BC EST # D142/98
Reconsideration of BC EST # D552/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act*, R.S.B.C. 1996, C. 113

- by -

Sunshine Coast Publishers Inc.
("Sunshine" or the "Employer")

- of a Decision issued by -

The Employment Standards Tribumal
(the "Tribunal")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/98

DATE OF DECISION: April 15, 1998

DECISION

COUNSEL

Ms. Marylee A. Davies	on behalf of the Employer
Mr. Gordon Smedley Mr. Joie Warnock	on behalf of the Complainant

OVERVIEW

This is an application by the Employer pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on December 17, 1997 (BC EST#D552/97). In the Decision, which varied a Determination of the Director's delegate, the Adjudicator found that Mr. Smedley was not a "manager" because there was "no evidence that Smedley participated in the control, supervision or management of the business". As such, he was not employed in an "executive capacity". In the result, Mr. Smedley was entitled to overtime wages for overtime hours worked. The Decision referred the matter of the amount of the entitlement back to the Director. The Employer argues that the Adjudicator erred and that the Determination should be restored or the matter referred back to the Adjudicator.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Employer has presented proper grounds for reconsideration.

SUBMISSIONS

The Employer advances two grounds for reconsideration. First, the Employer argues, the Decision is not supported by the evidence presented at the oral hearing because the Adjudicator failed to consider evidence that there was an agreement in writing between Mr. Smedley and the Employer whereby the former acknowledged his status as a manager and was not entitled to overtime payments. Moreover, the Adjudicator misdirected himself by considering evidence with respect to an application for certification before the Labour Relations Board to the effect that the parties did not consider Mr. Smedley to be part of management. Second, the Employer argues that the Adjudicator improperly refused to consider written statements, supporting its case, from a number of former employees, who were not available to attend the hearing.

The Complainant opposes the application.

ANALYSIS

Section 116 of the *Act* provides that the Tribunal may reconsider any decision of the Tribunal. An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BC EST#D122/96), and other decisions, the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system.

In my view, the Employer's application does not meet the test for reconsideration. The Employer argues that Mr. Smedley was within the management exclusion with respect to overtime. There was no issue at the original hearing that Mr. Smedley was "a person whose primary employment duties consist of supervising and directing other employees". The issue before the Adjudicator, therefore, was whether he was "employed in an executive capacity".

Section 1(1) of the *Regulation* of the *Act* defines, *inter alia*, "manager":

> 1. In this Regulation:
>
> "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 term "executive capacity" is not defined in the legislation. It has not received a great deal of consideration in earlier decisions of the Tribunal. I agree with the Adjudicator in this case that being employed in an "executive capacity" requires the person to perform duties in such capacity as "relate to active participation in control, supervision and management of business". In *O'Hara* (BC EST#D124/98), I noted, at page 8:

> "The legislation makes a distinction between a person who is engaged in the supervision and direction of employees and a person employed in an "executive capacity". Either may be a manager and, as such, excluded from the overtime provisions in the legislation. In my view, it follows that the latter need not supervise and direct employees. I agree with my colleagues in *Amelia Street Bistro*, (BC EST #D479/97), reconsideration of BC EST#D170/97), that the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. As stated by the

> panel in *Amalia Street*, the degree to which power and authority typical of a manager is present and exercised by an employee are necessary considerations to reaching a conclusion about the "total characterization" of the primary employment duties of the employee. In my view, it is not the intent of the definition of "manager" in the legislation to include first line supervisors and foremen who do not frequently exhibit the power and authority typical of a manager. Such authority, which is question of degree, typically includes the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business. The authority must be shown to be exercised by the employee said to be a manager. In order to be employed in an executive capacity, the person must have "duties in such capacity relate to active participation in control, supervision and management of business". However, mere active participation is insufficient. The concepts of "control, supervision and management" implies the exercise of the power and authority typical of a manager, though not necessarily in regards to supervision and direction of employees."

The Employer presented evidence at the original hearing that there was "a written agreement between the Employer and Mr. Smedley whereby he acknowledged his status a manager and his ineligibility for overtime wages". At that time he received an amount on account of past overtime. In my view it is irrelevant that the person is described by the employer as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party (*Amalia Street Bistro*, above). Moreover, in determining whether a person is a manager the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. Even if I accept that the "agreement" was entered into voluntarily, it is no more than an agreement between the Employer and the employee characterizing the latter as a manager unless the employee is either (a) a person whose primary employment duties consist of supervising and directing other employees; or (b) a person employed in an executive capacity. In that regard, I note that Section 4 of the *Act* provides that requirements of the *Act* are minimum requirements and an agreement to waive any of those requirements is of no effect. In other words, the employee must be a manager in substance, and must exercise a degree of power and authority typical of a manager as set out above. While I am sympathetic to the Employer's concern that Mr. Smedley did not subsequently raise the issue of overtime payments until the relationship became "strained", the focus in an inquiry of this nature is still the requirements of the *Act* and *Regulation*. Moreover, while the agreement is not referred to in the analysis, I note that the Adjudicator did make reference to the agreement in the evidence. He also referred to evidence by the Complainant that he felt that he would be terminated unless he signed the agreement. In the result, I am not persuaded that the Adjudicator did not consider this evidence.

The Employer also argues that the Adjudicator considered evidence and misdirected himself by considering evidence with respect to an application for certification before the Labour Relations Board to the effect that the parties did not consider Mr. Smedley to be part of management. On a fair reading of the Decision, it is clear that the Adjudicator did not place much, if any, weight on this evidence. He noted, correctly, in my view, that such evidence was peripheral to the appeal before him. The Adjudicator set out the evidence with respect to Mr. Smedley's duties and responsibilities in great detail and concluded, "based on the evidence and on the balance of probabilities", that there "was no evidence that Smedley participated in the control, supervision and management of the business" of the Employer. From the Decision it is apparent that the Employer did not present any evidence at the hearing which would support a finding that Mr. Smedley was a manager and, with the exception of the matters referred to in this appeal, the application does not raise factual allegations which would substantiate such a conclusion. In my view, this does not present a ground for reconsideration.

Finally, the Employer argues that the Adjudicator should have considered the written statements of former employees. The Adjudicator noted, at page 6:

> "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 are offered in evidence as proof 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."

I agree with the Adjudicator. As a rule, hearsay evidence should not be admitted or accepted to establish a crucial or central point. The rationale for this can be found in a concern for procedural fairness and for the integrity of the process. Such evidence has inherently an untrustworthy quality to it as it is not subject to cross examination. In my view, the Adjudicator's decision on this point is consistent with the practice of the Tribunal.

Moreover, the Employer's appeal on this point is not based on "new evidence not available" at the time of the original hearing. The evidence, statements from named former employees, could have been presented at the hearing by calling the former employees to testify. It appears that the Employer chose not to do so. In my view, this does not constitute grounds for reconsideration.

For the above reasons, I conclude that the Employer's application for reconsideration must fail.

ORDER

Pursuant to Section 116 of the Act, I order that the Decision in this matter, dated December 17, 1997 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal