

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 -

All Steel Fabricating Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/328

DATE OF DECISION: September 8, 2000

DECISION

OVERVIEW

The Employer, All Steel Fabricating Ltd. (“All Steel”), is appealing Determination ER #:087-177 in which the Employer was found to owe the Employee, Kevin Iverson, (“Iverson”) at total of \$10,322.80 for unpaid overtime wages and vacation pay for the period December 12, 1997 to December 12, 1999. At Iverson’s request All Steel agreed give him overtime work against company policy. Iverson needed the money. All Steel argues that it would be unjust enrichment for Iverson to benefit from overtime hours when no overtime hours were authorized.

This decision is based on written submissions from the Employer, and the Director’s Delegate. The employee made no submissions

ISSUES

1. Can an employee and an employer contract out of the *Employment Standards Act*?
2. Can an employer deduct an amount from the employee’s pay cheque without written consent?

FACTS

The facts are not in dispute. Iverson worked for All Steel from December 1997 to December 12, 1999. Iverson was in financial difficulty. In March 1998 he requested overtime work at straight pay to increase his income. All Steel has a policy against allowing overtime and prefers to provide straight hours to more employees. Iverson persuaded All Steel to allow him more work under a written authorization that he would be paid at straight time.

In addition Iverson obtained a \$2000 loan from All Steel. When Iverson left All Steel they deducted the outstanding loan from his last pay cheque.

Iverson’s complaint to the Director was to recover

1. for overtime worked in the last 5 months of employment and
2. the loan deduction.

There is no dispute on the hours worked or the amount of the debt owed to All Steel.

The Director’s Determination ordered overtime pay for the full period of employment plus vacation pay. The Determination also ordered return of the amount deducted for the debt.

THE LAW

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled.

The Determination is based on the provisions of the *Act* which are not discretionary. The *Act* specifically prohibits contracts between employers and employees, which have the effect of canceling the basic provisions of the *Act*. Section 4 provides as follows.

Requirements of this Act cannot be waived

- 4 *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.*

The *Act* sets out what constitutes overtime in section 41 as follows.

Overtime wages for employees on a flexible work schedule

- 41 *An employer must pay an employee who is on a flexible work schedule and who works more than an average over the shift cycle of 8 hours a day or 40 hours a week*
- (a) *overtime wages as prescribed in the regulations, if the schedule was adopted under section 37, or*
- (b) *overtime wages as required by the collective agreement, if the schedule was adopted under section 38.*

The prohibition on making deductions from a pay cheque is set out in section 21.

Deductions

- 21 (1) *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
- (2) *An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*
- (3) *Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

EVIDENCE AND ANALYSIS

The Employer's submission in support of this appeal states that there has been a serious 'mistake in law ' and that the determination 'failed to comply with the principles of fundamental justice'.

All Steel cites *Re Kaycan Ltee.* [1998] BC EST#D606/97 in support of its position. In *Kaycan* the employee was given specific instructions not to work and did work. The employee was denied compensation. All Steel argues that to allow overtime wages for the time worked by Iverson is to overrule their policy against overtime. For Iverson to be paid overtime would be unfair to the other workers who were denied the regular time when Iverson was working overtime. Iverson was not given instructions not to work like the employee in *Kaycan*. All Steel knew the hours worked were overtime hours as defined by the *Act*.

In *Re Shanrock Investments Ltd. (c.o.b. Lighthouse Neighbourhood Pub and Restaurant)* BC EST #D348/98 Adjudicator Petersen was dealing with a similar agreement to waive overtime. He agreed with the Director's Determination that such an agreement was void and, therefore, of no effect. He goes on to say "Whether the Employee and the Employer entered into the agreement voluntarily is irrelevant." The employer and employee are bound by the statute.

All Steel argues that Iverson is using the *Act* as a sword instead of a shield. All Steel seeks to grant this Tribunal powers to grant equitable remedies based on whether the parties have 'clean hands'. The statutory provisions of the *Act* are not equitable remedies. This Tribunal does not have jurisdiction to grant equitable remedies. There is no authority to hold back wages payable to an employee.

I cannot find any basis on which to disturb the Determination.

ORDER

Pursuant to section 114 (1)(a) the appeal is dismissed.

Pursuant to section 115 of the *Act*, Determination ER: 087-177 dated April 13, 2000 which requires All Steel Fabricating Ltd. to pay to Kevin Iverson \$10,332.80 is confirmed. All Steel Fabricating Ltd. must pay any additional interest due from the date of the Determination under Section 88 of the *Act*.

April D. Katz
Adjudicator
Employment Standards Tribunal