

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

by

Ted Decock and Joyce Decock
("Decock")

of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE No.: 96/735

DATE OF HEARING: April 30, 1997

DATE OF DECISION: May 16, 1997

DECISION

OVERVIEW

This is an appeal by Ted Decock and Joyce Decock ("Decock"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination of the Director of Employment Standards (the "Director") issued on November 19, 1996. In this appeal the employer claims that no wages are owed to William J. Rose ("Rose").

The hearing was held in Vernon and Ted Decock appeared on behalf of Decock. Rose attended and was represented by Anne Foss. The Determination involved a claim for overtime pay and vacation pay thereon.

ADJOURNMENT REQUEST

At the hearing Ted Decock requested an adjournment on the basis that he could not read a handwritten response to Decock's submission made by Rose. Ted Decock admitted that he had received the handwritten submission on April 4, 1997 and admitted that he had not made any protest to the Tribunal nor had he indicated that he would be seeking an adjournment or asked for a more legible copy of Rose's handwritten response. I reviewed Ted Decock's copy of the handwritten materials that he said he could not read. His copy of the handwritten submission was replete with yellow highlighting. I asked Ted Decock which portion of the handwritten submission he could not read because I had absolutely no difficulty reading my copy. He pointed out a portion that he could not read and I read this portion to him without any difficulty.

I denied the adjournment request and gave Decock the option of proceeding or not proceeding. I indicated that I would give him time to call his lawyer if he wished to. He advised that he wished to proceed with the hearing.

It is notable that later on in the hearing Ted Decock referred to the content of the handwritten submission in his submissions and cross-examination of Rose.

FACTS

Rose is a finishing contractor who regularly subcontracts his services to general contractors. He had previously subcontracted his services to Decock.

In April or so of 1996 Ted Decock and Rose discussed Rose performing finishing carpentry services at an apartment complex which Decock was intending to build. Ted Decock says that Rose provided him with an itemized, fixed price contract for labour for the project, having a total cost of approximately \$6,900.00.

Ted Decock says Decock was content to abide by that contract but Rose later insisted that he be paid on an hourly rate basis. Accordingly, Rose commenced work on the project on May 28, 1996 on an hourly rate basis of \$15.00 per hour.

Rose's version of the discussions preceding his commencement of work are the opposite. Rose's evidence was that he fully intended to enter into a contract with Decock on a "piece rate" basis but Decock did not seem to want to negotiate such a contract and instead told Rose he would be paid on an hourly rate basis of \$15.00 per hour. Decock was prepared to pay Rose for all of his hours, however, hours in excess of 40 hours per week or 8 hours per day were to be banked and paid as regular wages after the project was finished. It was clear that the parties did not contemplate that Rose would be entitled to overtime rates of pay pursuant to the *Act*.

Rose started work in late May and worked until early June. He had not been paid for his hours in excess of 40 hours per week and had not been paid anything for overtime or vacation pay on those extra hours and he therefore filed a complaint with the Employment Standards Branch.

Prior to filing the complaint he prepared a schedule of the work that was done and calculated a cost for that labour. He says he provided this document to Ted Decock at that time in order to induce Decock to make payment to him for the extra hours worked. Ted Decock in his evidence referred to this document as the contract that was initially entered into with Rose before he commenced work on the project. The document has blank spaces for certain components of the work. Rose says this was the case because he was not entirely finished the work when he was let go by Decock. I find Rose's explanation of the "contract" document to be the only plausible one, however, this finding is not particularly important since it was clear that the "contract" had no application during the time that Rose worked for Decock.

Rose regularly submitted time sheets to Decock, setting out hours worked. These hours often exceeded 8 hours per day. Decock paid Rose on the basis of 40 hours per week, explaining that the balance of hours would be accounted for later.

Ted's evidence was that he never required or authorized overtime work although it is clear that he knew Rose was working in excess of 8 hours per day and 40 per week.

ISSUE TO BE DECIDED

Was Rose an employee for the purposes of the *Act* and, if so, is he entitled to pay for his overtime hours.

ANALYSIS

Rose was clearly an employee of Decock of the purposes of performing finishing carpentry work on a project for Decock. Rose was paid by the hour, he had no chance of profit or risk of loss, he supervised no other employees, and Decock made employee payroll deductions from Rose. While there was discussion of a contract for the provision of his services, no such contract was entered into. If a contract had been entered into my decision may well have been different since it is clear that in the construction industry parties are able in some circumstances to truly sub-contract their services. On the basis of the evidence, this was not one of those cases.

The fact that Decock did not authorize overtime is not a relevant consideration since Section 35 of the *Act* dictates that overtime rates must be paid where the employer directly or indirectly allows overtime hours to be worked. I have no hesitation in finding that Decock knew and approved of Rose working overtime hours.

ORDER

In summary, I order under Section 115 of the *Act*, that the Determination #CDET 004737 be confirmed subject to the Director's letter of January 2, 1997 which takes into account a further payment of wages by Decock leaving a balance due under the Determination of \$1,227.47 as of January 2, 1997.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal