

An appeal

- by -

Theodore Dechant  
("Dechant")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Carol L. Roberts

**FILE No.:** 2002/48

**DATE OF DECISION:** April 26, 2002

## DECISION

This decision is based on written submissions by Theodore Dechant, Lynn Egan, a delegate of the Director of Employment Standards, and Dan Cooper on behalf of Oakcreek Golf & Turf Inc. ("Oakcreek")

### OVERVIEW

This is an appeal by Theodore Dechant, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued January 15, 2002. Mr. Dechant alleged that he was owed overtime wages. The Director concluded that Mr. Dechant was a manager, and not entitled to overtime wages.

### ISSUE TO BE DECIDED

Whether the Director's delegate erred in concluding that Mr. Dechant was a manager.

### FACTS

Mr. Dechant's job title was the service manager for Oakcreek Golf & Turf Inc. ("Oakcreek"), a turf maintenance equipment sales and service company. He was employed, for the purposes of this appeal, from January 12, 1993 to April 3, 2001. At the end of his employment he complained that he had not been paid wages for overtime hours.

Mr. Dechant advised the delegate that he kept a record of his hours worked along with other employees in his department. He agreed that he was able to establish his hours of work, but that he often worked in excess of 40 hours per week. He also advised the delegate that he operated on a time-bank system, where he made deposits and withdrawals to the account.

Oakcreek did not dispute that Mr. Dechant worked the hours he claimed to have worked, but submits that he was not required to do so. Oakcreek argued that Mr. Dechant was not entitled to overtime wages since he was a manager.

The delegate accepted the accuracy of Mr. Dechant's hours of work, and that he worked in excess of 40 hours per week. In February 1999, Oakcreek sent Mr. Dechant a letter advising him that he was not entitled to bank overtime since he was in management. The letter further stated:

...we recognize that the position for time to time requires additional hours... As you are aware we are in the process of hiring another service technician to assist the branch productivity which in turn will relieve some of the overtime that is presently required

A hand written note on the letter stated that Mr. Dechant was paid \$5000 for past overtime "to clarify and create a good relationship".

On January 3, 2001, Mr. Dechant signed a letter stating that he accepted "two used Yamaha golf cars in as where is condition..." as payment for overtime hours worked between January 1, 1999 and December 31, 1999.

The delegate concluded that Mr. Dechant did work in excess of 8 hours per day and 40 hours per week, and that Oakcreek was aware of his extra work, and attempted to reward him for that. She also concluded that Mr. Dechant worked these hours on his own accord, and was told that they were not required. Because Oakcreek was aware of the hours Mr. Dechant worked through his submission of time sheets, the delegate found that, pursuant to s.40, Oakcreek directly or indirectly allowed Mr. Dechant to work overtime.

The delegate then assessed whether or not Mr. Dechant was employed in a management position.

Although Mr. Dechant agreed that he performed many management duties, he stated that his management authority disappeared over the last 24 months of his employment. Mr. Dechant contended that he had no say in hiring and firing of employees, had no input into employees' rate of pay, and did not participate in employee evaluations. He advised the delegate that his work was limited to servicing vehicles, answering service calls, writing up work orders, and assigning work to employees.

Oakcreek contended that Mr. Dechant was responsible for hiring, firing and managing all staff in the service, parts and transportation departments, and managing the service department in central B.C. It further submitted that Mr. Dechant set Oakcreek staff wages. Oakcreek provided the delegate with information indicating that Mr. Dechant hired at least 5 employees, authorized pay increases, scheduled hours of work, and assigned job duties to employees. According to Oakcreek, management responsibilities for the parts department was removed from Mr. Dechant in 1993 due to the volume of work involved but Mr. Dechant retained responsibility for the service and transportation departments.

The delegate interviewed Dave McIntyre, who moved into Mr. Dechant's position after Mr. Dechant resigned. According to Mr. McIntyre, the position was a management position because he maintained his own budget; worked mainly in the office, not the shop; and hired, disciplined and terminates employees independently.

After a review of the information, the delegate concluded, with admitted difficulty, that Mr. Dechant was a manager. She determined that, at the commencement of his employment, the position held by Mr. Dechant was that of a manager, and that Mr. Dechant carried out all the duties of a manager. She further concluded that the relationship changed significantly during the final 24 months of Mr. Dechant's employment. She was unable to determine whether the changes were a result of Mr. Dechant choosing to spend more time performing servicing work, or Oakcreek taking authority away from Mr. Dechant.

In arriving at her conclusion that Mr. Dechant was a manager, the delegate placed most weight on the evidence of Mr. McIntyre. He occupied the same position as Mr. Dechant prior to Mr.

Dechant's resignation, and, in her view, clearly had managerial powers and responsibilities. She concluded that the *Act* had not been contravened, and ceased her investigation.

## ARGUMENT

Mr. Dechant argues that the delegate erred in accepting Mr. Cooper and Mr. McIntyre's evidence without providing him an opportunity to review their statements, and rebut them. He provided that rebuttal in his appeal. I will address only those factors as they relate to Mr. Dechant's final 2 years of employment, as that is the only time period relevant to this appeal. (s. 80) In any event, Mr. Dechant did not apparently dispute Oakcreek's position that he performed the duties of a manager up to approximately January 1999.

Mr. Dechant says that he had no authority to hire and fire employees, but was merely consulted on who should be hired. He says he had no input into establishing salaries, nor was he consulted when raises were being considered.

Mr. Dechant further contends that Mr. Cooper hired a person in April 1999 who was to eventually replace him. Mr. Dechant says the sole input he had into this decision was to make telephone contact with him to assess his mechanical ability.

Mr. Dechant says that when that person did not work out, he was told in December 2000 that Oakcreek was hiring someone to work in the office and that from that point he (Dechant) would be working in the shop full time. Mr. Dechant says he did not participate in any aspect of the hire. He submits that he took no part in interviewing or hiring Mr. McIntyre, or establishing his wage rate. He argues that if he was a manager and Mr. McIntyre's supervisor, he would have participated in this process. Mr. Dechant stated that after Mr. McIntyre was hired, his job duties were limited to servicing vehicles and trailers, answering service calls, assisting customers, making up work orders for the mechanics, and assigning shop duties to other mechanics, at the instruction of Mr. McIntyre.

Mr. Dechant contends that the delegate erred in placing more weight on Mr. McIntyre's evidence. He submits that Mr. McIntyre was not hired as his assistant, because Mr. McIntyre did little to no work on the floor, and Mr. Dechant was not in the office performing managerial tasks at the time. Mr. Dechant also says that he was never given a budget to operate his department, unlike Mr. McIntyre.

Mr. Dechant argues that his employment duties were akin to those of a lead hand, rather than a manager. He says he was never able to authorize wage increases, and that his ability to authorize payments was limited to expenses incurred for company business.

Oakcreek argued that Mr. Dechant was responsible for scheduling the shop employees and assigning daily tasks for him. It acknowledged that, along with other managers, Mr. Dechant had the authority to authorize pay increases, but that all increases had to be approved by the President or General Manager of Oakcreek.

Finally, Oakcreek submitted that Mr. Dechant "abdicated" his authority as manager, Oakcreek did not directly or indirectly remove it.

The delegate took no position on the appeal, but submitted that, if the Tribunal found Mr. Dechant was not a manager, overtime wages, vacation pay and interest in the amount of \$6,373.48 was owing to him.

## ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I find that the delegate erred in concluding that Mr. Dechant was a manger.

Section 34(1)(f) of the *Employment Standards Regulation* (the "*Regulation*") provides that part 4 of the *Act* (that part relating to overtime wages) does not apply to a manager.

Manager is defined in section 1 of the *Regulation* as:

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity.

At issue is whether Mr. Dechant's primary employment duties consisted of supervising and directing other employees (my emphasis), or employed in an executive capacity.

These issues were considered by the Tribunal in *Northland Properties Ltd.* BC EST #D423/98.

Executive capacity includes, but is not limited to, duties that involved participation in the control, supervision and administration of business affairs and the exercise of substantial authority in decisions affecting the business. There is no evidence Mr. Dechant was employed in an executive capacity.

In 429485 B.C. Ltd (c.o.b. Amelia Street Bistro)(Re), the Tribunal said that a conclusion as to whether a person falls within s. 1(a) provisions:

...depends on a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business.

As this Tribunal has often stated, how parties define their relationship is only marginally relevant to determining whether or not the employee is a manager. The true test is the actual authority exercised by the employee, not the authority that might be set out in a position description.

Furthermore, the burden of establishing that a person is excluded from the protection of the *Act* or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion. (see *Northlands*).

There is little evidence that, at the end of his employment, Mr. Dechant was exercising those employment duties set out in his job description in 1993. Indeed, it appears that Oakcreek acknowledged that when it submitted that Mr. Dechant abdicated his responsibilities. Mr. Dechant spent a minimal amount of time, if any, directing other employees, or exercising the type of power and authority typical of a manager. He had no departmental budget, and did not, during his final two years of employment, hire, fire or discipline any employees. He spent the majority of his time in the shop, rather than the office.

I conclude, on the evidence, that the delegate erred in concluding that Oakcreek had set out clear and convincing evidence that Mr. Dechant was a manager, and thus excluded from the overtime provisions of the *Act*. While she acknowledged difficulty in arriving at her conclusion, I find that she erred in relying on Mr. McIntyre's evidence in the absence of any evidence that Mr. Dechant actually performed the tasks that Mr. McIntyre currently performs. In conclusion, I find that Mr. Dechant was not a manager, and is entitled to overtime wages.

The delegate found that Mr. Dechant had been paid overtime wages, or received consideration for overtime. There appears to be no dispute that Mr. Dechant received some form of consideration for the additional hours he worked during his employment, and in particular for the 1998 and 1999 years.

Section 35 of the *Act* provides that an employer must pay overtime wages in accordance with Section 40 if the employer requires or, directly or indirectly, allows an employee to work

- (a) over 8 hours a day or 40 hours a week...

Section 40 (1) provides that

An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under Section 37 or 38

- (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
- (b) double the employee's regular wage for the time over 11 hours.

The delegate determined that Oakcreek was aware of Mr. Dechant's overtime hours through his regular submission of time sheets indicating the hours that he worked. In her view, with which I

agree, Oakcreek directly or indirectly allowed Mr. Dechant to work overtime, for which he is entitled to be compensated.

Having reviewed the delegate's submissions on the quantum owed to Mr. Dechant, I find no basis to interfere with her calculations.

## **ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated January 15, 2002, be varied as follows. The determination that Mr. Dechant is not a manager is set aside. I have determined that Oakcreek must pay Mr. Dechant the sum of \$6,373.48 as compensation, broken down as follows:

Overtime wages:	\$5,750.03
Vacation pay:	\$ 345.00
Subtotal:	\$6,095.03
Interest:	<u>\$ 278.45</u>
<b>TOTAL:</b>	<b>\$6,373.48</b>

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**