

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 -

Michael W. Hoyle
("Hoyle")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 1999/607

DATE OF HEARING: December 17, 1999

DATE OF DECISION: January 31, 2000

DECISION

APPEARANCES:

Peter Hoyle: for Michael W, Hoyle
Edward L. Montague: for G. D. S. Direct Countertops Ltd.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act*) by Michael W. Hoyle (“Hoyle”) against a Determination issued by a delegate of the Director of the Director of Employment Standards (the “Director”) on September 16, 1999. Hoyle filed a complaint with the Employment Standards Branch alleging that G. D. S. Direct Countertop Ltd. (the “Employer”) had failed to pay him approximately \$14,000 in wages (including overtime and vacation pay) according to a contract of employment. The Determination found that no outstanding wages were payable to Hoyle.

Hoyle appealed the Determination on a number of grounds, including the factual basis for the conclusions of the Director’s delegate, in particular Hoyle’s duties and agreed rate of pay from January 1998 to January 1999. The Employer replied that Hoyle was paid according to an agreement he had with management and no wages owed.

ISSUE TO BE DECIDED

The principal issues to be decided in this case are the terms of Hoyle’s agreement with the Employer and the work he actually performed under that contract, in particular the rate of pay to which Hoyle and the Employer agreed in August 1997. Hoyle raised other issues that will be resolved in the course of deciding the principal issues.

FACTS

The Employer manufactures and sells countertops to wholesale markets. It has three principals, Mr. Dan Morcombe (“Morcombe”), Garret Murker (“Murker”) and Skip Murker, Murker’s son. Skip Murker was a silent partner who invested funds to start the company and offered advice to the other partners. The origins of the business included a connection with Thunderbird Building Supply (“Thunderbird”), a retail chain that also supplied builders on a wholesale basis. Morcombe and Murker were employed by Thunderbird, and Skip Murker has a business interest in Thunderbird. The Employer was established as a subsidiary of Thunderbird in 1991. In 1991 or 1992, the company became a separate entity. Morcombe and Murker worked on production for the company from its inception.

Hoyle was an employee of Thunderbird at the time he was hired by the Employer on October 21, 1996. Indeed, Thunderbird paid his salary until January 4, 1997. The principals knew Hoyle

from Thunderbird. In addition, Hoyle had married the daughter of a friend of Skip Murker, Murker's father. After Hoyle was hired, the Employer's labour force normally consisted of himself, Murker and Morcombe. Occasionally, part-time or temporary workers were employed in production. Hoyle's initial contract of employment with the Employer was dated October 1, 1996. It described Hoyle's position as "Marketing/Sales." Compensation was to be paid on a straight commission basis based on monthly sales and profits from those sales. There was no dispute that Hoyle received a draw of \$1000 every two weeks under that contract.

Hoyle's contract was altered on August 22, 1997. The substance of that contract is the heart of the appeal and the Employer's response to it. According to Murker, Hoyle never developed the sales volume necessary to pay his draw, and in August 1997. The company's volume of business increased, so that additional help was needed in the shop. Hoyle had complained that he could not live on \$1000 per pay period. Merker and Morcombe testified that, management and Hoyle agreed to increase his draw to \$1400 each two weeks, for which he would continue to solicit customers and work in the shop for two to three days per week. Hoyle was to continue his outside sales work. However, Hoyle and the Employer witnesses agreed that he never really did solicit sales from outside customers. His sales work consisted of dealing with customers who called asking for estimates and delivery dates. The only data either party produced on Hoyle's sales productivity covered the year 1998. Employer records showed that that Hoyle generated approximately \$13,500 in commissions, but was paid \$36,400, for a shortfall of approximately \$23,000. Counsel for the Employer stated without contradiction that the Employer had not made any effort to recover this shortfall.

Hoyle stated that he did not agree to any changes in compensation for different jobs, i.e., sales and production. The Employer agreed to pay him \$1400 per pay period for the work he performed for the company. After August 22, performed a variety of tasks in the shop, including the production of countertops, pickup of materials, delivery of finished products and the like. Hoyle stated that he frequently worked overtime in the course of these duties. He also did estimating of costs and sent quotations to customers. He did not visit customers, as he had while he was employed in a purely sales capacity.

Hoyle's employment with the Employer ended January 8, 1999. According to Murker, he and Morcombe decided to terminate Hoyle because he was not producing sales at the levels the company needed or expected. He delayed the decision because of Hoyle's connection with friends of the Murker family. After Hoyle's termination, he filed a complaint with the Employment Standards Branch for unpaid overtime and other wages.

The Employer acknowledged that it did not maintain payroll records as required by the *Act*. It provided information to an accounting firm that prepared pay cheques and tax returns and the like. In support of his complaint, Hoyle produced detailed records of the hours he had worked, which included approximately eight to ten hours of overtime per week. Morcombe testified that Hoyle frequently came to work before the shop opened, but that he spent considerable time doing personal work. Moreover, the Director's delegate and based the Determination on the hours of work data that Hoyle provided. At the hearing, the Employer accepted the delegate's calculation of hours worked, so it was not necessary to review the evidence concerning the work Hoyle

actually carried out outside of normal working hours. The Employer completed a Record of Employment after Hoyle's termination. Murker acknowledged that the entries about the method of payment for Hoyle were incorrect but stated that he did not understand the forms. Subsequently, corrected forms were completed.

The Employer submitted a Declaration of Conditions of Employment to Revenue Canada in April 1998 stating that Hoyle was not paid by commission. After Hoyle's termination, the Employer filed a Record of Employment with Human Resources Development Canada on January 11, 1999 indicating that Hoyle was not paid on a commission basis. The statement was repeated in a second Record of Employment to reflect two weeks' payment for length of service, again indicating that Hoyle was paid on the basis of an hourly wage. Subsequently, when dealing with the Director's delegate and in the hearing for this case, the Employer maintained that Hoyle was paid \$1000 on a commission basis and \$400 per pay period for shop work but never on a conventional wage basis.

Morcombe testified that he could hire production employees in the shop with relatively little experience for \$9.00 per hour. A more qualified employee would receive between \$12.00 and \$13.00 per hour for production work, but would not do sales. Murker stated that Hoyle could not perform all of the tasks an experienced production worker could carry out.

ANALYSIS

Both parties in this dispute acknowledged that no written evidence existed of the August 22, 1997 agreement between Hoyle and the Employer. Nor were there records of the hours that Hoyle worked. Since the Employer accepted Hoyle's personal records of his hours, it is not necessary to deal with the extent to which he did personal work during his overtime or indeed during regular time.

The heart of the difference between the parties then is the hourly rate Hoyle was to receive after August 22, 1997. Hoyle maintained that he should receive \$17.50 per hour, i.e., \$1400 per pay period of 80 hours. The Employer argued that it could hire temporary employees to work in the shop for between \$9.00 and \$12.00 per hour, so it made no sense to pay Hoyle the rate he claimed. Hoyle's rebuttal to that point was that he did more than production work. He made drawings, did estimates, dealt with the customers and the like. Hoyle could not produce any evidence that he generated enough sales to justify the higher rate of pay.

Hoyle testified that he believed that he was receiving \$2800 per month in salary. However, he presented no evidence that the Employer regarded his compensation as completely salary. The appellant in these proceedings bears the onus of proving that the Determination was incorrect. Hoyle has not presented evidence that both parties agreed on the employment contract as he understood it. On the balance of probabilities, I find that the Employer's version of the contract was correct. There was simply no reason for the Employer to pay Hoyle the equivalent of \$17.50 per hour for shop work that it could obtain for much less. The government forms on which the Employer stated that Hoyle was paid wages were not clear on their face, although a careful reading of the instructions would lead to different entries.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination dated September 16, 1999 is confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal