
CHARACTERISTICS OF EMPLOYEE DUTIES FOUND NOT TO BE MANAGERIAL OR SUPERVISORY

*By Barry W. Kwasniewski**

A. INTRODUCTION

On October 15, 2018, the Ontario Labour Relations Board (the “Board”) released its decision in *Merali v Designs G7 Inc.*,¹ which dealt with the review of an Order to Pay that required the employer, Designs G7 Inc. G7 Designs, Inc./Worklio (“Designs G7”) to pay overtime and vacation pay to a former employee, Anaar Merali. In upholding the Order to Pay issued by an Employment Standards Officer, and affirming that Ms. Merali was entitled to overtime pay pursuant to the *Employment Standards Act, 2000* (the “ESA”),² the Board looked at the characteristics of Ms. Merali’s employment to confirm that she had not been employed in a supervisory or managerial capacity. As discussed in this *Bulletin*, this decision is relevant to charities and not-for-profits with respect to the issue of properly classifying their managerial and supervisory Ontario employees, in that an incorrect classification may result in claims pursuant to the ESA alleging unpaid overtime pay.

B. BACKGROUND

The applicant, Ms. Merali, was a former Senior Recruiter reporting to the Chief Executive Officer of the respondent, Designs G7, and was seeking to vary the amount of compensation owed to her under an Order to Pay, which Order required Designs G7 to pay \$1,427.37 in overtime pay and \$280.27 in vacation pay; the issue of vacation pay was not raised before the Board and therefore not relevant to this case. Ms.

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¹ *Merali v Designs G7 Inc.*, 2018 CarswellOnt 17607 [*Merali*].

² *Employment Standards Act, 2000*, SO 2000, c 41 [*ESA*].

Merali claimed that she was entitled to an estimated 103.2 hours of overtime pay instead of the 20.62 hours of overtime pay specified on the Order to Pay. In response to the application, Designs G7 asserted that Ms. Merali was not owed any overtime pay because she had been employed in a supervisory or managerial capacity, which exempted her from any entitlement to overtime pay under the ESA.

C. ANALYSIS AND DECISION

In affirming the Order to Pay, the Board's analysis dealt with two issues: 1) whether Ms. Merali had *not* been employed in a supervisory or managerial capacity with Designs G7 which *would* entitle her in this case to overtime pay under the ESA, and 2) if Ms. Merali was entitled to such overtime pay, whether the amount of the Order to Pay was accurate.

1. Entitlement to Overtime Pay

After examining the characteristics of Ms. Merali's employment with Designs G7, the Board held that Ms. Merali was entitled to overtime pay under the ESA. By way of background, Part VIII of the ESA governs the overtime pay regime of employees. Under Part VIII, section 22 of the ESA introduces the overtime pay rule, which is generally triggered when an eligible employee works in excess of 44 hours in a week as provided below:

22 (1) Subject to subsection (1.1), an employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week or, if another threshold is prescribed, that prescribed threshold.³

However, exemptions apply to the overtime pay rule; Ontario Regulation 285/01⁴ provides a list of employment roles to which Part VIII of the ESA does not apply. Relevant to the decision by the Board is the exemption of employees who work in a "supervisory or managerial" position, which is found under subsection 8(b) of Regulation 285/01:

Exemptions from Part VIII of Act

8. Part VIII of the Act does not apply to ...

³ *Ibid*, s 22.

⁴ O Reg 285/01.

(b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;⁵

The Board had “little difficulty” in finding that Ms. Merali’s work duties were neither supervisory nor managerial in character. Ms. Merali’s duties did not allow her to exercise any level of authority over the work of other employees. First, Ms. Merali worked alone at a location in Toronto and did not have other employees reporting to her. Second, she did not train or supervise those employees whom she had recruited as Senior Recruiter. Third, Ms. Merali did not have any authority to hire, fire, discipline, or conduct performance evaluations of employees at the company. Fourth, Ms. Merali’s duties included that of an executive assistant, such as “booking flights, arranging travel, and dealing with [the CEO’s] personal car and his snowmobile.” Further, the Board clarified that Ms. Merali’s salary, which ranged from \$85,000 to \$100,000, or the fact that she received a bonus did “not make her a manager as the Employer has asserted.”

2. Amount of Overtime Hours

The Board affirmed the amount of the Order to Pay, refusing to vary the amount because the evidence provided by Ms. Merali did not indicate that she worked the 103.2 hours of overtime claimed. As a result, the 20.62 overtime hours as determined by the Employer Standards Officer was not varied by the Board.

D. CONCLUSION

It is important for charities and not-for-profits to accurately distinguish between their managerial and non-managerial employees, as there may be significant legal consequences depending on whether an employee is a manager/supervisor or not. Under the ESA, managerial employees are not entitled to certain protections such as overtime compensation. While subsection 8(b) of Regulation 285/01 indicates that an employee’s duties need not be *exclusively* supervisory or managerial to be exempted from overtime pay, there is no bright-line test that determines whether an employee is managerial, which may add to the confusion that charities and not-for-profits face when dealing with an issue of determining the managerial status of an employee.

The decision in *Merali* serves as a reminder to charities and not-for-profits that it is the nature of the employee’s work duties, including a consideration of whether the employee has any authority over other

⁵ *Ibid*, s 8(b).

employees, which are indicative of a managerial position. The designation of an employee as a “manager” or “supervisor” is not determinative of an employee’s legal status as such. It is the actual duties and responsibilities that the employee performs which are relevant to the proper classification. Other aspects of the employment relationship, such as salary and work bonuses will not in-and-of-themselves indicate whether an employee is managerial or supervisory. As such, charities and not-for-profits must be careful to consider the actual characteristics of an employee’s work duties and ensure that such duties are in line with their intention to employ an employee as a managerial or non-managerial employee.