

An appeal

- by -

Interior Joinery Ltd.
("Interior Joinery")

- 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: Cindy J. Lombard

FILE No.: 2000/782

DATE OF HEARING: March 1, 2001

DATE OF DECISION: April 11, 2001

DECISION

APPEARANCES:

For Interior Joinery Ltd.

Bert Mass, Director/Officer
William Moulds, Director/Officer
Murray Hannah

For the Respondent

John Bakay on his own behalf

For the Director

Karen Madsen

OVERVIEW

This is an appeal by the employer, Interior Joinery Ltd. (“Interior Joinery”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination of the Director of Employment Standards (the “Director”) issued on October 25, 2000. In that Determination, the Director found that the Respondent employee, John Bakay, was an employee not a manager during his term of employment with Interior Joinery and was entitled to overtime wages in the amount of \$7,768.00 plus interest of \$317.26 for a total of \$8,085.26.

Oral evidence was heard from Mr. Bert Mass (“Mass”) and William Moulds (“Moulds”) owners and officers of Interior Joinery as well as Murray Hannah, an employee, all on behalf of Interior Joinery.

John Bakay (“Bakay”) gave evidence on his own behalf.

The Director was represented by Karen Madsen.

ISSUES TO BE DECIDED

Whether Bakay was a manager during the period for which he claims overtime wages, namely, July 30, 1999, to March 31, 2000.

FACTS

Bakay was employed by Interior Joinery between July 30, 1999, and March 31, 2000.

At that time Interior Joinery was in trouble as a business i.e. a company which manufactured and custom cut lumber. Moulds and Mass were owners together with a third party who had recently left and taken all but a couple of employees with him. Moulds states that he and Mass considered winding up the company but instead decided to make a go of it.

According to the Appellant-Interior Joinery:

Moulds says that an ad was placed in the Penticton paper advertising for a plant manager and Bakay applied. Bakay had experience in the area and had worked at that plant in the past. According to Moulds, it was made clear to Bakay that he was being hired as a manager who was responsible for getting the plant up and running including hiring employees and repairing the equipment which was in poor shape.

Moulds says that he needed a manager because neither he, who resided in Vancouver, nor Mass, who at that time resided in Williams Lake, could be there on a daily basis.

Bakay says Moulds was aware of the financial difficulties being experienced by Interior Joinery and that Bakay therefore agreed to a wage of \$2,800.00 per month, an amount below his usual earnings of at least \$4,000.00 per month with an opportunity for profit sharing in the future. On December 16, 1999, this sum was increased to \$3,600.00 per month.

In August, 1999, Murray Hannah who was an employee of Moulds' company in Vancouver, Cannex Lumber Sales, was sent up to Penticton to set up and integrate inventory and quality control systems with Cannex. The job, says Moulds, was intended to be temporary; however, Hannah stayed and his position is now General Manager of Interior Joinery.

Moulds says that Hannah did not assume Bakay's management duties. According to Moulds, Bakay had access to company financial information and did not ever receive any profit sharing because the company did not reach a profitable level while Bakay was employed.

Moulds says that he gave Bakay a book to keep track of hours, not for the purpose of paying overtime, but in support of any eventual profit sharing.

Moulds conceded in his evidence that in January 2001, Bakay was working as a millwright and not as a manager.

Hannah gave evidence that he was initially at the Interior Joinery plant only to deal with inventory control and installation and integration of the computer system. With respect to the operation of the plant, Hannah says that he deferred to Bakay.

According to Bakay:

Bakay says that he did not see nor respond to an ad for a plant manager rather he did respond to an ad for a moulder and equipment operator.

Bakay says that initially he was contacted by Mass who asked him to repair the plant machinery and was hired at an hourly fee of \$17.50 per hour, well below his expected hourly rate of \$25.00 to \$35.00 per hour for a machine operator. According to Bakay, he did not apply for a manager

position and in fact did not have those skills. Bakay says that he reported to Moulds. Later Moulds asked to show his hourly rate at a monthly rate of \$2,800.00.

According to Bakay, his duties included:

- a) setting up equipment
- b) repairing equipment
- c) operating equipment e.g. moulder
- d) helped with hiring of employees but Moulds set their wages
- e) set program up given to him by Hannah as to what product needed to be produced and Bakay insured that was done
- f) scheduled employees when necessary
- g) supervised in order to ensure that production orders were met
- h) some training of employees

At no time says Bakay was he ever made privy to any company financial information.

He says that Moulds told him that the company could not afford to pay overtime but that he would be paid when the company cash flow was better and should therefore keep track of overtime hours in a notebook, which he gave him.

When he commenced his employment in July 1999 there were only two employees. By the time he left, twelve to fourteen people had been hired.

ANALYSIS

Section 40 of the *Act* provides that all employees are entitled to overtime pay after a certain number of hours worked in a day or week.

Section 1 of the *Employment Standards Act Regulations* defines manager to mean:

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

Neither the title “manager” nor the fact that a monthly wage is paid is determinative rather the overall functions, duties and responsibilities are. Some of the elements to be examined in determining whether Bakay’s duties consist primarily of supervising and directing other employees include:

1. The amount of time spent supervising and directing other employees;
2. The nature of Bakay’s non-supervising employment duties;
3. The degree to which the person exercises the kind of power and authority typical of a manager;

4. To what element of supervision the power applies;
5. The reason for the employment;
6. The nature and size of the business.

Some of the objective factors, which could indicate that, an employee is a manager, are:

1. The power of independent action, autonomy, and direction;
2. The authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business;
3. Making final judgments about such matters as hiring, firing, authorizing over-time, time-off or leaves of absence, calling employees into work or laying them off, altering work processes, establish or alter work schedules, and training the employees and for that person's job description included supervising and directing employees.

We have concluded based on the application of the above test to the evidence in this case that the appellant was an employee and not a manager. We accept Bakay's evidence that the majority of his day was spent operating a machine, usually the moulder machine, or repairing equipment. Some limited time was spent by Bakay supervising, helping with hiring and training employees. At the time of Bakay's initial hire in July 1999, there were only three employees. Subsequently, he was involved in the hiring process of several employees; however, neither hiring nor supervising were his primary function on a day to day basis. Bakay did have authority to hire employees (but not to fix their final rate of pay), set their schedules and training. Overall, however, Bakay had supervising authority on the plant floor akin to a foreman. Ultimately, authority and control rested with Moulds directly through Hannah who maintained daily control over production. All financial authority and access to that information remained with Moulds.

For the foregoing reasons the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated October 25, 2000, be confirmed.

CINDY J. LOMBARD

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal