

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-

Master Pool Coatings Inc.

(“Master Pool” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/551

DATE OF HEARING: December 7th, 1998

DATE OF DECISION: January 6th, 1999

DECISION

APPEARANCES

C. Grant Haddock for Master Pool Coatings Inc.
Anthony Marconato on his own behalf
Roger Marzin on his own behalf
Lesley A. Christensen for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Master Pool Coatings Inc. (“Master Pool” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 28th, 1998 (the “Determination”).

The Director’s delegate determined that Master Pool owed its former employees, Anthony Marconato (“Marconato”) and Roger Marzin (“Marzin”), the total sum of \$3,053.08 on account of unpaid overtime wages and interest--Marconato was awarded \$1,732.68 and Marzin’s award was \$1,320.40. By way of the Determination the Director also levied a penalty, in the amount of \$0, pursuant to section 98 of the *Act*.

ISSUE TO BE DECIDED

The employer says that the two complainant employees were paid a “blended” hourly rate that included compensation for overtime pay and thus the delegate erred in finding that there was any unpaid overtime liability.

FACTS

Master Pool builds swimming pools. According to its president, Ilario Sovrnigo, both Marconato and Marzin were hired as labourers and upon being hired were both told that the typical workday was 9 1/2 hours but that they would be paid a “straight-time” hourly rate that included 1 1/2 hours of overtime pay for each day. Each employee signed a form headed “Confirmation of Trial Employment and Wage” which stated, in part:

“Your rate of pay is based on an average (between straight time and over-time) and is being paid at a flat rate. Your wage rate is based on working 9 1/2 hours per

day. The time begins when you arrive on the jobsite. There will be no additional money paid for any overtime other than the regular rate..."

Further, each employee was given a memorandum which explained how their \$12.50 hourly wage rate (the starting wage for each complainant employee) was equivalent, for an 9 1/2 hour day, to a regular hourly wage rate of \$11.59 with overtime paid at \$17.39 (*i.e.*, time and half). The memorandum continued:

"By paying you a straight wage, you are better off in that you still receive the higher wage even if you work less than 9.5 hours. We expect you to work 9.5 hrs. per day on average. There will be no payment for any work over 9.5 hrs. WITHOUT PRIOR APPROVAL."

Neither employee ever questioned their method of payment, or made a demand for overtime pay, during the course of their employment. I find that both employees knew that their \$12.50 hourly rate was, in fact, an accounting device inasmuch as it included a "base hourly rate" of \$11.59 and an overtime rate of \$17.39.

Both employees also knew that they would be working about 9 1/2 hours on most days. As Marzin testified: "I understood that the \$12.50 included 1 1/2 hours of overtime each day". I also find, however, that the employer instituted this system solely for its own benefit; the primary benefit apparently being the simplification of its payroll record-keeping function. The employees' pay stubs did not show a separate record for the 1 1/2 hours of overtime worked each day; any overtime that was recorded on their stubs was based on the lower "nominal" hourly rate as set out in the memorandum referred to above.

ANALYSIS

Sections 35 and 40 of the *Act* state that an employer must pay overtime at a rate of 1.5 times the "regular wage" for any hours worked beyond 8 in a day and at a rate of 2 times the "regular wage" after 11 hours. An employee's "regular wage" is defined, in section 1, as the "hourly wage" if the employee is paid by the hour.

Thus, it seems to me that the key issue in this case is whether or not the complainant employees' hourly wage was the "blended rate" that, accordingly to the employer, already included 1.5 overtime hours each day, or the lower "nominal rate" from which the "blended rate" was calculated. The Director's delegate submits that the employees' "regular wage" was the "blended rate" whereas the employer takes the view that the "regular wage" was the nominal hourly rate.

In my view, this case turns on a simple application of the definition of "regular wage" in section 1. As the *employer's own documents* clearly show, if the employees worked no more than eight hours in a day they were paid the "blended rate". It seems odd, and indeed somewhat perverse, that the employees' effective hourly wage should decrease if they worked more than 8 hours per day. For example, using the "blended rate" of \$12.50 per hour, the hourly rate is \$12.50 for an 8-

hour day, but only \$11.59 for a 9.5 hour day. I might add that the employer's payroll records and wage statements only record the "blended rate" as the employees' regular hourly wage rate.

Employees who are paid by the hour are entitled, under the *Act*, to a higher hourly rate (*i.e.*, the overtime rate) if their workday exceeds 8 hours. Perversely, in this case, the employer's system purports to pay an *decreasing* effective hourly wage rate as the employee's workday extends from 8 to 9.5 hours. In my view, the employer's scheme is a thinly disguised attempt to "contract out" of the overtime provisions of the *Act*, something section 4 prohibits.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$3,053.08 together with whatever further interest that may have accrued, pursuant to

section 88 of the *Act*, since the date of issuance. As I have found that the employer breached the overtime provisions of the *Act*, the \$0 penalty is also confirmed.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal