

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 -

James E. Hamilton Enterprises Ltd.
("Hamilton")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/558

DATE OF HEARING: October 6, 1997

DATE OF DECISION: November 7, 1997

DECISION

APPEARANCES

Mitchell James Hamilton on behalf of James E. Hamilton Enterprises Ltd.
Adele Hamilton McLennan on behalf of James E. Hamilton Enterprises Ltd.

OVERVIEW

This is an appeal by James E. Hamilton Enterprises Ltd. (“Hamilton”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 30, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Hamilton alleges that the delegate of the Director erred in the Determination by concluding that Kevin Sweeney (“Sweeney”) was owed wages for overtime hours and statutory holiday pay plus interest for a total of \$1,803.59.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Does Hamilton owe overtime wages to Sweeney ?
2. Does Hamilton owe statutory holiday pay to Sweeney ?

FACTS

Sweeney was employed by Hamilton from October 1, 1989 to February 3, 1996.

Sweeney’s employment was terminated by Hamilton.

Sweeney filed a complaint alleging that he was entitled to be paid overtime wages and statutory holiday pay for the period February 3, 1994 to February 3, 1996.

Hamilton stated that Sweeney was a ‘manager’ during the period of employment encompassed by this complaint.

Hamilton further stated that Sweeney and the other manager were responsible for the entire operation of their shift. Their duties included hiring/firing employees, scheduling employees, ensuring that customer concerns were addressed, preparing payroll and generally ensuring that the employees performed their assigned work. Hamilton further stated that both Sweeney and the other manager were responsible to the General Manager.

Hamilton further stated that as Sweeney was a 'manager', he is not entitled to overtime wages and statutory holidays.

Hamilton finally stated that the very nature of the industry in which Sweeney was employed requires managers to be very "hands on" and consequently they are not able to simply stand around, observe and direct the employees, they have to help out as well.

The delegate of the Director investigated the complaint and concluded that Sweeney was entitled to be paid overtime, statutory holiday pay and 6% annual vacation pay on those amounts, for the period February 3, 1994 to December 17, 1994.

The delegate of the Director issued a Determination on June 30, 1997 in the total amount of \$1,803.59.

ANALYSIS

I must first determine if Sweeney was in fact a manager or not. If I conclude that Sweeney was a manager he is, by the provisions of the *Regulation*, consequently not entitled to be paid for overtime or for statutory holidays.

The *Employment Standards Regulation* (the "*Regulation*") defines 'manager' as:

"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;

Hamilton provided signed statements from 2 employees who confirmed that they were fired by Sweeney and they did not return to the workplace after being fired. The delegate of the Director has not indicated if these 2 employees were in fact contacted during the investigation. The Determination appears to indicate that the delegate of the Director has accepted Sweeney's contention that he "merely sent the employees home" and that they were in fact fired by someone else. While these statements from the 2 former employees are in the nature of hearsay, I find them to be helpful in my deliberations, chiefly because these 2 individuals have no vested interest in the outcome of this appeal.

Sweeney consistently referred to himself in the daily journals as "being in charge". Sweeney, in his letter of resignation states "Because of the skills I have learned here as a manager over the last 3 years and as an employee for the last 6 and a half years.....".

Sweeney also alleged that he was owed additional vacation pay and further that a \$500.00 cheque received in September 1995 was in fact a “bonus” and not, as subsequently concluded by the delegate of the Director, as a payment for outstanding vacation pay to that date.

The evidence provided indicated that only 2 employees had ever been “fired” by Hamilton over the period February to December 1994. I am satisfied that those 2 employees were in fact fired by Sweeney.

The only explanation provided by the delegate of the Director to limiting Sweeney’s complaint to the period February - December 1994 was that Hamilton did not provide payroll records. There was no evidence that the delegate of the Director had requested payroll records for any period other than February - December 1994. The delegate stated in the Determination that “Mr. Sweeney does not argue that he was a manager during this period because he does not have records nor does the employer for the period in question (1995). While the employer referred to Mr. Sweeney as a manager during the period of his employment, and while Mr. Sweeney uses the same term to describe his job, at no time during his period of employment with James E. Hamilton Enterprises Ltd. was Mr. Sweeney a bona fide manager.”

There was no evidence that Sweeney’s job duties were markedly different in 1995 and 1996 than in 1994.

Based on the evidence provided and on the balance of probabilities, I conclude that in the circumstances of Sweeney’s employment in 1994, 1995 and 1996, Sweeney was “employed in an executive capacity” because he had the right to hire/fire employees, exercised that right and was therefore a ‘manager’ as defined by the *Regulation* while employed by Hamilton during the period February 3, 1994 to February 3, 1996. The totality of Sweeney’s job duties are consistent with him having been a manager.

Sweeney, as a manager, is consequently not entitled to be paid at overtime rates of pay nor is he entitled to be paid for statutory holidays.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 30, 1997 be canceled.

Hans Suhr

Adjudicator

Employment Standards Tribunal