

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 -

G. King Photo-Colour Ltd
("Photo-Colour")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 1998/741

DATE OF DECISION: March 30, 1999

DECISION

OVERVIEW

This is an appeal by the employer G. King Photo-Colour Ltd. ("Photo-Colour) of a Determination dated November 4, 1998 wherein the Delegate imposed a penalty of \$500.00 for the failure of Photo-King to provide information demanded by the Delegate. The employer argued that the demand did not concern an employee and did not hinder an investigation. The demand was properly made by the Delegate, and the penalty assessment was confirmed.

ISSUES TO BE DECIDED

Was Alexander King an employee of Photo-King?

Was the demand properly made by the Delegate, concerning an employee?

FACTS

The Delegate was engaged in the investigation of an overtime complaint by Alexander King against Photo-Colour. The Delegate made a demand for records including information related to hours worked each day and daily pay. The employer acknowledged receipt of the demand for information, and failed to produce the information requested.

The Delegate was unable to review the employer's records because the employer failed to produce the records. The employer apparently did not record the hours worked each day, because at the time of hiring it was hoped that Mr. King would become a management employee. The employer kept its records in a different manner for managers, recording only deviations from full attendance.

The employer argues that producing records in the format requested would not have assisted the investigation. It says that it provided the information requested.

It is apparent from the material filed in this appeal, particularly the Complaint and Information form that Mr. King was a quality control/maintenance technician. There is no evidence from the employer in support of its argument that Mr. King was a manager rather than an employee. The employer filed an appeal of the penalty determination and in its submission dated November 6, 1998, raised issues related to the appeal of the determination awarding Mr. King a sum of money for overtime entitlement. This submission proceeds on the assumption that Mr. King was an employee and does not raise an issue that Mr. King was a manager. In a subsequent submission on November 10, 1998 the argument is raised that Mr. King was a manager.

The Delegate submitted a written submission dated November 30, 1998 which states that:

“Douglas King’s evidence was that, during the time he was employed, Alexander King had no duties regarding the direction or supervision of other employees. He said that Alexander King had no hiring or firing authority, did not schedule other employees although he did provide input, and that he did not do leave management. Douglas King said that Alexander King might have become a true Manager” but that he was not considered to be a manager during the time he was employed.”

ANALYSIS

In this proceeding the burden rests with the employer to demonstrate that there has been an error in the Determination such that I should cancel or vary the Determination. I have considered the issues set out below:

Was Alexander King an employee?

The Director considered that Mr. King was an employee because he was not involved in the hiring, firing, supervising or scheduling of employees. On the complaint form Alexander King has characterized himself as a quality control/maintenance technician. This would appear to fit within the definition of “employee” in the *Act*. There is no evidence filed on behalf of the employer which supports its assertion that Mr. King was a manager. There appears to be an admission made by the employer in its letter to the Tribunal dated December 21, 1998 as follows:

We absolutely agree that during the two-month period of his employment, the Complainant was in training, and therefore, not acting in a supervisory/management capacity.

It appears that the employer has conceded the issue, and I find that Alexander King was an employee.

Was there compliance with the Demand, or any reasonable excuse for non-compliance?

The employee had made a complaint concerning overtime hours worked. It was quite proper, therefore, for the Delegate to make a demand concerning the records of hours worked by the employee. The lack of record keeping by the employer forced the Director to rely solely on the records of the employee. The Director, thus did not have all the information available to assess the complaint made. The lack of records therefore hindered the investigation.

In my view the employer appears to have chosen or used a form of record keeping which did not comply with the *Act*, as there was no daily record kept of hours actually worked by the employee. The keeping of records as required by the *Act* is essential for the Delegate to determine, in an efficient and timely manner whether the employer has complied with the *Act*. There was no information from which the Delegate could determine that the *Act* was complied with, upon receiving a complaint from Mr. King. The use of a computerized

accounting system, which does not allow for compliance with the *Act*, is not a reasonable excuse in failing to comply with a demand made for production of records.

ORDER

Pursuant to Ssection 115 of the *Act*, I order that the Determination made is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal