



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/29

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



11. 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?
12. 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***

13. The Employer argued that the Director concluded that the record of alleged overtime hours worked prior to February 9, 2005 constituted a "time bank".
14. S.42 of the *Act* requires that in order to establish a "time bank" an employee must provide a written request to an employer.
15. 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.
16. 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.

17. 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.
18. 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.
19. 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.
20. 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

### ***Natural justice***

21. 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.

22. 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.
23. 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.

### **ORDER**

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

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