page, lay out of editorial copy, lay out of photographs, preparing an original of the page to be ‘camera ready’ for the printers;
- Smedley also performed technical repairs to the computer hardware and software as required;
- Smedley worked in the Sechelt office of Sunshine and was paid at an hourly rate of pay;
- in May/June of 1995, Smedley was placed on ‘salary’ and asked to work out of the Gibsons office as a reporter;
- due to short staffing, Smedley alternated between both the Gibsons and Sechelt offices;
- the production manager at the time, Laurie McConnel had requested, for medical reasons, to be relieved of her duties as “production manager”;
- Smedley was approached by the publisher, Terry Clements, (“Clements”)who asked if he would step in as “production manager” although he, Clements, was “not sure this department needs a manager”;
- Smedley accepted the position of “production manager” and remained as such until his employment was terminated March 1, 1997;
- Sunshine published two newspapers during 1996, the Sunshine Press and the Coast Outlook;

Joie Warnock (“Warnock”) testified with regard to her involvement with the employees of Sunshine and the subsequent union organizing drive. Warnock stated that :

- she was the National Representative of the Communications, Energy and Paperworkers Union (“CEP”) charged with the duty of organizing the employees of Sunshine;
- Smedley was involved in the newly organized bargaining unit as a shop steward and bargaining committee member;
- Smedley was not excluded from membership in the union by the Labour Relations Board, nor did Sunshine attempt to remove Smedley from the bargaining unit during the negotiations which followed the granting of the certification.

Smedley testified and stated that:

- the only additional duties that he performed after being named as the “production manager” was that he was responsible for sending in the time sheets and monitoring the supplies on hand;
- he was responsible for ensuring that the Coast Outlook was prepared and ready to go to the printers by the end of the day on Tuesdays, which was the deadline for that paper;

- he would stay for as long as it took to get the paper ready;
- working overtime hours was the norm at Sunshine but only the hourly paid employees were ever paid for that extra work;
- he would work between 6 - 20 hours of overtime each week due to the chronic shortage of staff;
- he acknowledged signing a letter dated November 1, 1995 which indicated that he was to receive \$2,500.00 for past overtime work and “ As you are currently production manager and are not qualified to receive overtime pay, ....”;
- he stated that he only signed the November 1, 1995 letter as he felt that if he did not sign it, he would be fired;
- he continued to work overtime hours after signing the November 1, 1995 letter;
- the rest of the employees who worked overtime hours were paid on an hourly basis and did receive payment for their overtime work;
- only the publisher, first Clements and later Darren Bayrack (“Bayrack”) were able to authorize overtime by the hourly paid staff;
- in most cases, staff members would stay overtime as required to get the jobs done and on some occasions, Bayrack would tell a staff member to go home as they had stayed long enough;
- Jill Devonshire (“Devonshire”) was the “production assistant” after he became the “production manager”;
- Devonshire was responsible for ensuring that the Sunshine Press was prepared and ready for the printers by the end of the day on Saturdays, which was the deadline for that paper;
- the Sunshine Press was the larger of the two papers published by Sunshine;
- he began to keep a daily record of his hours worked in October 1996 after it became clear that the company was not going to be doing anything about the overtime hours required to do the job;
- a number of memo’s signed by him were mainly as a result of a number of the employees having the same concerns and he compiled and forwarded those concerns;
- only the publisher had the authority to hire and fire staff;
- only the publisher, Clements and then Bayrack, had the authority to set wage rates or to grant a raise;
- he never attended any management meetings;
- he did not discipline staff or perform performance appraisals;
- he did not have the authority to purchase supplies, he would merely advise Bayrack who would then issue a Purchase Order;
- he made suggestions to Bayrack in regard to purchasing new equipment/supplies which he and the other employees felt would improve the productivity of the company;
- he would address complaints by directing them to the appropriate persons;
- all employees would edit the ads for content as required;
- he would do “outside work” for about 1/2 hour per week on the average.

Devonshire testified and stated that:

- she was the “production assistant” at the time that Smedley was the “production manager”;
- she was responsible for ensuring that the Sunshine Press was ready to go to the printers by the end of the day on Saturdays, the deadline for that paper;
- her responsibilities for the preparation of the Sunshine Press were the same as those of Smedley in regard to the Coast Outlook;
- she was paid on an hourly basis;
- she requested a raise in 1996 from Bayrack and she did receive one;
- she recalls one instance of when a colour ad did not turn out the way the customer expected and she had to report to Bayrack and the Sales Manager about this problem;
- the general deadlines for each paper were set by Bayrack as the publisher and by the Sales Manager;
- she did not receive direction from Smedley nor did she observe Smedley giving direction to any other staff member;
- she would tell Bayrack what needed to be done and how much overtime it would take and he would authorize it as required;
- Smedley never authorized overtime or scheduled work;
- most of her overtime occurred on Saturdays as that was her production day, although she did overtime on other occasions as well;
- her vacations were scheduled through Bayrack.

Brian Farr (“Farr”) testified and stated that:

- he became involved in the operations of Sunshine at the request of the shareholders;
- he was the corporate general manager;
- his function was to turn things around for Sunshine at their operations;
- he hired some additional sales personnel in order to generate more revenue;
- his day to day involvement in the operations of Sunshine were very limited;
- he participated in corporate strategy meetings and in some meetings with the sales personnel;
- the company was in a desperate financial position;
- the amount of overtime worked was “large” for the amount of paper produced;
- he directed that efforts be made to reduce the amount of overtime worked;
- he understood that Smedley was a manager and was not aware of any complaint in regard to overtime wages until the union was certified.

Farr provided written statements from a number of former employees and management personnel. I cannot rely on those written statements. The reason is that those written statements are offered in evidence as proof of the truth of their contents. The authors of those written statements were not produced as witnesses at this hearing. Those written statements are hearsay and carry with them the problems associated with the probity of hearsay evidence, ie. the author of the statement is not under oath and is not subject to cross examination. Hearsay evidence by its nature is not the best evidence available in a matter and accuracy tends to deteriorate with each repetition of the statement. For the above reason, I am not prepared to give any evidentiary consideration of the written statements.

The Director concluded in the Determination that Smedley performed an executive function in control and guidance of the production department and that he was a manager within the meaning of the *Regulation*.

## ANALYSIS

Section 40 of the *Act* provides that all employees are entitled to overtime pay after a certain number of hours worked in a day or a week. Despite the all-inclusive language of Section 40, however, some employees are not entitled to claim overtime, they are excluded, by regulation, from the hours of work and overtime provisions of the *Act*.

In Section 34 (1) (f) of the *Regulation*, a “manager” is specifically excluded from the overtime pay provisions of the *Act*.

Section 1 (1) of 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;*

There is no issue in this appeal that Smedley was considered to be “*a person whose primary employment duties consist of supervising and directing other employees*”.

The issue in this appeal is whether Smedley was “*a person employed in an executive capacity*” .

The term “executive capacity” is not specifically defined in 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.”

The evidence provided was that Smedley did not attend management strategy meetings, nor did Smedley hire or fire any employees during the period he was “production manager”.

The evidence was that Smedley’s job duties changed very little when he became “production manager” as compared to his duties as “production assistant”. The evidence of Devonshire who was the “production assistant”, was that her duties with respect to preparing the larger of the two papers, the Sunshine Press, for publication was the same as Smedley’s duties in preparing the Coast Outlook for publication.

There was no evidence that Smedley participated in the control, supervision or management of the business of Sunshine.

Furthermore, while the evidence with respect to the application for certification on behalf of the employees of Sunshine is peripheral to this appeal, the conduct of the parties before the Labour Relations Board is informative as it clearly indicates that the parties themselves did not consider Smedley to be a part of the management for the purposes of the certification. The evidence was that Smedley functioned as a shop steward and member of the bargaining team until the time his employment was terminated.

For all of the above reasons, based on the evidence and on the balance of probabilities, I conclude that Smedley was **not** employed in an “executive capacity”. Smedley is therefore entitled to receive overtime wages for overtime hours worked.

With respect to the issue of overtime hours worked, Sunshine did not keep any records as they believed that Smedley was a “manager” and the records provided by Smedley cover only a portion of the time period in question. Smedley has provided an estimation in the amount of \$7,137.00 for the overtime wages owing.

Based on the evidence provided and on the balance of probabilities, I conclude that Smedley did work overtime hours. I am not able however, to determine the actual amount of overtime hours worked from the evidence at hand. I further conclude that it would be appropriate, in the circumstances of this appeal, for the Director, with the assistance of the parties, to further investigate this matter in order to establish the actual amount of overtime wages owing.

For all of the above reasons, the appeal by Smedley is allowed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 5, 1997 be varied as set forth above. I further order that the issue with respect to the amount of overtime wages owing be referred back to the Director for further investigation.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**