



DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

James Dennis

APPELLANT/EMPLOYEE

-AND-

Xtended Hydraulic & Machine Inc. and Robert Tebb, Director
and Katherine Tebb, Director

RESPONDENT/EMPLOYER

DATE OF HEARING: June 7, 2024

PLACE OF HEARING: Employment Standards Office
3rd Floor Boardroom
Regina, SK

LRB FILE: No. 034-24

WAGE ASSESSMENT: No. 1-011221

INTRODUCTION

This matter was heard before me on June 7, 2024, in Regina, Saskatchewan.

I am satisfied there has been compliance with subsections 2-74(6), 2-75(2) and 2-75(3) of *The Employment Standards Act* (the 'Act'). Therefore, I have determined that I do have jurisdiction to hear this matter.

Mr. James Dennis the Appellant/Employee represented himself.

Ms. Katherin Tebb, Director and Mr. Robert Tebb, Director represented the Employer, Xtended Hydraulic @ Machine Inc. and themselves as Directors.

Andrew Langgard, Employment Standards Officer was the Directors Delgate for the Employment Standards Branch.

The Wage Assessment was prepared pursuant to the Saskatchewan Employment Act s.s.2014 c.s-15.1, herein after referred to as "The Act" is for \$1,215.45.

I. PRELIMINARY MATTERS

There were no preliminary objections raised by any of the parties.

II. DISPUTE

The Employee, Mr. Dennis appealed the Wage Assessment alleging that a further \$2,175.00 should form part of the Wage Assessment.

This amount was for overtime work by the employee but not paid.

The Employer and Employment Standards Officer took the position that this overtime amount was not owing as the Employee had been in a Managerial capacity during this employment with the Employer and, pursuant to Section 3(4) of the Employment Standard Regulations, this amount would not be payable.

III. AGREED FACTS

The parties agreed that Mr. Dennis was an employee of the company from July 4, 2023 to November 4, 2023.

Mr. Dennis was paid at a rate of \$50.00 per hour.

IV. EVIDENCE OF EMPLOYEE

Mr. Dennis gave sworn evidence as follows:

After he had given notice to resign from his position he received a cheque as payment, but this payment did not have his overtime hours on it.

Mr. Dennis had calculated the hours to be owing to him to be 29 hours from time sheet entries he had obtained from Kayla Paul, who is the person that kept track of the hours for the employees. Mr. Dennis sometimes made overtime entries into the computer as well.

Mr. Dennis described his job duties with the Employer as follows:

1. He over saw all aspects of the work of seven employees.
2. He managed the time sheets for himself and the seven employees.
3. He directed his employees daily on the job floor, including prioritizing what work they were to do and, when they were to do it.

4. He ensured there was sufficient material for the employees to process daily.
5. If not enough material, Mr. Dennis made certain it was obtained and given to the employees.
6. Mr. Dennis scheduled the seven employees' schedules and prioritized the work they were to do.
7. If there were problems with an employee he met with them to discuss the same, and gave direction as to how to resolve the problem.
8. He disciplined the employees when necessary.
9. If he thought an employee should be let go Mr. Dennis would meet with other management personnel to discuss the firing.
10. Mr. Dennis was part of the management team of the company.

11. Mr. Dennis completed performance reviews for his seven employees and consulted with Human Resources about his reviews.
12. Mr. Dennis was paid more than any of the other employees.
13. Mr. Dennis gave advice to, and was consulted by, management regarding material and equipment purchasing and where they should purchase from.
14. Mr. Dennis had independence on the work floor on a daily basis.

Under cross exam Mr. Dennis confirmed that he had signed an employment contract with the employer (Employer Exhibit 1).

Mr. Dennis confirmed the agreement does not discuss overtime or banking of overtime.

Mr. Dennis stated that he had never been asked to do overtime by the employer, although sometimes he did stay late to help out.

Mr. Dennis confirmed that there were no agreements between him and the employer to bank overtime.

Mr. Dennis confirmed that he had access, along with Kayla, to the time sheet records of employees and sometimes made entries on the employees time sheets.

V. EVIDENCE OF THE EMPLOYER

Mr. Robert Tebb was sworn and gave evidence on behalf of himself as the Director, Ms. Tebb as Director and the Corporation.

Mr. Tebb agreed with the employees description of his position with the Company and the work that he performed.

Mr. Tebb stated that the employee had never been asked to work overtime and that no authorization had been given to Mr. Dennis to work overtime.

The time Mr. Dennis was with the company was a slow period for the company and resultantly the company had no need for overtime from any of the employees.

Under cross examination, Mr. Tebb stated that there was no agreement to bank overtime with Mr. Dennis, nor had there been any discussions with Kayla about overtime.

Mr. Tebb also stated that both Mr. Dennis and Kayla had access to the time sheet records and entries.

VI. ANALYSIS/DECISION

The Saskatchewan Employment Act and Regulations define an employee who performs services that are entirely of a managerial character to be exempt from the requirement to pay overtime.

However, that does not end the matter. In order to put Mr. Dennis in the exception set out in the Legislation the totality of the evidence must be reviewed in order to determine what Mr. Dennis 's actual position was.

The Legislation states that the provisions relating to overtime do not apply to an employee who performs services that are entirely of a managerial character.

Whether or not an employee was a manager has been discussed extensively by the Court of Queen's Bench in the Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards) (1995) S.J. No 620. A Judgement of the Saskatchewan Court of Queen's Bench by Justice Klebuc.

The issue here is whether Mr. Dennis 's position falls within the exception contained within the Legislation.

The phrase "services that are entirely of a managerial character" contained in s.3(4) of the Regulations has been broadly considered. Mr. Justice Wright of this Court in Elcan Forage Inc. v. Weiler (1992), 102 Sask. R. 197 (Sask Q.B.) concluded the exception provisions contained in S.3 of the Regulations must be strictly construed to

ensure rights extended by the Act to employees are not casually eroded.

In Machtinger v. HOJ Industries Limited, (1992) 1 S.C.R. 986, the Supreme Court of Canada held that the Labour Standards Legislation should be interpreted to extend protection to as many employees as possible.

The word "entirely" was judicially considered by Wimmer J. in Michael Hill v. Ronert C. Begg, Keith O'Shea and Mr. Mechanic Sales & Service Ltd. (1982), Q.B. No.686/86. Justice Wimmer stated, "In my opinion the word "entirely" in this section is to be understood in the sense of continuously in contra-distinction to from time to time."

What constitutes "of a managerial character" for the purposes of s.4(2) of the Act will vary according to the facts of each case. Hence, an all-encompassing definition for the phrase is impractical. However, a reference to those characteristics and functions indicative of, or at least associated with managerial positions, as indicia for determining whether an employee's services are of a managerial character are, in my view, appropriate. The indicium making up such criteria can

readily be extracted from case authorities, dictionary definitions, reports of arbitration awards and legal writings on employment law.

The fundamental ones in Mr. Justice Kelbuc's opinion are:

1. The supervision and direction of other workers;
2. The discipline of subordinates, individually or as part of a management team.
3. Evaluating the performance of subordinates;
4. Hiring and promoting of subordinate staff;
5. Some independence and discretion in performing assigned duties;
6. Supervision of a collective agreement, where the workplace is unionized;
7. Negotiating remuneration individually rather than collectively;
8. Level of remuneration, vis-à-vis, non-managerial staff;
9. Participation in carrying out the employer's budgets and performance requirements.

This list is not intended to be all inclusive; nor must each criterion be found to exist before an employee's position can take on a managerial character; nor is each criterion entitled to equal weight. To the

contrary, in my opinion only the functions of supervision and the right to discipline are of fundamental importance and are therefore of a greater significance.

Mr. Dennis 's lack of authority to regularly hire and promote other employees did not place his services as a managerial outside of the meaning of the Legislation when viewed collectively in the context of this workplace.

Also, when reviewing the Westfair Foods Ltd. fundamental indica of managerial character powers, only point number 6 is not applicable in this case, as the employer was not unionized.

Applying the criteria and indica to the evidence, especially Mr. Dennis' evidence, I find that he was in a managerial position and resultantly not entitled to overtime.

VII. CONCLUSION

The Appeal is dismissed and the Wage Assessment in the amount of \$1,215.45 is upheld.

Dated at Moose Jaw, in the Province of Saskatchewan, this 12th, of June 2024.



Clifford B. Wheatley
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at <http://www.saskatchewan.ca/>.

Right to appeal adjudicator's decision to board

- 4-8**(1) An Employer, Employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.
- (3) A person who intends to appeal pursuant to this section shall:
- (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
 - (b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.
- (4) The record of an appeal is to consist of the following:
- (a) in the case of an appeal pursuant to Part II, the wage assessment, or the notice of hearing;
 - (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
 - (d) any exhibits filed before the adjudicator;
 - (e) the written decision of the adjudicator;
 - (f) the notice of appeal to the board;
 - (g) any other material that the board may require to properly consider the appeal.
- (5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.
- (6) The board may:
- (a) affirm, amend, or cancel the decision or order of the adjudicator; or
 - (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

- 4-9**(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.
- (2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.
- (3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

- 4-10** The director of employment standards has the right:
- (a) to appear and make representations on:
 - (i) any appeal or hearing heard by an adjudicator; and
 - (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and
 - (b) to appeal any decision of an adjudicator or the board.