Employment Standards TRIBUNAL

An appeal

- by -

Identec Solutions, Inc.
("Identec")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/552

DATE OF HEARING: February 3, 2003

DATE OF DECISION: February 18, 2003

DECISION

APPEARANCES:

on behalf of Identec Solutions Inc.	John Kingsmill Raymond Braun
on behalf of the individual	by teleconference

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Identec Solutions Inc. ("Identec") of a Determination that was issued on October 18, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Identec had contravened Part 4, Section 40(1) of the *Act* in respect of the employment of Lorne Antle ("Antle") and ordered Identec to cease contravening and to comply with the *Act* and to pay an amount of $6,373.52.

In its appeal, Identec has raised what amounts to four grounds of appeal:

1. The Director erred in law in concluding Antle was not a manager under the *Act* after April 23, 2001;

2. The Director erred in concluding Identec was not a "high technology company" in the period from April 23, 2001 to July 23, 2001;

3. Even if Antle was not a 'manager' under the *Act*, the Director erred in concluding Antle was not a "high technology professional" after April 23, 2001; and

4. The Director erred in concluding Identec allowed Antle to work overtime.

In a submission on the appeal, dated January 2, 2003, Identec added the following ground:

> The Director erred in concluding Antle's compensation package was based on a standard eight hour work day/forty hour work week.

In his reply to Identec's January 2, submission, Antle says the statement raises a new argument. There is nothing in the Determination or the material on file indicating that matter was raised during the investigation.

ISSUE

The issue in this appeal is whether Identec has shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to cancel or vary the Determination, or to refer it back to the Director. The specific matters raised in this appeal are outlined above.

THE FACTS

Identec produces radio frequency identification devices. Antle worked for Identec from June 15, 2000 to July 23, 2001. He was hired as 'Director, Product Support Services' at a salary of $65,000.00 a year. That salary was increased to $66,300.00 a year just before Antle was given three months written notice of termination.

Until April 23, 2001, Antle had six employees reporting to him. It was accepted by all parties that until April 23, 2001 Antle would have been a manager under the *Act*. On April 23, 2001, Identec downsized its work force. All but one of the employees reporting to Antle were let go. The one remaining employee reporting to Antle was Gabrielle Merk, who was identified in the material on the file and in the evidence before me as occupying an administrative/clerical position that included keeping track of raw goods inventory; assisting in accounting, preparing invoices; and in shipping, preparing shipping orders. She was not a 'high technology professional'. There was some dispute, both during the investigation and at the hearing, about whether Ms. Merk continued to report to Antle after April 23, 2001. The Determination reached no conclusion on that point and, in any event, did not consider a conclusion on that point to be necessary to the analysis, as the Director concluded that an insignificant amount of time was spent by Antle on supervising other employees. The Determination contained the following comment:

> The Act requires and the Employment Standards Tribunal has upheld the notion that to be a manager under the Act, the majority of an individual's time must be involved in the supervision of subordinate employees. It is not in question that Antle had a supervisory role, but the significance in terms of work hours expended was insignificant.

The Determination also found that Antle was not a 'high technology professional' after April 23, 2001, stating that to be a 'high technology professional' under the *Act*, an individual must be actively working as and engaged in high technology outputs and endeavours and finding on the facts that Antle, "while he may have had some high technology duties, the time on [those duties] was insignificant".

On whether Identec was a 'high technology company' after April 23, 2001, the Determination said:

> The Act requires that more than 50% of a company's employees be, in total, managers, and/or high technology professionals, and/or executives. If Antle is a high technology professional and/or a manager, the company meets the criteria in the relevant period. If Antle does not, the company does not.

During the investigation , Identec provided the Director with an analysis of the employee count for the purpose of, among other things, demonstrating that Identec satisfied the definition of 'high technology company' in Section 37.8 of the *Employment Standards Regulations* (the "*Regulations*") both before and after April 23, 2001. The Determination does not specifically address that analysis.

The terms of Antle's employment were set out in an agreement, dated for reference June 15, 2000. The salary to be paid to Antle was identified in terms of an annual salary and the agreement contained no reference to hours of work.

ARGUMENT AND ANALYSIS

The burden on Identec in this appeal is to persuade the Tribunal that the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). I shall address each ground of appeal in the order in which they were raised.

1. Was there any error in the conclusion that Antle was not a manager under the *Act* after April 23, 2001?

The *Regulations* define a manger as:

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

Identec says the Director erred in law in concluding Antle was not a manager under the *Act*. The appeal argues errors of law were made in two areas:

(a) failing to consider the application of paragraph (b) of the definition in light of the terms of the employment contract and his remuneration and perquisites; and

(b) failing to consider the factors identified by the Tribunal in *429485 B.C. Limited., operating Amelia Street Bistro*, BC EST #D479/97 (*"Amelia Street Bistro"*).

There is no apparent reason in any of the material on file for the Director to have considered whether Antle was employed in an executive capacity and Identec has not shown any reason for doing so in this appeal. The term 'executive capacity' has been explored in several decisions of the Tribunal. It connotes a person with real and recognizable authority relating to the conduct of the business. In *Smedley*, BC EST #D552/97, the Tribunal stated:

> The term "executive capacity" is not specifically defined in the *Regulation*. The Oxford Dictionary defines an "executive" as:
>
> > n. a person or group that has administrative or managerial powers in a business or commercial organization, or with authority to put the laws or agreements etc. of a government into effect.-- -adj. having the powers to execute plans or to put laws or agreements etc. into effect.
>
> Black's Law Dictionary defines "executive capacity" as "Duties in such capacity relate to active participation in control, supervision and management of business."

There is no evidence at all that Antle was employed in an 'executive capacity' either before or after April 23, 2001. Antle was not, for example, consulted with respect to the downsizing, asked for his contribution or input leading up to the downsizing and, most telling, was himself given notice of termination terminated without any forewarning. That hardly describes the involvement a person with real executive authority would have in such a key decision. An examination of Antle's salary and perquisites does not affect or alter the analysis. The Tribunal has said that the remuneration received by

an employee is not determinative of his or her status under the *Act*. Typical of the Tribunal's response is the following comment from *Zeller's Inc.*, BC EST #D429/02:

> The fact that an employee receives the same benefits and an equivalent, or higher, salary than a person who might be excluded from Part 4 of the *Act* under the definition of 'manager' does not determine the status of that individual for the purposes of the *Act* any more than the title given to that employee does. Regardless of an employee's salary, the question of whether he or she is a manager for the purposes of the *Act* requires an analysis of the facts and a conclusion about the "total characterization" of the primary employment duties of that employee. The salary of an employee may be a factor when considering the question, but it is by no means determinative.

Identec also argues the Director applied the wrong test in deciding whether Antle was a manager under the *Act*. The argument of Identec on this point focussed on the statement in the Determination suggesting the amount of time Antle spent on supervising subordinate employees determined his status under the *Act*. Identec says that in seemingly deciding the issue on that one factor, the Director failed to give consideration to other factors, many of which have been identified by the Tribunal in *Amelia Street Bistro*, and committed an error of law. Presumably, the 'error' of law lies in finding that Antle was not a manager.

The Tribunal said in *Amelia Street Bistro*, that it is the 'total characterization' of the individual's duties that will decide that question of whether an individual is a manager for the purposes of the *Act* and in all cases it is a matter of degree. It is a broader examination than simply concluding a majority of an individual's time was or was not spent on supervising subordinate employees. In fact, that was the key point being addressed in *Amelia Street Bistro*. However, agreeing that the Director's analysis was unduly restrictive and saying it was wrong are two different things. The objective of an appeal is not simply to show the Director's logic or analysis might be flawed or incomplete; it is also necessary to demonstrate that the deficiency in the logic or analysis has led the Director to a wrong conclusion and that the Tribunal is justified in exercising its authority under Section 115 of the *Act*.

Notwithstanding the deficiency in the Director's analysis, Identec has not shown the Director's conclusion was wrong, that Antle should have been found to be a manager under the *Act* and the Determination should be cancelled, varied or referred back. I am satisfied from the material on file and from the evidence on the appeal that Antle was not a manager under the *Act* after April 23, 2001. The Tribunal described in *Amelia Street Bistro* what was necessary to show an individual was a manger under the *Act*:

> Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgements about such matters as hiring, firing, disciplining, authorizing overtime, time off, leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have responsibility and discretion about all of these matters. It is a question of degree, keeping in mind that the object of the exercise is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager.

The definition of manager in the *Regulations* indicates it is also necessary to show matters relating to supervising and directing subordinate employees were Antle's primary employment duties.

Identec has the burden of demonstrating an error. No attempt was made by Identec in the appeal to develop this ground of appeal with substantive evidence showing that Antle had and exercised power and authority typical of a manager. Mr. Ray Braun, Vice-President of Operations and Antle's immediate supervisor, gave evidence of Antle's work responsibilities after April 23, 2001. He was quite vague on the details of the work that Antle actually performed during that period, being unable to recall several specific matters put to him in cross-examination. While I appreciate that, as a matter of contract, the terms of the employment agreement continued after April 23, 2001, and in that respect the "responsibilities" which are set out in that agreement did not change, I accept that in reality his duties changed significantly and that there were aspects of his contractual responsibilities that were not performed because they did not exist after April 23, 2001. There was no evidence that Antle was responsible for doing any 'managing' or that he was he responsible for the work of any employee after that date.

This ground of appeal is rejected

2. Did the Director err in concluding Identec was not a 'high technology company from April 23, 2001 to July 23, 2001?

The definition of 'high technology company' in Section 37.8 of the *Regulations* states:

> ***"high technology company"*** *means a company where more than 50 percent of employees meet the definition of high technology professional, are managers of persons who meet the definition of high technology professional or are employed in an executive capacity.*

The Determination found Identec was not a high technology company. The Determination said that whether Identec was a high technology company turned on whether Antle was a high technology professional and/or a manager of high technology professionals. Identec says that is not so; that even accepting Antle was not a high technology professional and/or manager, which is disputed, Identec met the definition of high technology company. On the basis of the material on file and presented at the hearing of the appeal, there appears to be some merit to the position of Identec. That material, and the evidence, would appear to suggest that Identec, even discounting Antle, met the definition of high technology company.

There is no clear indication in the Determination of the basis for concluding that, without Antle, Identec did not meet the definition of high technology company. It is possible the Director did not accept that all of the employees identified by Identec as high technology professionals, managers of high technology professionals or executives, fell within those classifications, but the Determination says nothing about that. It is also possible that the Director did not accept that Identec's employee complement after April 23, 2001 was 18, as indicated in their analysis. There is some indication in the material that Identec had not included two part time employees in their analysis, Farr and Urban (neither of whom were high technology professionals) and there was some dispute about the status of two other individuals, Heath and Stapleton. The Determination, however, says nothing about that. It may also be that the Director, having accepted that Antle was neither a manager or a high technology professional, and having examined the overtime hours claimed, decided it made no difference to the end result whether the amounts payable were found owing under Section 40 of the *Act* or Section 37.8 of the *Regulations*, but once again the Determination says nothing about that.

Based on the detailed position taken by Identec on this question, the Director was required to do more than simply state a conclusion; the Director was required to provide reasons for the conclusion. That has not been done on the question of whether Identec was a high technology company after April 23, 2001.

The appeal succeeds on this point and the question of whether Identec was a high technology company after April 23, 2001 must be referred back to the Director. The Director only needs to address the question as it relates to whether Identec was a high technology company after April 23, 2001; if so, whether that changes the end result; and, if it changes the end result, in what manner it changes it.

3. Was there any error in the conclusion that Antle was not a high technology professional after April 23, 2001?

The Director found that Antle was not a high technology professional after April 23, 2001 because he was not actively working and engaged in high technology endeavours and outputs after April 23, 2001. The Determination states:

> . . . Antle's evidence is that he was kept on the payroll to work out his three-month notice period while other employees were laid off, and the employer gave him whatever it could to keep him busy, and it was not apparently high technology work. Antle had to do janitorial work, landscape maintenance, and other make work duties. Identec has not directly refuted this, but reiterated he was both a high technology professional and a manager between April 24, 2001 and July 23, 2001.

Identec argues that by virtue of his skills, compensation package and work experience, none of which changed after April 23, 2001, Antle continued to be a high technology professional after April 23, 2001. The argument made by Identec presumes Antle was a high technology professional before April 23, 2001. That presumption is not entirely free from doubt, but regardless, I find that Identec has not met the burden of showing Antle was, or continued to be, a high technology professional after April 23, 2001. Considering the remedial nature of the *Act*, I agree with the view of the Director and Antle that in order for Antle to be considered a high technology professional, Identec had to show that a significant amount of the work he was doing could be related to those skills which are specifically listed in paragraph 37.8(1)(a) or which could be included in the term "any similarly skilled worker". The evidence falls far short of showing Antle was working in one of the specific skills listed in that paragraph or that he was working as a "similarly skilled worker" during the relevant period to the degree necessary to a conclusion he was a high technology professional.

This aspect of the appeal is dismissed.

4. Did the Director err in concluding Identec allowed Antle to work overtime?

If Identec was not a high technology company during the relevant period, the applicable overtime provisions in the *Act* include the following:

> *35. An employer must pay overtime wages in accordance with section 40 if the employer requires or, directly or indirectly, allows an employee to work . . .*

If Identec was a high technology company during the relevant period, subsections 37.8(3) and (4) of the *Regulations* will apply, but I do not read either of those provisions as altering the basis upon which an employer must pay overtime. In either case, overtime wages would have to be paid if Identec required or allowed Antle to work overtime.

Identec argues the Director failed to consider that no overtime was specifically authorized by Identec and Antle did not seek authorization to work the overtime hours he claimed for. It is well established that specific authorization to work overtime is not a condition precedent to entitlement to overtime wages. In any event, the suggestion that Antle was not 'authorized' to work overtime hours is, on the facts, not particularly compelling. The evidence of Mr. Braun was that on April 23, 2001, at the time he gave Antle his notice of termination, he also told Antle what was happening, told him he was entitled to three months notice and asked him to stay for that period and help out where he could, as the company would be short-handed. In another part of his evidence, Mr. Braun indicated that after the downsizing, the remaining employees had a general authority to "do whatever it takes to get the job done". There was no evidence that Antle was required to seek authorization to work overtime hours. In fact, it is highly unlikely that he would have been, as Identec believed he was not entitled to be paid overtime wages. Both Mr. Kingsmill and Mr. Braun were present through the last three months of Antle's employment. It would be most improbable that either or both of them did not make some observation about the hours Antle was working. Antle continued throughout that period to record his hours. That record was available to Mr. Braun, who on the evidence was Antle's immediate supervisor and was responsible for monitoring and 'approving' the hours being worked by him. Nothing was done or said by Mr. Braun or Mr. Kingsmill during the last three month period about the hours being worked and recorded by Antle.

On balance, I conclude that Identec asked, and allowed, Antle to work whatever hours he felt was required over the last three months of his employment to meet the instruction from Mr. Braun to "help out where he could, as the company would be short-handed". This aspect of the appeal is dismissed.

The final ground of appeal identified by Identec is:

> Was the compensation package in Antle's employment contract intended to be all the remuneration he received regardless of the number of hours worked?

There is an initial issue about whether this ground of appeal should even be considered. It was not raised during the investigation and, consequently, the Director has had no opportunity to address it during the investigation or in the Determination. This ground was not included in the appeal and not raised until almost two months after the time limited for appeal had expired. As such, Identec has failed to comply with the time limits and the procedural requirements of the process.

The Tribunal has opted for a relatively strict approach to compliance with the substantive and procedural requirements of an appeal (see *D. Hall & Associates Ltd.*, BC EST #D354/99). The statutory purpose for that approach was stated in *SSC Industries Ltd.*, BC EST #D087/96:

> The purpose for placing time limits and procedural requirements in the appeal process is twofold: first, it meets the statutory purpose of ensuring a fair and expeditious determination of disputes arising under the Act; second, it ensures a closure on the matters in dispute, preventing "open-ended" claims and responses which would ultimately result in an unmanageable review process. (at para.8)

Identec says this argument is generally related to their argument that the Director should have considered Antle's entitlement to overtime in light of his contractual arrangements and the remuneration and perquisites contained in it.

It is a difficult decision, but in all the circumstances, I choose to address this ground on its merits. Notwithstanding that decision, I do not find any merit in this argument.

The *Act* gives no effect to agreements which alter or affect its requirements (*cf* Section 4). The argument made by Identec would require serious consideration if Antle was a 'manager' under the *Act*. Simply, if Antle was a 'manager' he would not entitled to overtime pay at all. His only claim would have been for regular wages for excessive hours worked. Such a claim would depend on an interpretation of the employment contract about the hours of work that were agreed to for the compensation provided.

However, the Director concluded Antle was not a manager in the relevant period, and I have confirmed that conclusion in this decision. For the purposes of this appeal, Antle is an employee under the *Act* and is entitled to the same entitlements and protections as any other employee, including entitlement to overtime pay for all work after 8 hours in a day and 40 hours in a week, or, if subsection 37.8(4) applies, to overtime pay for time worked after 12 hours in a day or 80 hours in 2 weeks. Those standards cannot be altered or affected by any agreement.

This argument is dismissed.

To summarize, all of the grounds of appeal, except that relating to whether Identec ceased to be a 'high technology company' after April 23, 2001, are dismissed. On the one successful argument, that matter is referred back to the Director. Some general guidance to the Director on this one matter has been laid out above, but for clarity and ease of reference, I will restate it with more particularity below.

I would ask the Director to review the question of whether Identec was a high technology company after April 23, 2001 from the material on file, including the analysis submitted by Identec. If it is decided the Determination should not be changed, reasons for that conclusion should be provided that are responsive to Identec's analysis. If it is decided the Determination was wrong on the question, I do not perceive that decision would impact the conclusion that Antle was entitled to overtime wages, but it will change the basis for the overtime calculation from Section 40 of the *Act* to subsection 37.8 of the *Regulations*. It is not apparent at this point to what extent, if any, a different conclusion may have on the amount found owing to Antle. That will need to be addressed by the Director, if necessary.

I will await the conclusions of the Director on the referral back.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 18, 2002 be referred back to the Director in accordance with this decision.

David B. Stevenson
Adjudicator
Employment Standards Tribunal