

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 -

Nimesh Patel
("Patel")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

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| ADJUDICATOR: | Mark Thompson |
| FILE NO.: | 98/408 |
| DATE OF HEARING: | September 11, 1998 |
| DATE OF DECISION: | December 29, 1998 |

DECISION

APPEARANCES

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| Bradley McQuhae | On behalf of Newlands Systems Inc. and an associated company Accent Stainless Steel Manufacturing Ltd. |
| Nimesh Patel | On behalf of himself |

OVERVIEW

This is an appeal by Nimesh Patel ("Patel") 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 June 2, 1998.

Patel had filed a complaint with the Employment Standards Branch alleging that he had not been paid overtime and annual vacation pay by Newlands Systems Inc. and Accent Stainless Steel Manufacturing Ltd. (the "Employer"). After his complaint was filed, Patel received the vacation pay to which he was entitled. The Determination found that he was a manager under the Employment Standards Regulation and thus not entitled to overtime pay.

Patel's appeal was based on the argument that he was not a manager under the Regulation. He presented extensive documentary evidence and testified in his own behalf.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether Patel was a manager.

FACTS

Patel was employed by Newlands Systems Inc. and Accent Stainless Steel Manufacturing Ltd. (an associated company) (the "Employer") from October 11, 1994 through March 27, 1998. The Employer terminated Patel because of a reduction in the volume of its business on three weeks' notice. Patel filed a complaint with the Employment Standards Branch (the "Branch") on April 1, 1998 alleging that he had not received overtime pay for the period of his employment. Patel also complained that he had not received vacation pay as required by the Act, but the Employer paid him before the Director's delegate issued the Determination in question. In addition, the Employer paid Patel \$5,191.51 for "premiums on the overtime that has been worked since the start of record keeping." Mr. Bradley McQuhae ("McQuhae"), an officer of the Employer, could not explain why the term "overtime" was used to describe the premium pay Patel received, except that it might have

been a bonus in recognition of Patel's good work. The Employer's comptroller prepared the data on which the overtime payment was based. The Determination found that Patel was not entitled to overtime pay because he was a manager and thus excluded from the overtime provisions of the Act under Section 34(f)(1) of the Employment Standard Regulation.

Patel was first employed as a "mechanical designer/engineer." His job description included nine responsibilities, none of which involved any managerial responsibilities, i.e., there was no reference to the supervision of other employees. On September 8, 1995, Patel was promoted to "engineering supervisor." Mr. Bradley McQuhae ("McQuhae"), an officer of the Employer informed Patel and two other staff members in the Engineering Department that Patel would become the "Engineering Department head." McQuhae further stated:

Nimesh will be responsible for all functions of the engineering department. Information flow, project priority and staffing will be through Nimesh.

An undated job description was produced for Patel as engineering supervisor, reporting to the Technical Director. The description stated that, in addition to "the same duties as the engineering staff", Patel had a number of other duties, including responsibility for establishing and maintaining manning levels, reporting on forward work loads, solving design problems, "on-going education of engineering staff," staff performance evaluation and salary review, establishing capital budgets for the department, liaison with the production supervisor and attendance at weekly production meetings. In March 1997, an internal Employer document signed by McQuhae described Patel as "in charge" of the engineering department.

In October 1996, McJannett and McQuhae wrote to Patel informing him of a substantial increase in his salary. They asked him to review plans for his work and what capital items he would need in his budget. McQuhae established Patel's authorized expenditure limits in February 1997 and reduced the detail he was required to include in his time sheets. This may have been in response to a request for an additional telephone Patel addressed to McQuhae earlier in the same month. In August 1997, McJannett wrote to Patel to inform him of an increase in his salary and praised his engineering work and his management of the engineering team.

Patel presented evidence of his duties as the engineering supervisor. He participated in decisions to lay off staff in the engineering department. The Employer alleged that these responsibilities indicated that he was a manager under the Act. Patel testified that he merely implemented decisions made by McQuhae and others. In June 1997, Patel submitted recommendations to Mr. Loch McJannett (McJannett), another officer of the Employer regarding the appropriate salary structure in the engineering department. The recommendations sought McJannett's views and referred to Patel as the engineering manager. A memo from Patel to employees in the engineering department listed areas on which the staff needed to work. Patel saw this as a request for suggestions from the staff while the Employer pointed to it as evidence of his managerial responsibilities. Similarly,

in June 1996 and August 1997, Patel wrote to Balbir Sidhu ("Sidhu"), a member of the engineering department announcing an increase in his salary. Patel sent a memo to Patrick Luo ("Luo"), an employee in the engineering department, announcing a salary increase. The Employer and the Director's delegate interpreted these memos as evidence of managerial responsibility. Patel stated that Sidhu, for instance, had approached him about his compensation at the time of his salary review. Patel in turn presented McQuhae or McJannett with a recommendation, and one of them had made the decisions regarding compensation. In making his recommendations, Patel relied only on the standard data provided by the Association of Professional Engineers. The memos were to inform the employees of the decision and to establish a written record of the decisions.

When McQuhae decided that the department needed another engineer, the Employer advertised and Patel interviewed the candidates. McQuhae was involved in the decision. He, Patel and McJannett interviewed the candidates and reached a common recommendation.

Other evidence on which the Director's delegate relied on memos to Luo offering him employment, pointing out some deficiencies in his work and announcing the termination of his employment. The termination letter was written on McQuhae's instructions, without any discussion between McQuhae and Patel. Patel also wrote Mr. Chang Chu to offer probationary employment, permanent employment. Patel offered employment to two individuals and announced the termination of one of them. In all cases, Patel stated that the memos were written under McQuhae's direction or were drafted by the Employer's Controller in the case of the termination letters. One of the termination letters was written after Patel told senior management about the individual's abilities. McJannett stated that all four individuals named in the correspondence were instructed to report to Patel.

Patel presented two letters from former employees of the employer who worked with him during much of his period of employment. Both stated that Patel spent virtually all of his time working on engineering, design and drawings.

Patel prepared an "engineering work load distribution" as a summary of his time for the first 7 weeks of 1998, i.e., the period immediately prior to his termination. The distribution showed him spending 6 per cent of his time on departmental management, 11 per cent on meetings and internal matters, 35 per cent on quotations, sales and customer services and 36 per cent on design and drawings for production.

Mr. Gerald Gyuricska, a production supervisor in the Employer's shop, testified concerning Patel's duties. Mr. Gyuricska worked with Patel for three years and saw him as a fellow manager. Mr. Gyuricska supervised approximately 25 persons in production, and Patel supervised staff in the engineering department. Mr. Gyuricska seldom had contact with the engineering staff, but contacted Patel instead.

Sidhu testified that he was still an employee of the Engineering Department, and reported to Patel for two years. He and other members of the Engineering Department went to Patel with salary requests. Patel decided what each individual would do in the department and

answered design questions. Sidhu estimated that Patel spent less than 25 per cent of his time on "productive" work, i.e., engineering tasks. On one major project, Sidhu and Patel both did design work, but Sidhu spent more of his time on the engineering part of the project. Most of Patel's time was spent dealing with people. On cross examination, Sidhu stated that "dealing with people" included meeting clients and production meetings. Sidhu also testified that Patel worked on all aspects of engineering done in the department.

According to the data presented, the number of people in the Engineering Department seems to range from two to seven (including Patel) during his term as supervisor. While the evidence was not completely clear, it appeared that the normal complement in the engineering department was four or five individuals, including one who worked on accounting.

ANALYSIS

Section 34 (1)(f) of the Employment Standards Regulation exempts managers from the provisions of Part 4 of the Act, which includes payment for overtime work. Section 1 of the Regulation defines a manager as follows:

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

This case turns on the factual issue of Patel's primary employment duties.

Patel clearly was at the boundary between managerial and non-managerial status. He had some managerial duties, directing work and participating in decisions regarding hiring and termination, for instance. There was no issue that he was employed in an executive capacity.

This Tribunal has examined the question of employee/manager status on a number of cases. One of the leading cases, Director of Employment Standards, BC EST #D479/97 (Crampton, Stevenson, Thompson), sets out the criteria for determining whether a person is a manager. Objective factors which would indicate that an employee is a manager include: (1) the power of independent action, autonomy and discretion; (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 judgements about such matters as hiring, firing, authorizing overtime, time-off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering work schedules and training the employees; and (4) that the person's job description included supervising and directing employees. Moreover, these factors must be present in the person's daily activities. It is not sufficient that the person have the authority to satisfy these criteria. In addition, the use of titles is not determinative of a person's status as a manager.

After reviewing the evidence in this case, I conclude that Patel was not a manager. I would describe him as a team leader, who supervised a relatively small staff of highly qualified technical personnel. According to Patel, the Director's delegate made the determination based on a number of documents which appeared to confer managerial status on him. The delegate did not question Patel about the circumstances under which the documents were issued. The delegate did not appear at the hearing, so I must rely on the evidence Patel and the Employer presented on these points.

I accept that Patel spent most of his time working on engineering problems, and some of "supervision" was answering questions and assisting staff in the department with the technical aspects of their work. He exercised very little independence or autonomy in the managerial sense. Staff in the department were highly qualified and seem not to have required close supervision. Patel did not have a budget for the department, and personnel decisions at most were made in close consultation with McQuhae and McJannett. Patel did not have independent authority or make final judgments to hire or fire other employees. No evidence was presented that he authorized overtime, vacations and other time off. His job description did include some elements of supervision, but this factor does not overcome the major part of his duties, which was the performance of engineering tasks. I also note that the department was relatively small and it is unlikely that an employer would hire a highly-qualified and well-compensated individual whose "primary employment duties" consisted of supervising other staff in a unit of that size. By contrast, Mr. Gyuricska supervised 25 to 30 persons and had team leaders reporting to him.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination of June 2, 1998 is cancelled. Patel presented a calculation of the amount of overtime pay to which he was entitled. The Tribunal should not review evidence of this type in the first instance. Therefore, I refer the case back to the Director for the calculation of the amount owed to Patel consistent with the principles of this Decision and the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal