

An appeal

- by -

Whitehall Bureau of Canada Limited
(“Whitehall”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2009A/163

DATE OF DECISION: March 16, 2010

DECISION

SUBMISSIONS

David E. Turner, Esq.	Counsel for Whitehall Bureau of Canada Limited
Michael E. Montgomery	on his own behalf
J.R. Dunne	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Whitehall Bureau of Canada Limited (“Whitehall”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 16, 2009.
2. The Determination was made in respect of a complaint filed by Michael E. Montgomery (“Montgomery”), who alleged Whitehall had contravened the *Act* by failing to pay minimum daily and overtime wages, business expenses and annual and statutory holiday pay.
3. The Determination found that Whitehall had contravened Part 3, section 21, Part 4, sections 34 and 40, Part 5, section 45 and Part 7, section 58 of the *Act* and ordered Whitehall to pay Montgomery an amount of \$15,993.29, an amount which included wages and interest.
4. The Director also imposed administrative penalties on Whitehall under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$2,500.00.
5. The total amount of the Determination is \$18,493.29.
6. In this appeal, Whitehall says the Director erred in law and failed to observe principles of natural justice in making the Determination. The following errors of law are identified and elaborated upon in the appeal and the accompanying submissions:
 1. The Director erred in law by failing to consider whether Montgomery had submitted his claimed expenses to Whitehall and, by summarily concluding they were submitted to Whitehall, exceeded the jurisdiction of the Director to make an order requiring their payment;
 2. The Director erred in placing the burden of proof on Whitehall to establish most of expenses claimed were not business expenses and by not requiring Montgomery to establish his claim on a balance of probabilities;
 3. The Director erred in law by imposing an administrative penalty for failing to pay expenses which were not claimed or were not business expenses;
 4. The Director erred in law by applying the wrong standard of proof to the issue of whether Montgomery was a manager under the *Act* and by applying a more onerous definition of manager than found in the *Regulation*; and
 5. The Director erred in law in finding Whitehall was required to pay Montgomery minimum daily and overtime wages, annual and statutory holiday pay and in imposing administrative penalties for contravening provisions of the *Act* relating to these matters.

7. The following natural justice issues are identified:
 1. The Director failed to observe principles of natural justice by failing to provide reasons for accepting Montgomery's claim for business expenses without requiring him to prove each claimed expense.
8. None of the parties seeks an oral hearing on this appeal. The Tribunal has a discretion whether to hold an oral hearing on an appeal: see Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has decided an oral hearing is not necessary and this appeal can be decided on the submissions and the material submitted by all of the parties, including the section 112 (5) Record filed by the Director.

ISSUE

9. The issues in this appeal are whether Whitehall has shown the Director committed any error in law or failed to observe principles of natural justice in making the Determination.

FACTS

10. The complete facts of this matter are set out in the Determination. Briefly stated, Whitehall is an investigation firm and Montgomery was employed by Whitehall from June 1, 2007 to December 2007 as "Vice-President Investigations Western Canada" at a rate of pay of \$65,000.00 a year.
11. The complaint was filed in March 2008. Montgomery limited his claims under the *Act* to reimbursement of expenses, minimum daily and overtime wages and annual vacation and statutory holiday pay. The claims made by Montgomery and the response to the Director by Whitehall raised several issues for consideration by the Director, which are set out in the Determination as being:
 1. whether Montgomery was owed annual vacation pay;
 2. whether Montgomery was entitled to reimbursement of business costs;
 3. whether Montgomery was a manager under the *Act*; and
 4. whether Montgomery was owed minimum daily pay, overtime wages and/or statutory holiday pay.
12. Montgomery and Whitehall submitted a large amount of information and material to the Director during the complaint process.
13. In respect of the issues identified, the Director found Montgomery was entitled to annual vacation pay in the amount of \$1,946.25 for the period of his employment, had been paid for three days of vacation time off and was owed the balance, an amount of \$1,196.25. There is no appeal of that part of the Determination and nothing further need be said about it.
14. The Director found Montgomery was entitled to be reimbursed for expenses incurred during the course of his employment with Whitehall. The Director was provided by Montgomery with a list of 144 expense items. This list was provided to Whitehall, who provided a specific response to 23 of the expense items and a general response on the remainder. The Director addressed the expense items covered by the specific responses submitted by Whitehall in the Determination, allowing some and denying others. In respect to the claims not included in Whitehall's specific response, the Determination states:

Mr. Montgomery submitted sufficiently credible evidence to satisfy me that the balance of his expense items amount to business costs incurred on behalf of Whitehall. The expenses are detailed enough, supported by receipts (although a majority of them are supported by credit card receipts) and Mr. Montgomery's verbal evidence and on the whole appear to be reasonably tied to Whitehall's business operations.

Furthermore, I accept that Whitehall had a reasonable opportunity to respond to Mr. Montgomery's evidence. Whitehall chose to limit its response to only a few specific expenses. Specifically, Whitehall chose to respond to only 23 individual expense items but responded in a general manner to the balance of the expense items. In electing to do so, Whitehall bore the risk of such a general and unspecific response. I find Whitehall's general response and evidence to be wholly insufficient to refute Mr. Montgomery's evidence. Accordingly, I find no basis to conclude the expenses are not business related and credible.

15. Later in the Determination, the Director finds:

This is not a case where the employer had no express or constructive knowledge that the employee was incurring expenses on their behalf. Whitehall has an extensive policy and procedures manual of which an entire section is devoted to expenditures and it would appear that a good portion of some of these expenses are past [sic] on to Whitehall clients.

16. In this appeal, Whitehall challenges the conclusion of the Director on the expense claims.

17. On the issue of whether Montgomery was a manager under the *Act*, the Director found the evidence did not show Montgomery's employment fell within the definition of manager in the *Regulation*. The Determination contains an analysis of the evidence provided by the parties of Montgomery's employment duties and responsibilities, findings of fact, an analysis of Montgomery's employment, based on those findings of fact, the provisions of the legislation and the principles emanating from those provisions, and provides reasons for the conclusion reached by the Director.

18. Whitehall challenges the conclusion.

19. Based on the conclusion that Montgomery was not a manager under the *Act*, the Director found he was entitled to claim overtime wages, statutory holiday pay and minimum daily wages and considered whether the evidence supported his claims for those entitlements. The Director found the evidence did support those claims and awarded wages in respect of each of them.

20. In this appeal, Whitehall says the Director's decision on these claims, and the administrative penalties related to them, cannot stand if the Director erred in finding Montgomery was not a manager under the *Act*.

ARGUMENT

21. The arguments made by the parties are extensive and comprehensive. I will summarize them under two main headings – error of law and natural justice – and under subheadings that identify the issue being addressed.

Error of Law

Claimed Expenses Issue

22. Whitehall argues that the Director had no jurisdiction to make a Determination on the expense claims because it was not established there was a contravention of the *Act* by Whitehall. Whitehall argues that a contravention of section 21 requires Montgomery to establish three facts:

- 1) he accrued [sic] the expense;
 - 2) the expense was a business expenses; and
 - 3) Whitehall refused or neglected to pay the expense.
23. Whitehall says there is no evidence that all of the expenses claimed were submitted to them by Montgomery, the Director has simply assumed this to be the case because some had been submitted. It is argued that without evidence the expense claims were submitted and Whitehall given an opportunity to pay them there can be no refusal or neglect to pay those expense claims and, hence, no contravention of the *Act*.
24. Alternatively, Whitehall argues the Director placed an incorrect burden of proof on them with respect to those expense claims for which a specific response was not provided. Whitehall says the Director reversed the burden of proof – effectively requiring them to prove the expenses claimed were not business costs – without ever requiring Montgomery to establish they were.
25. The Director has filed a response to the appeal, relying on the section 112(5) Record and the reasons provided in the Determination. The Director has also provided some comments on specific aspects of Whitehall's argument. Responding to the position of Whitehall that Montgomery did not establish the expenses claimed were business expenses, the Director says Montgomery made extensive submissions in support of the mileage and expense claims, provided a detailed breakdown of his mileage claims and provided a list describing all of the other expenses being claimed together with supporting documents and receipts for those. The Director also notes that even if Whitehall was not aware during his employment of some of the expenses Montgomery claimed in his complaint to the Director, Whitehall was made aware of these claims during the complaint process and had an opportunity to resolve these claims in that process.
26. Montgomery has also filed a response to the appeal. As it relates to this area of the appeal, his response conveys two central points: first, that he did provide expense documents to Whitehall and Whitehall failed or refused to comply with a demand from the Director to produce them; and second, that Whitehall had ample opportunity to review the information and supporting documents he provided to the Director in support of the expense claims and failed to show, except in respect of a few claims, that these claims were either already paid or unjustified. Montgomery says the failure of Whitehall to fashion a response to most of the claims should not be allowed to form the basis for an appeal.
27. In its final reply, Whitehall has provided a detailed submission to Montgomery's response. Notwithstanding the detail and scope of the response, it can be summarized by repeating a portion of its opening sentence: "Mr. Montgomery's response submission does not present any clear answer to any of the issues raised in the Whitehall Appeal Submissions". In the submission, Whitehall also objects to the introduction by Montgomery of allegations and assertions that it says are irrelevant to the issues raised in the appeal.
28. Whitehall notes that some of Montgomery's response is actually an appeal which seeks to have aspects of the Determination varied. Whitehall say Montgomery has not filed an appeal and the time for doing so has expired.
29. I will note here that Montgomery has filed a further response, addressing what he perceives to be inappropriate behaviour by the principal of Whitehall. Whitehall has objected to this response being considered. The objection is well founded and I will not consider the contents of this communication in deciding the appeal.

Manager Issue

30. Whitehall says the Director erred in law by applying the wrong standard of proof in deciding whether Montgomery was a manager under the *Act*. Whitehall argues the Director's use of the phrase "sufficient, clear, cogent and convincing evidence" imports a standard of proof that is greater than the "balance of probabilities" standard that is required in the *Act* for deciding this issue.
31. Whitehall also argues the Director erred in law by applying a more onerous definition of manager than what is found in the *Regulation*. Whitehall accepts that the general principles which apply when considering if a person is a manager under the *Act* are those described in *Amelia Street Bistro*, BC EST # D479/97, but says the Director misapplied those principles, overstating some facts and factors that indicated Montgomery was a manager while understating other facts and factors. In the latter category, Whitehall specifically refers to the following elements relating to Montgomery's job, responsibilities and authority which, they say, demonstrates his "*principal responsibilities consists of supervising or directing, or both supervising and directing, human or other resources*":
- the title held by Montgomery – "Vice President Investigations";
 - the high level of salary received by him;
 - the extent of Montgomery's involvement in sales;
 - his involvement in client relationships;
 - his attending meetings at head office – on one occasion as a "field expert, to discuss training in the use of cameras and computer equipment
 - his role in integrating Eye-Spy technology and operations into with Whitehall technology and operations;
 - his involvement in co-ordinating, reviewing and submitting Whitehall's bid for the Worksafe project;
 - his involvement in finding a new office location for Whitehall;
 - his day to day control over the office assistant;
 - his direct control over Mr. Tsangaris, another investigator in Whitehall's office; and
 - the contents of an October 17, 2007 e-mail.
32. Whitehall says the basis for some of the conclusions reached by the Director is unclear and refers to the Director's finding that Montgomery had no authority for hiring or disciplining staff, no authority to make key decisions, to bind the company or to finalize transactions on his own, no independent authority to make extraordinary or capital expenditures, no authority in developing financial plans or binding the company in financial matters and no authority or discretion to exercise independent judgement beyond day to day routine tasks. Whitehall says there was evidence presented by them indicating the above conclusions were unjustified, and makes the following arguments:
- (a) because Mr. Jaekel, the president of Whitehall, disagreed with Montgomery about the location of the Whitehall office does not mean Montgomery had no authority to make key decisions;
 - (b) because Mr Jaekel told the office assistant of her new wage or to stop answering the phone "Eye-Spy – Whitehall" does not mean Montgomery had no authority in hiring and disciplining staff; and

- (c) Montgomery saying he follows the client's guidelines, not Whitehall's, stating the staff in the western office follow his instructions, asserting he makes decisions as he sees fit and saying HQ reports to the western office are clear evidence he had managerial autonomy and was exercising it.
33. Whitehall says there was no evidence that Montgomery did *not* have the authority to hire and discipline staff, to authorize time off and leaves of absence, to call employees into work or to establish and alter work processes, to establish work schedules and to train employees. Whitehall says the October 17 e-mail implies clear control over the employees in the western office and the exercise of considerable autonomy.
34. Whitehall also argues Montgomery's job responsibilities demonstrate he was acting "*in an executive capacity*" and would fall within the definition of manager on that basis. The arguments made above, on the first part of the definition are relied on and particular aspects of Montgomery's job, including his involvement in the day to day operations of the western office of Whitehall, his title, his remuneration, his involvement in the WorkSafe bid and the contents of the October 17 e-mail, are referred to in support of this argument.
35. In response, the Director says the proper test was applied, the findings of fact were appropriate and the conclusion was based on a "total characterization of Mr. Montgomery's actual job duties". The Director says the inclusion of the reference to "sufficient, clear, cogent and convincing evidence" do not import a different standard of proof, but only indicate the function of the Director is to ensure findings of fact are made on sufficient, clear and convincing evidence, as opposed to making such findings on "insufficient, unclear and unconvincing" evidence.
36. The Director says Whitehall is simply re-arguing their case, seeking to have the Tribunal revisit the case on its merits and reach a different conclusion.
37. Not surprisingly, Montgomery disagrees with the submissions of Whitehall on this issue. He says the Director reached the correct conclusion on the facts.
38. In its final reply, Whitehall uses the responses from the Director and Montgomery to effectively restate, and in some respects elaborate, its appeal arguments. The substance of the appeal and the arguments supporting it are not changed by this submission.

Natural Justice

Claimed Expenses Issue

39. Whitehall submits the Director failed to observe principles of natural justice by failing to provide reasons for the decision on all of the 144 expense claims. Whitehall says this failure has deprived them of the opportunity to appeal the findings on the expense claims for which no reasoning was provided.
40. The Director says the findings on the expense claims which were not specifically challenged by Whitehall were based on an acceptance of Montgomery's evidence. Whitehall had an opportunity to specifically challenge any or all of the expense claims and chose to address only some. The Determination on the expense claims is clear that it was made on a balancing of the evidence.

Administrative Penalties

41. The submissions of Whitehall on the administrative penalties are premised on the success of the appeal. Whitehall says if the Determination on the expense claims is cancelled and/or Montgomery is found to be a

manager, there is no “contravention” to which the administrative penalties can attach and they ought to be cancelled.

42. The Director does not appear to argue with the general proposition that without finding a contravention of the *Act*, there is no basis for imposing an administrative penalty. The Director infers, however, that a Determination was issued in this case finding the *Act* had been contravened and Whitehall has failed to provide any reason, except to indicate that aspects of the Determination may be “moot”, why the administrative penalties imposed in the Determination should be cancelled. The Director says this argument is without merit.
43. Montgomery has made an extensive submission on the administrative penalties, which, to summarize, says the existing penalties must be confirmed but the Director should have imposed multiple penalties for some of the contraventions, missed other contraventions of the *Act* and, consequently, the entire matter of the administrative penalties needs to be reconsidered or revisited.

ANALYSIS

44. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was made.*

45. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
46. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The *Britco Structures* case also considered the appeal authority of the Tribunal on questions of mixed fact and law, concluding the Tribunal’s appeal authority extended only to questions of mixed fact and law where an identifiable question of law could be extricated and shown to have resulted in the error. Statutory interpretation is a question of law, as are questions about what the correct legal test is. This statement is reflected in what the Tribunal has adopted as the definition of “error of law”, which is taken from the British Columbia Court of Appeal’s decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the Assessment Act];
- 2. a misapplication of an applicable principle of general law;
- 3. acting without any evidence;
- 4. acting on a view of the facts which could not reasonably be entertained; and
- 5. adopting a method of assessment which is wrong in principle.

Claimed Expenses Issue

47. The Director found Whitehall had contravened section 21 of the *Act*. That provision states:
- 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.*
48. The Determination correctly notes the effect of subsection (1) is to prohibit an employer from withholding wages from an employee for any reason and the effect of subsection (2) is to prohibit an employer from making an employee responsible for any of an employer's business costs. The Determination also correctly notes the cost imposed on an employee may be direct or indirect.
49. Whitehall says it paid every one of the expense claims submitted by Montgomery, and there is no contravention of the *Act* in respect of those expense claims that were not submitted to them for payment in a timely manner during his employment.
50. A plain reading of section 21 of the *Act* as it relates to the claim being made by Montgomery required him to establish the following:
- (i) Montgomery incurred costs during the course of his employment;
 - (ii) the costs incurred were required, as that term has been accepted and applied by the Tribunal (see for example *Director of Employment Standards (Re Park Hotel and Hunter's Grill*, BC EST # D257/99), by Whitehall; and
 - (iii) the costs incurred were business costs.
51. The Director found that Montgomery established each of those elements, presenting "extensive submissions" on the claims, a list describing the claims and documents supporting these claims. This evidence was accepted by the Director as establishing the contravention.
52. I do not accept there is a requirement in section 21 of the *Act*, or in any other provision of the *Act*, requiring Montgomery to show Whitehall was presented with a demand for those costs and refused or neglected to pay them in order to establish the contravention. Once the statutory elements of the provision have been established, as they were in this case, it is open to Whitehall to avoid liability for the contravention by showing Montgomery has been reimbursed for the costs incurred and, as a result, no wages are owed for the contravention. That is an appropriate assigning of the evidentiary burden in such cases, as it is the employer who is statutorily required to keep a record such matters: see sections 27 and 28. To be clear, the contravention of section 21 in this case arose at the moment Montgomery was required to pay Whitehall's business costs, not when he sought reimbursement for those costs. While not directly saying so, it is apparent from the Determination that the Director did not accept the alleged failure by Montgomery to submit the expense claims in a timely way defeated his claim:

I am unable to find Mr. Montgomery should be denied what I accept is a valid claim, for the balance of his expenses simply because he failed to submit these expenses to Whitehall in a timely manner. Such a

finding would run contrary to a central purpose of the Act: to ensure employees receive at least basic standards of compensation and conditions of employment.

53. The fact an employee has not sought reimbursement may be viewed by the Director as evidence the costs incurred were not required to be paid by the employer or that they were not business costs, but neither consideration arises in this case, where the Director was completely satisfied on the evidence provided by Montgomery that the costs incurred by him were both required by Whitehall and were their business costs.
54. To a large extent, the above comments also answer the other arguments by Whitehall on the issue of the jurisdiction of the Director to consider and to make a Determination on the expense claims. I do not accept the submission by Whitehall that the Director had no evidence on which to find a contravention of section 21. The Director specifically states otherwise. Additionally, as I have indicated above, it was not necessary to find Montgomery submitted a claim for reimbursement of the costs he incurred in order to establish the contravention and the corresponding entitlement to reimbursement for the business costs paid out.
55. On the arguments relating to the burden of proof, I do not agree that the Director did not place an onus on Montgomery to establish his claim for expenses or failed to explain how Montgomery met the standard of proof on the expense claims. The Determination clearly states Montgomery provided sufficiently credible evidence establishing the necessary elements of section 21. That evidence was sufficiently detailed, supported by receipts and by Montgomery's verbal evidence. Whitehall was provided with that evidence and had a reasonable opportunity to challenge it.
56. Having been provided with sufficient and credible evidence from Montgomery, the Director was completely justified in accepting the claim in the absence of sufficient and credible evidence from Whitehall that tipped the balance against accepting Montgomery's claims.

Natural Justice

57. It is appropriate to address the natural justice argument at this point. Simply put, I find the Director did provide reasons for accepting Montgomery's expense claims, including those claims which were only generally challenged by Whitehall. The fact those reasons are comprised of no more indicating an acceptance of Montgomery's verbal evidence and the supporting documentary material simply speaks to the fact there was no competing evidence from Whitehall that required analysis. Simple reasons do not equate to no reasons. The reasons provided by the Director are sufficient to give Whitehall the opportunity to appeal the findings by attempting to show the Director's conclusion on the credibility of the evidence supporting those claims is a reviewable error.

Manager Issue

58. Whitehall has raised two general questions on this issue: whether the Director applied an incorrect standard of proof to a consideration of the manager issue; and whether the Director correctly interpreted and applied the definition of manager found in the *Regulation*.
59. A question about whether the Director applied the correct standard of proof is a matter of general law.
60. On this question, Whitehall points to several areas of the Determination which suggest the Director imposed a higher standard of proof than a balance of probabilities. Whitehall says the terminology used by the Director in these areas indicate burden imposed on Whitehall was to provide "clear and convincing proof".

61. The problem for Whitehall on this aspect of the appeal is that the conclusion Whitehall says should be drawn from the words which are identified is not borne out by a less selective, and more complete, reading of the Determination. The Director summarizes his conclusion on the manager issue as follows, at page R26:

In summary, I find **on a balance of probabilities**, Mr. Montgomery was not a manager as defined in the Regulation. In fact, the evidence that does exist with respect to Mr. Montgomery's power and authority reveals that his authority and responsibilities were of such nature to be more in line with a person who would be a lead hand and that any authority he may have was limited by head office and the policy and procedures of the company. (emphasis added)

62. Following that summary, the Director provides more than six pages of evidentiary analysis and conclusions of fact on the issue. It is clear that within that analysis, the Director was balancing all of the evidence which was found to be relevant to the issue.

63. Like many other adjudicators who have been asked to consider whether the use of such adjectives as referred to by Whitehall elevates the standard of proof required to a degree not mandated in the *Act*, I am not convinced the descriptive words used do anything more than acknowledge the statutory framework within which the evidence provided by the parties must operate. The wisdom of nearly fifteen years of experience in addressing who is a manager for the purposes of the *Act* demands, as correctly stated in the Determination, a cogency to the evidence commensurate with the interests at stake. Where an employer seeks to remove substantial statutory protections from an employee, the evidence must clearly show that such a result is justified. There is no indication in the Determination – there is in fact a statement to the contrary – that the Director was applying any standard other than the balance of probabilities.

64. I decline to give any particular or definitive meaning to the phrase used by the Director and I reach no conclusion about the use by the Director of the adjectives “sufficient, clear, cogent and convincing”. Attacking the Determination by parsing the phrase and analyzing the words without reference to the full analysis by the Director is useless. Whatever those words may mean to anyone else, to the Director they clearly meant applying the balance of probabilities standard of proof to evidence that was not insufficient, unclear and unconvincing. The only thing of which I need be satisfied in regard to the standard of proof utilized by the Director is that it was the balance of probabilities standard; and the only question I need ask is what the words used meant to the Director, not what they may mean to anyone else. The Director says the words do not import a greater test but describe the nature of the evidence required on the issue. I accept that is the case and dismiss this argument.

65. I will now address the submission by Whitehall that the Director applied a more onerous interpretation of manager than what is found in the *Regulation*.

66. Section 1 of the *Regulation* defines a “manager” to mean:

- (a) *a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human and other resources; or*
- (b) *a person employed in an executive capacity.*

67. A question about whether an employee is a manager under the *Act* is one of mixed fact and law, requiring an application of findings of facts, about what the employee actually does, to the definition of manager in the *Regulation*. As indicated above, the Tribunal has authority over questions of mixed law and fact where “a question of law can be extricated that has resulted in the error”: *Britco Structures, supra*.

68. Whitehall identifies the question of law that arises in this part of the appeal as being whether the Director imposed a more onerous definition of manager than what is required at law – or in other words, adopted a definition of manager that was too narrow – in deciding Montgomery was not a manager under the *Act*.
69. I am not persuaded the Director adopted a wrong definition of manager, or applied wrong legal principles and a wrong legal test, in deciding this issue. The definition of manager adopted by the Director and the legal principles applied accord with the wording of the definition and the principles expressed in decisions of the Tribunal that reflect on that definition and the tests to be considered in applying it. The following excerpt from *Howe Holdings Ltd.*, BC EST # D131/04, which was issued subsequent to the amendment to the definition in November 2002, describes how the issue must be approached:

The issue of whether a person’s primary employment duties consisted of supervising and directing other employees was addressed by the Tribunal in *429485 B.C. Ltd. (c.o.b. Amelia Street Bistro)*. (see also *Northland Properties Ltd.*, BC EST # D423/98, in which sections 1(a) and (b) were comprehensively considered). In *Amelia Street*, the Tribunal said that a conclusion as to whether a person falls within s. 1(a) provisions:

... depends on a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a “manager”. That would be putting form over substance. The person’s status will be determined by law, not by the title chosen by the employer or understood by some third party.

The Tribunal has said that, in order to be employed in an executive capacity, the person must have duties that relate to active participation in control, supervision and management of the business.

As remedial legislation, the *Act* is to be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. (see, for example, *On Line Film Services Ltd v Director of Employment Standards*, BC EST 319/97 and *Helping Hands v. Director of Employment Standards*, 1995) 131 D.L.R. (4th) 336 (B.C.C.A.)).

...

The burden of establishing that a person is excluded from the protection of the *Act* or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion. (see *Northlands*).

...

I am also unable to find that the delegate’s analysis of the post November 30, 2002 definition of manager is in error. It is apparent that the legislature intended to expand the definition of manager by including the words “other resources”. Like the delegate, I am unable to find that there is any substantive difference between the phrase “primary employment duties” and “principal employment responsibilities”. Black’s Law Dictionary, 6th Edition defines “primary” as “First; principal; chief; leading.” “Principal” is defined as “chief; leading; most important or considerable; primary, original”.

The replacement of the phrase “other employees” with “human or other resources” suggest that the legislature intended to include within the definition of manager those employees with responsibilities over other “resources”. I also agree with the delegate that those resources must be linked to the resources of the immediate workplace, or, in this case, the motel itself. While it is clear that Ms. Halford had, as her principal employment duties, responsibility for the motel, the evidence was that she “supervised”, and “directed” only subject to the approval of Mr. Khan. Her spending authority was limited, she required approval to perform any repairs, she had limited discretion in setting room rates, and she did not set wage rates. I find no error in the delegate’s conclusion that Ms. Halford was not a manager, and thus, entitled to overtime wages.

70. The above statement accurately describes how the Director approached the issue in reaching a conclusion on Montgomery's status under the *Act*.
71. Whitehall does not disagree that the applicable principles are those expressed in the *Amelia Street* decision, but says the Director required a level of autonomy and authority not expressed in *Amelia Street*. The difficulty for Whitehall with this line of argument is that it does not, as asserted by Whitehall, argue that the Director applied the wrong test, but that the Director applied the correct test wrongly. In reality, the argument being made by Whitehall is that the findings of fact made by the Director about all those matters that make up the "total characterization of that person's duties": their employment responsibilities; power and authority; and extent of their participation in the control, supervision and management of the business, do not justify the finding that he is not a manager.
72. In some cases, Whitehall says the Director erred by placing too little, or no, weight on certain evidence in making findings of fact, such as the evidence of Montgomery's title of Vice President Investigations, and the evidence of his level of salary. In respect of the title, the Director stated it is the actual working relationship, not the labels attached to the relationship, that are the focus of the analysis, and in respect of the salary, the Director stated the relevant consideration was the job functions performed by Montgomery, not the salary.
73. There is no error in law or principle in the Director's approach. Both of the above statements by the Director are consistent with the definition of manager set out in decisions of the Tribunal and with the applicable principles to be applied to that definition.
74. In other parts of the appeal argument, Whitehall says the Director erred by ignoring facts. In this respect, Whitehall says Montgomery "continued to be the boss" of Whitehall's western office after his company was purchased by Whitehall and the Director erred in not considering this point as being indicative of being a manager.
75. In respect of this matter, a reading of the Determination does not support the suggestion that the Director failed to consider the contention by Whitehall that Montgomery was the "boss" of their western office. The Director quite comprehensively examines Montgomery's role as the "boss" of the western office, assessing his job responsibilities and the scope of his authority in that position and reaches the conclusion that his job responsibilities did not bring him within the definition of manager. The Determination makes reference the absence of authority to hire and fire, the absence of any authority to make key decisions, to bind the company or to finalize transactions on his own, the absence of any independent authority to make extraordinary or capital expenses; the absence of any authority in developing financial plans or binding the company in financial matters and the absence of authority or discretion to exercise independent judgement beyond day to day tasks in reaching that conclusion.
76. I do not accede to the contention by Whitehall that in order to form the above conclusions, the Director distorted the evidence, overstating some evidence and understating or ignoring other evidence.
77. Whitehall challenges the Director's conclusions on the matter of Montgomery's involvement in sales, client relations, technology integration, investigations, attending corporate meeting and supervision. The gist of their position is that the Director required too high a standard in respect of those matters. The conclusion of the Director on these matters is set out on page R26:

Even if I accepted the totality of the employer's evidence on this point (i.e. that Mr. Montgomery was involved in sales, client relations, investigations, technology integration between Eye-Spy and Whitehall, attending corporate office meetings, supervision of Western office staff), I am not convinced that these responsibilities demonstrate the level of "power of independent action, authority, and discretion with

respect to decisions affecting the conduct of the business” that is contemplated as being exercised by persons employed in a management capacity.

78. The finding of the Director was based on factual conclusions considered against the test for determining whether an employee is a manager under the *Act*. The test used by the Director is the correct test. Whitehall disagrees with the Director’s view of the facts, and says the facts did demonstrate that Montgomery had the necessary power and authority to be considered a manager and ought to have led the Director to that conclusion. Whitehall’s arguments do not demonstrate an error of law in the Director’s factual findings, but, primarily, disagree with the conclusions of the Director on those facts. It is worth noting that nowhere in the appeal submissions has Whitehall indicated what legal “standard” the Director used to decide the issue that was wrong and different than the “standard” set out in cases such as *Amelia Street Bistro*. All of the comments by the Director in the Determination demonstrate the correct legal standard was applied to the evidence received by the Director, findings of facts made on that evidence, which, I would add, included the October 17 e-mail, portions of which are set out in the appeal submission.
79. The Director found that while Montgomery was involved in sales, there would have to be some evidence, which was not provided, of additional authority within that function, such as the ability to “determine and set the price for the sale of service or product”, for him to be considered a manager. Whitehall says that is too high a standard, but has not demonstrated there was evidence that, on any standard, showed Montgomery exercised the kind of power and authority typical of a manager within that function.
80. The comments are similar for Whitehall’s submission in respect of the Director’s analysis on Montgomery’s involvement in client relations. Whitehall cannot simply say Montgomery was involved in client relations and expect the Director to conclude from that fact he was a manager under the *Act*.
81. I do not need to specifically address the other matters about which Whitehall says the Director erred. It suffices to say each of the other matters raised in the appeal submission – Montgomery’s involvement in investigations, technology integration and searching a new office location, his attendance at head office meetings, his role in the WorkSafe bid and his day to day control over the western office and Mr. Tsangaris – represent challenges of the Director’s factual findings about Montgomery’s employment responsibilities and whether those responsibilities bring him within the definition of manager. While Whitehall may disagree with the conclusions drawn by the Director from the facts, it has not demonstrated an error of law in the analysis.
82. In other areas of the appeal, as indicated above, Whitehall directly challenges findings of fact, contending the Director has “overstated” some evidence and “understated” competing evidence. That kind of disagreement with findings of fact is not something over which the Tribunal has any authority.
83. For much the same reasons, and on much the same evidence, the Director found Montgomery did not function in “an executive capacity”. The Director found Montgomery had “extremely limited authority and extremely limited decision making ability”; the Director found he had “no decision making ability in critical areas of the business; he was not “the” or “one of the” controlling minds of the company.
84. Whitehall says, against those findings, Montgomery should have been found to be employed in an executive capacity based on other evidence and two decisions of the Tribunal, *Sunshine Coast Publishers Inc.*, BC EST # D244/96 and *Common Ground Publishing Corp.*, BC EST # D433/00. My response to arguments relating to the evidence and findings would echo what I have said above about the authority of the Tribunal over those matters. As well and in any event, the decisions relied on do not assist Whitehall in this part of their appeal. Those decisions are fact specific and do not establish any overriding and determining principle respecting persons who are involved in the day to day operations of an employer.

85. Moreover, I disagree that the facts in those cases are “analogous” to this one. In both of those cases, the individuals were found to be senior executives, part of the “management team”, charged, effectively, with the final responsibility of managing the entire business. Those are far from the findings of fact in this case. As with other aspects of Whitehall’s arguments, this argument invites the Tribunal to accept assertions of fact that are inconsistent with the findings made by the Director without showing the Director’s findings raise an error of law.
86. In sum, the Director applied definition of manager and the operative tests and principles flowing from *Amelia Street Bistro* and other decisions of the Tribunal correctly. The analysis in the Determination shows the Director applied the right legal tests to the issue and asked the right questions within the principles established on this issue. The Determination contains an extensive description of Montgomery’s duties and responsibilities as well as a complete analysis of the statutory definition of “manager”. I am unable to extricate a question of law from the issue Whitehall seeks to have addressed. While Whitehall may not agree with the conclusion, the application of the law, correctly found, to allegedly erroneous findings and conclusions of fact does not convert the issue into an error of law and give the Tribunal the authority to substitute its judgement about the effect of the facts for that of the Director.
87. The appeal on this issue is dismissed.

Administrative Penalties

88. It follows that the appeal from the administrative penalties must be dismissed. This decision has not altered the finding by the Director that Whitehall contravened those provisions of the *Act* for which the penalties were imposed. The Director is correct in stating the penalties are mandatory and include no area for discretion once a contravention is found or any scope for considerations of fairness.
89. Montgomery has suggested the matter of administrative penalties should be considered or reconsidered. The short answer to this suggestion is that Montgomery has filed no appeal of the Determination and he is out of time for doing so. Nothing in this appeal raises a question of whether Whitehall contravened other provisions of the *Act* than were found by the Director.
90. The Tribunal has examined a similar circumstance in *Kimberly Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied, BC EST # RD114/05), and made the following comment:

The issue of whether Kopchuk and Dinoto contravened other provisions of the Act was not raised in Kopchuk’s appeal, and was not argued before me. My power on this appeal is limited to matters dealt with in the Determination or matters under appeal: *Mt. Rocky Investment Ltd.*, BC EST # RD457/01 (Reconsideration of BC EST # D269/00 and BC EST # D142/01). In my view, I have no jurisdiction on this appeal to find further contraventions, and I make no such finding. Although the penalty provisions of the *Act* require the Director to impose an administrative penalty once a contravention has been found, nothing in the *Act* or *Regulation* requires the Tribunal to remit a determination back to the Director on the basis that other contraventions may have occurred, in order to give the Director a second chance to decide whether to find further contraventions, with further ensuing penalties.

91. I adopt those comments here.
92. The appeal as it relates to the administrative penalties is denied. The submission by Montgomery that the Tribunal should either impose additional penalties or refer the question of additional penalties back to the Director is a matter outside of the jurisdiction in this appeal and is rejected.

93. On the same basis, I reject the submission of Montgomery that I should vary the Determination to include other amounts owing. Montgomery has filed no appeal and the time limited filing an appeal has expired.
94. In sum, the appeal is dismissed.
95. I should make a note of one final matter. Very late in the appeal process, the Tribunal received an unsolicited communication from a person who is not party to these proceedings. The communication was unrelated to any issue or other matter raised in the appeal. Accordingly, the Tribunal has ignored this communication and has decided there is no need to either distribute it to the parties or to ask for any comment on it. To do so would not advance or assist in deciding any part of this appeal and would be inconsistent with the statutory purpose of providing a fair and efficient resolution of this dispute.

ORDER

96. Pursuant to Section 115, I order the corporate Determination dated November 16, 2009, be confirmed in the amount of \$18,493.29, together with any interest that has accrued under Section 88 of the *Act*

David B. Stevenson
Member
Employment Standards Tribunal