

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-

Dek-Tek Industries Inc.
(the “Dek-Tek”)

-of a Determination issued by-

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: E. Casey McCabe

FILE NO.: 97/803

DATE OF HEARING: February 3, 1998

DATE OF DECISION: March 20, 1998

DECISION

APPEARANCES

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| Mr. Ray Kaaria | for Dek-Tek Industries Inc. |
| Mr. Ryszard Witkowski | for himself |
| Ms. Dianne MacLean | for the Director of Employment Standards |

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards *Act* (the “*Act*”) by Dek-Tek Industries Inc. (“Dek-Tek”) of a Determination dated October 14, 1997 which determined that Mr. Witkowski was entitled to compensation pay for length of service and payment for overtime and statutory holidays worked.

ISSUES TO BE DECIDED

1. Is Mr. Witkowski a manager?
2. Did Mr. Witkowski quit his position with the employer?
3. Is Mr. Witkowski entitled to compensation pay for length of service?
4. Is Mr. Witkowski entitled to overtime pay and pay for statutory holidays worked?
5. Did Mr. Witkowski work the hours he claims as overtime hours?
6. Is Mr. Witkowski disqualified for compensation pay for length of service by reason of his employment at a construction site by an employer whose principle business is construction?

FACTS

At the commencement of the hearing on January 12, 1998 the employer made an application for adjournment. The employer based this application on two factors. Firstly, the employer states that he was unable to locate certain witnesses whose testimony he felt was essential to his case. Secondly, and this factor is related to the first factor, the employer states that due to the short period between the filing of his appeal and the notice of hearing, which encompassed the Christmas period, he was unable to adequately prepare for the hearing including the location of certain witnesses. It was agreed by both the complainant and the employer that one such witness, Mr. Peter Bulkoski, should be heard. It was further acknowledged that Mr. Bulkoski’s evidence would require an official interpreter.

The employer had appeared with two witnesses who were prepared to give evidence. Therefore, the matter proceeded with the two persons who were present giving testimony. An adjournment was granted to allow the employer time to issue a summons for Mr. Bulkoski and to allow the Tribunal time to secure the attendance of an official interpreter. At the commencement of the continuation on February 3, 1998 the employer indicated that Mr. Bulkoski was present but that it was unable to locate certain other witnesses. It had been made clear to the employer and the other parties on January 12, 1998 that it would take very strong circumstances to secure any further adjournments. On that basis the hearing concluded on February 3, 1998 despite the employer requesting further time to produce witnesses who were not present that day.

The employer designs and produces sundeck railings, stairs and duck-board systems primarily for the residential market. The employer's products are sold to lumber yards and do-it-yourselfers. The employer also installs its products at residences using both regular employees and sub-contractors. The employer operates out of a shop located in Burnaby, B.C.

ANALYSIS

Is Mr. Witkowski a Manager?

The employer argues that the complainant is a manager under the definition in Part 1 of the *Regulations to the Act*. The employer argues that the complainant supervised the employees in the shop, participated in hiring decisions and made recommendations on terminations. The employer further argues that the primary function of the complainant was supervision rather than the hands-on aspect of fabricating and installing the components for the sundecks. The employer does not argue that the complainant is employed in an executive capacity with the company.

The *Regulations to the Act* define manager. Under the *Regulations* "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 evidence indicates that the complainant at all time worked with at least one other person in the shop and on installations. The complainant would be paid a higher hourly rate than these other persons. The complainant would often plan and prepare jobs and give instructions to the other workers regarding the specifications and applications required. The complainant's time would be split between the hands-on fabricating i.e. the cutting and assembling of panels or duck-boards and the organization of the jobs as they were passed to him by Mr. Kaaria.

Mr. Kaaria viewed the complainant as a production manager. He points to the fact that the complainant had a company credit card and use of a company van. It was further pointed out that the complainant had keys to the shop and knew the security access codes. Mr. Kaaria also noted that the complainant would access the shop on evenings and weekends to perform work that might be either for the company or for the complainant's personal use. Mr. Kaaria notes that the complainant's rate of pay indicates that, in the employer's mind, he was being remunerated at a level much higher than the fabricator/installer he worked with. The employer further argues that the role the complainant played in hiring and termination of employees indicates managerial status.

The best evidence given regarding the hiring function was the testimony of Mr. Bulkoski. Mr. Bulkoski testified that he found out about the job at Dek-Tek through a friend of a friend. He obtained the complainant's telephone number and phoned the complainant. Despite the fact that both the complainant and Mr. Bulkoski are Polish they did not know each other through the Polish community. This was the first contact between the two men. The complainant gave Mr. Bulkoski information about the company including its address, phone number and Mr. Kaaria's name. Mr. Bulkoski attempted to phone Mr. Kaaria a couple of times but was unsuccessful. He then called the complainant back who said he would talk to Mr. Kaaria about the position. A few days later the complainant phoned Mr. Bulkoski and said that Mr. Kaaria said that he was to report to work. Mr. Bulkoski reported to work on the specified day.

The evidence of the complainant and Mr. Kaaria indicated that there had been a discussion between the two. Mr. Kaaria acknowledged that there was a position available in the shop. He was concerned about Mr. Bulkoski's English skills but accepted the complainant's argument that Mr. Bulkoski was a good worker and that he, the complainant, could fill any language gap. As it turned out Mr. Bulkoski was ultimately terminated not because he wasn't a good worker but because he was unable to communicate in English directly with clients and customers to a level satisfactory to the employer.

With respect to the terminations the evidence indicated that the complainant did not play a significant role in terminations. The employer experienced a high turnover of staff. The complainant would be asked for and would give performance reports on his co-workers. Those reports would be given to Mr. Kaaria who would make the employment decision. The evidence clearly indicated that it was Mr. Kaaria's decision to terminate Mr. Bulkoski.

It is my finding that the complainant is not a manager under the definition of "manager" in the Regulations. The evidence indicates that the complainant's position is that of a lead hand rather than a manager. I acknowledge that the complainant did give instruction to co-workers but that alone does not make him a manager. The complainant had the skills and ability to organize work. The employer utilized those skills. The employer also utilized the complainant's practical skills at fabrication, assembly and installation of its product. Giving instructions in the shop or the field regarding the installation of the product does not amount to supervision in the managerial sense. Furthermore, I am not persuaded that the complainant hired Mr. Bulkoski. It is Mr. Kaaria who determines whether a position exists

in the shop and it is Mr. Kaaria who ultimately decides who will be hired and who will be retained. The complainant did present Mr. Bulkoski as a potential employee but the evidence indicates that it was Mr. Kaaria who made the final decision to hire him. Likewise, it was Mr. Kaaria who made the decision to terminate Mr. Bulkoski. Finally, Mr. Kaaria concedes that the complainant did not act in an executive capacity with the company. For the above reasons I find that the complainant is not a manager as contemplated under the *Act* or Regulations.

Entitlement To Overtime And Statutory Holiday Pay

The employer argues that the complainant should not be entitled to overtime or statutory holiday pay. The employer supports this position with the argument that he and the complainant negotiated a hourly compensation package that recognized that the complainant would be paid at straight time for all hours worked. The employer further argues that many of the hours claimed as overtime were hours that were not worked. The employer acknowledges that he received and checked the time cards of all employees including the complainant. However, the employer argues that the complainant is not entitled to the overtime hours because those hours are padded in the sense that they were unproductive. By that the employer means that although the complainant was in the shop for the time marked on his sheets he was not producing valuable hours for his employer. In other words he was taking much longer to perform tasks than it would take if there was more work available or, alternatively, he was performing personal tasks. For these reasons the employer argues that it should not be penalized with the overtime premium or the statutory holiday premium.

I am unable to agree with the employer on this matter. Section 4 of the *Act* squarely addresses this type of situation. Section 4 reads:

“The requirements of this *Act* or the *Regulations* are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.”

Sections 43, 49, 61 and 69 do not apply in this case. The substance of the section does apply. An employer and an employee are not allowed to contract out of the minimum requirements of the *Act*. I therefore find that the employer was knowledgeable of the hours being worked and paid for those hours on a straight time basis. The complainant is entitled to be compensated for the overtime premium for those hours and the statutory holiday premium for hours worked or statutory holidays.

Mr. Kaaria argues that even if the employer is found liable for overtime and statutory holiday pay that liability should be limited to a two month period prior to the termination of employment. Mr. Kaaria argues that the 24 month time limit set out in Section 80 of the *Act* is oppressive for employers. He argues that the liability becomes a time bomb whose eventual explosion could destroy an employer. He invites the Tribunal to implement a policy consideration that would lessen the liability for employers where employees have willingly entered into agreements that are subsequently found to breach the *Act*.

Section 80 of the *Act* reads:

- “80. The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning:
- a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and
 - b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination,
 - c) plus interest on those wages.”

In essence Mr. Kaaria argues that the use of the word “may” in the first line of the Section imports a discretionary element into an interpretation of the Section. He invites me to exercise my discretion and limit the liability of the employer in the circumstances of this case. I do not think it is appropriate to do so. The Director’s delegate initiated an extensive investigation into the facts and circumstances of this case. She contacted independent witnesses and made extensive efforts to contact witnesses that even the employer was not able to contact in time for the hearing. Based on her investigation she decided that the complainant was entitled to overtime premium and a premium for hours worked on statutory holidays. She issued a Determination to that affect. The employer had the benefit of the hours worked by the complainant. I am not prepared to second guess the Director’s delegate on her decision. I find her Determination was made in good faith and based on facts available to her that were also known to the employer. For these reasons I do not think that it would be appropriate to exercise discretion or use a policy gloss to limit the meaning of the wording of the legislation.

Compensation For Length Of Service

The employer argues that the complainant should not receive compensation for length of service because he quit his employment. Mr. Kaaria testified that the complainant came to him with the idea of taking a lay-off in November of 1995 because he was aware that the employer, whose business is seasonal, was entering a slow period. Mr. Kaaria testified that the complainant wanted to be laid off so that he could collect unemployment insurance but that the complainant also offered to return to work on a cash basis. Mr. Kaaria testified that he refused this offer. He further testified that it was the complainant who laid himself off by instructing Mary-Anne Varila, the bookkeeper, to issue a Record of Employment showing lay-off.. Mr. Kaaria testified that he was not aware that a Record of Employment stated shortage of work rather than quit until it was drawn to his attention in March 1996. Mr. Kaaria testified that at that point he protested to the Unemployment Insurance Commission.

Mary-Anne Varila testified that she is a secretary with the company and has been with the company since April 1995. She testified that the complainant was a little unhappy with his pay and, in the Autumn of 1995, his health was poor. She testified that the complainant had

asked Mr. Kaaria for a raise and that the raise was declined. Instead, she testified, the employer had offered the complainant a partnership option which included a salary and commission compensation scheme. She further testified that although she was not at the meeting between the complainant and Mr. Kaaria she does recall the complainant leaving the meeting and telling her that he was no longer going to work for Mr. Kaaria and to make out his Record of Employment. He also stated that he needed his holiday pay and final pay cheque at that time.

Ms. Varila testified that the complainant asked her to make out the Record of Employment and asked if she would put laid off on it. She further testified that it was not until an issue arose with the Unemployment Insurance Commission in March of 1996 that she first brought to Mr. Kaaria's attention that the Record of Employment stated laid off due to a shortage of work.

The complainant testified that he had asked for a raise prior to November 5, 1995 and that the raise was denied. He also testified that on his final day he had a discussion with the employer in which the employer raised the issue of the number of hours that the complainant was marking on his time sheets. The complainant states that he denied that he was cheating on his hours.

The complainant gave further testimony about the conversation he had with the employer on his final day. The complainant states that at approximately 1:45 p.m. Ms. Varila informed him that Mr. Kaaria was on the phone. The complainant says that they discussed the raise and that Mr. Kaaria informed him that he couldn't afford the raise and that he could no longer keep him employed. The complainant states that Mr. Kaaria told him to pack his tools. He states that he continued to work until 2:00 p.m. to finish off what he was doing and then he packed up and went home. He states that he had no conversation with Ms. Varila over the Record of Employment and specifically denies that he told Ms. Varila to put "laid off" on the Record. He states that the Record of Employment was ready for him at 2:00 p.m. It should be noted that over the entire length of the time it took to conduct the investigation and the hearing into this matter this was the first time that the complainant had indicated that the conversation leading to his termination was by telephone rather than in person.

I prefer the evidence of Mr. Kaaria and Ms. Varila on this point. I accept Mr. Kaaria's evidence that the complainant was a good worker and that the employer was interested in maintaining a working relationship. However, the evidence also indicated that in conversations subsequent to the termination Mr. Kaaria's offers of re-employment to the complainant were not based on an hourly wage but rather a partnership arrangement which would see the complainant taking a 50% interest in the duck-board aspect of the employer's business. The evidence also disclosed that the complainant was not interested in this arrangement. I do not think that the proposal by Mr. Kaaria is reasonable in these circumstances and therefore do not accept this perspective of the employer's argument.

Against this evidence I am required to make a difficult decision. This aspect of the case is a close call. However, I am of the view that the complainant's termination was sufficiently

deliberate on his behalf that the employer should be relieved from an obligation to pay compensation pay for length of service. In order to arrive at such a finding a subjective and objective element must be present. The subjective element was the complainant approaching Mr. Kaaria in November 1995 with the idea of taking a lay off. The complainant was unhappy with the terms and conditions of work and did not want to remain in the employ of Dek-Tek during the slow winter season. The objective element was the complainant telling Ms. Varila he was no longer going to work for Mr. Kaaria and instructing her to make out his Record of Employment. I must emphasize however that my decision is based solely on an application of the *Employment Standards Act* and is limited to an analysis of Section 63(3)(c).

In view of my finding under Section 63(3)(c) I need not deal with the argument that the complainant would not be entitled to compensation for length of service under the exception in 65(1)(e) which exempts people who are employed at a construction site by an employer whose principle business is construction. I will add as an aside that I was not persuaded that the employer's primary business is that of construction.

Mr. Kaaria also argues that there was a conspiracy between Mr. Bulkoski and Mr. Witkowski regarding Mr. Witkowski's complaints. I am not able to accept this conspiracy theory as put forward by Mr. Kaaria. Both Mr. Bulkoski and Mr. Witkowski are exercising rights found in the *Act*. It may be that Mr. Witkowski was unaware of these rights until informed of them by Mr. Bulkoski. However, one citizen informing another of his rights under a statute does not amount to a conspiracy. Mr. Witkowski merely exercised his rights to file what has become, in part, a legitimate complaint.

Finally, Mr. Kaaria expressed some concern over the manner in which the investigation occurred and the length of time it took to render the determination. Mr. Kaaria provided the names of six independent witnesses of whom four were difficult to contact which prolonged the investigation. I do not fault the Employment Standards Branch. The Director's delegate made every effort to contact these persons and had lengthy interviews with Ms. Varila and at least one other witness. She wrote an Determination with extensive reasons. This was a difficult case with complex issues. I can find no fault with the manner in which the Director's delegate conducted the investigation and rendered the Determination.

ORDER

I order the Determination of the Director dated October 14, 1997 be varied to delete the award for compensation for length of service. I confirm the other aspects of the award. Interest is to paid to the date of this award and beyond until payment is made.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal