Employment Standards TRIBUNAL

An appeal

- by -

AMS Consulting Ltd., carrying on business as Transitions Career Consultants
(the "Employer")

- 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:** Sheldon Seigel

**FILE No.:** 2007A/28

**DATE OF DECISION:** June 14, 2007

# DECISION

## SUBMISSIONS

| | |
|---|---|
| George Kos | on behalf of AMS Consulting Ltd. |
| John Dafoe | on behalf of the Director |

## OVERVIEW

1. This is an appeal brought by the Employer pursuant to Section 112 of the *Employment Standards Act* (*Act*) of a determination that was issued on February 16, 2007 by the Director. The determination found that the Employer had contravened sections 17 and 40 of the *Act* in respect of the employment of Shannon McKenzie, and ordered the Employer to pay Shannon McKenzie the amount of $5071.61. This amount included vacation pay, and accrued interest payable under s.88 of the *Act*.

2. The Director also imposed administrative penalties on the Employer under Section 29(1) of the *Employment Standard Regulation* (the "*Regulation*") in the amount of $1,000. The administrative penalties were for the contraventions of sections 17 and 40 of the *Act* on August 6, 2005 in respect of the employment of both Shannon McKenzie and another employee, and were clearly intended to be seen as single contraventions of each section. Therefore the total administrative penalty was $1,000 notwithstanding that reference to the penalty was made in a file relating to each employee.

3. The Employer submitted that the Director erred in law by concluding that the record of alleged overtime hours worked prior to February 9, 2005 constituted a "time bank" pursuant to section 42 of the *Act*.

4. The Employer submitted that the Director erred in law by concluding that Shannon McKenzie was entitled to be paid overtime rates, as Ms. McKenzie was a Manager as defined in the *Regulation* and therefore not entitled to overtime pay.

5. The Employer further submitted that the Director failed to observe the principles of natural justice in making the determination.

6. The Employer requested an oral hearing. The Employment Standards Tribunal reviewed the appeal and the materials submitted with it, and decided an oral hearing was not necessary in order to decide this appeal.

## ISSUE

7. The issues in this appeal are:

8. Did the Director err in law in making the determination? Specifically:

9. Did the Director conclude that the record of alleged overtime hours worked prior to February 9, 2005 constituted a "time bank" pursuant to section 42 of the *Act*?

10. If so, did the Director have jurisdiction to make such a determination in the absence of evidence that the employee provided a written request to establish a "time bank" as required by the *Act*.

11. Was the employee a Manager within the definition of the *Regulation* and therefore not entitled to overtime pay?

12. Did the Director fail to observe the principles of natural justice? Specifically:

13. Were the two delegates of the Director predisposed to find a violation of the *Act*, and did they therefore fail to conduct an adequate or impartial investigation?

14. Did the delegates of the Director fail to consider the credibility of the witnesses when weighing the evidence before them?

## ARGUMENT AND ANALYSIS

***Error in law***

15. The Employer argued that the Director concluded that the record of alleged overtime hours worked prior to February 9, 2005 constituted a "time bank".

16. S.42 of the *Act* requires that in order to establish a "time bank" an employee must provide a written request to an employer.

17. The Employer argued that there was no evidence of such a request and the Director had no discretion to unilaterally determine that a "time bank" was established.

18. The Employer's argument is derived from the Determination of February 16, 2007, where at pages 10-11 the Director cites s.42 and discusses the application of it and Section 40 to the facts of this matter. The Director states:

> If I were to find both that the accumulated "flex" hours at 10 February 2005 were an accurate record of the time banked and that the "flex" time bank constituted a time bank within the meaning of Section 42 of the Act, the 80.2 hours accumulated in the bank at 10 February 2005 would become payable on termination of employment.

19. The Director then considers the wording of the legislation and determines that only overtime hours can be considered within the plain meaning of s.42, and not "flex" time.

20. It appears that this analysis of the applicability of s. 42 to "flex" time confused the Employer. This is *obiter dicta* and therefore not the finding on which this matter turns.

21. The Determination continues with the question: "What were Buemann's hours of work over her last 6 months of employment?" The Director then discusses the applicability of sections 17 and 40 of the *Act* to the facts established regarding the Employee's hours of work as limited by s.80 of the *Act* and reaches a conclusion which is not influenced in any way by any reference to a "time bank" or s.42.

22. I find that the Director did not conclude that the Employee's overtime hours constituted a "time bank". The Director concluded only that the Employee was not paid in accordance with the requirements of the *Act* for the hours that she worked within the last six months of her employment with the Employer.

23. In its grounds for appeal, the Employer argued that the Employee was a manager and therefore not entitled to overtime pay:

> McKenzie was employed as the financial administrator and as such, had the responsibility for directing and supervising employees and "other" resources, that is the financial resources of the company. The duties performed by McKenzie clearly places her within the duties encompassed by the definition of "manager" as set forth in the Employment Standards Regulation, section 1.

24. In his appeal submissions, the Director answered the Employer's submission in part as follows:

> It is not appropriate that this issue be raised for the first time at the appeal stage. AMS has been represented in this case by Mr. Hans Suhr who is extremely well versed in the Employment Standards Act and regulations having worked both for the Employment Standards Branch and the Tribunal. AMS cannot argue that it was unaware of the provisions of the Regulations excluding a "manager" from the overtime provisions of the Act, yet it failed at any time during the investigation to advance the argument that she should be disentitled to overtime wages on this basis.

25. I agree that it is normally not acceptable for an appellant to rely on a position that was available to him but not utilized during the investigation and submissions leading up to a Determination. The Director's statement, however, that "AMS has been represented in this case by Mr. Hans Suhr" is not confirmed by the documentation. After reviewing the record, I can find no reference to Mr. Suhr until the covering letter for the Appeal Form, which is dated March 22, 2007. In that correspondence, Mr. Kos advises that he "asked Hans Suhr and Associates to assist me in these appeals." Therefore, notwithstanding the ostensible knowledge of Mr. Suhr with respect to these matters, it is not clear that the Employer had access to this expertise prior to the determination. I find, therefore that the Director's conclusion that the Employer may not pursue this ground of appeal for reasons only of late reliance is not determinative.

26. The *Regulation* provides, at s.1(1) "manager" means

(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or

(b) a person employed in an executive capacity;

27. The Employer has not provided sufficient evidence to establish that Shannon McKenzie's principal employment responsibilities consist of those described in that section or that she was employed in an executive capacity. Accordingly, the argument that Shannon McKenzie was a manager and therefore disentitled to overtime pay must fail.

***Natural justice***

28. The Employer claimed that the Director was predisposed to find a violation of the *Act*, and therefore failed to conduct an adequate or impartial investigation.

29. While bias is a well-established contraindication to acceptable standards of natural justice, the Employer provided no evidence whatsoever of bias on the part of the delegates of the Director. Further, the presence of written statements from witnesses whose names were put forth by the Employer speaks against the Employer's claim that the Director "only pursued avenues of investigation to confirm her position". I find that there is no evidence that the Director had any relevant position until a Determination was made.

30. On careful examination of the record and the Determination, I find that the Director did conduct an adequate and thorough investigation of this matter and properly weighed and assessed the evidence before her. Much was made in this appeal of the issue of credibility of the Employee. I find that the record is clear with respect to the claims put forth by the Employer, and that the Determination clearly sets out the Director's consideration of those claims and the careful evaluation and recounting of the evidence of the witnesses in that regard. I find that the delegates of the Director were in the best position to evaluate the credibility and consistency of the interviewed witnesses and compare that evidence to the documentary evidence provided by the witnesses. I am satisfied by the text of the Determination that this process was done properly and I have no evidence before me that would cause me to disturb the results of that process, particularly with respect to assessing credibility.

## ORDER

31. Pursuant to section 115 of the Act, I confirm the determination.

**Sheldon Seigel**
**Member**
**Employment Standards Tribunal**