

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Forest Floor Contracting Ltd.  
("FFC")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr  
**FILE NO.:** 1998/810  
**DATE OF HEARING:** March 5, 1999  
**DATE OF DECISION:** March 18, 1999

**DECISION**

**APPEARANCES**

Bruce Harris	on behalf of Forest Floor Contracting Ltd.
Debbie McAllister	on behalf of Forest Floor Contracting Ltd.
Steve Little	on behalf of Forest Floor Contracting Ltd.
Owen Fehr	on behalf of Forest Floor Contracting Ltd.
David J. McKenna	on his own behalf

**OVERVIEW**

This is an appeal by Forest Floor Contracting Ltd. (“FFC”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated December 10, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). FFC alleges that the delegate of the Director erred in the Determination by concluding that David J. McKenna (“McKenna”) was not a manager as defined by the *Act* and was owed overtime wages in the amount of \$5,001.44 (includes interest).

**ISSUES TO BE DECIDED**

The issues to be decided in this appeal are:

1. Was McKenna a manager as defined by the *Act* ?
2. Does FFC owe overtime wages to McKenna ?

**FACTS**

The following facts are not in dispute:

- FFC placed an advertisement for a “Fisheries Biologist/Technician;
- McKenna responded to this advertisement;
- McKenna was offered employment by letter dated March 14, 1997. The relevant parts of that letter provide:

“ Your primary responsibilities will include”

- project manager on stream survey/inventory contracts
- collection of all required survey data
- development of necessary reports and prescriptions
- supervision of additional fisheries personnel
- training and development of company personnel
- liaise with clientele
- primary administrative duties associated with the development of a fisheries/environmental component within Forest Floor Contracting Ltd.
- determine marketability, attract and secure contract work within fisheries/environmental disciplines
- where necessary, acquire forest management knowledge/skills to assist with forestry projects
- assist with the development of proposals

The starting salary will be \$50,000.00 per annum based on 40 hours per week over 52 weeks. This salary is based on straight paid time with no overtime. All hours worked in excess will be carried at straight time. The extra hours can be paid out or set aside as paid time off and be scheduled as holidays. Annual leave will include 3 weeks paid time off due as the time is accrued.”

- McKenna accepted the offer by signing the letter on March 24, 1997;
- McKenna’s first day of work was June 2, 1997;
- McKenna was a Fisheries Biologist;
- McKenna’s last day of work was January 15, 1998;
- McKenna terminated his employment.

I heard extensive evidence from witnesses on behalf of FFC with regard to their understanding of the employment relationship of McKenna. I will not attempt to recount all of the information provided, however, I will relate the portions relevant to the matters in dispute.

Bruce Harris (“Harris”) testified that:

- he is a principal of FFC;
- he was involved at all times in the selection and hiring of McKenna;
- McKenna was hired to fulfill the role of manager of the newly formed Fisheries department;
- McKenna conducted his duties with the attitude and authority of a manager;
- McKenna indicated that he understood his role as the manager of the Fisheries department;
- McKenna was treated fairly by FFC, paid competitive wages, moving expenses, provided with 2 months free room & board, given a Christmas bonus and had access to a company truck for personal use;

- McKenna set his own hours of work and was not required or forced to work extra hours;
- McKenna became dissatisfied at FFC when he was unable to negotiate a salary increase after only 5 months of employment;
- the first occasion that McKenna requested overtime pay was after he had secured other employment and submitted his resignation to FFC;
- he feels that the claim by McKenna is a misuse of the Act as McKenna fulfilled FFC's expectations as a manager, set his own hours and now wants to be paid overtime wages for those extra hours he decided to work;
- FFC feels that McKenna is not entitled to overtime wages as he is a manager;
- FFC feels that the determination of McKenna's status is more a function of the importance of the work performed to the company rather than the amount of time spent on the function of manager as defined by the Act;
- FFC used the term "project manager" and "manager" interchangeably and consider them to be one and the same;
- if McKenna is found to not be a manager as defined under the Act, FFC does not dispute the quantum as calculated by the delegate of the Director.

In response to questions on cross examination by McKenna, Harris stated that:

- there were no other managers in the Fisheries department;
- other employees in the Fisheries department were not paid overtime wages for overtime work;
- one of the employees of the Fisheries department was also listed on at least one proposal as the "project manager";
- depending on the circumstances, "project manager" and "manager" could have different meanings;
- he, as the principal of FFC, determined the classification of "project manager" or "manager";
- on the proposal dated May 8, 1997, Randy Sulyma, RPF is listed as the "project manager";
- on the revised proposal dated June 5, 1997, after McKenna begins working for FFC, Randy Sulyma RPF is still listed as "project manager";
- McKenna did not make any capital purchases while employed at FFC;

Debbie McAllister ("McAllister") testified that:

- she is the Office Manager and Payroll Administrator for FFC;
- she has been employed by FFC since September 1995;
- she was involved in drafting the advertisement for the newspapers and Canada Employment Centres;
- the original intent was to hire a Fisheries Biologist/Technician in order to provide those services to their clients;
- due to the number and quality of resumes received in response to the advertisement, and due to becoming more aware of the quantity of potential work available, the

company changed the original intent and decided to expand the hiring process to set up an entire Fisheries department with its own manager;

- FFC had decided to hire a junior Fisheries Biologist, a Technician and McKenna as a senior Fisheries Biologist to head up the department;
- she was not personally at the meetings where it was decided to change the intent in regard to the Fisheries department, however, she was advised of the decision to hire a manager;
- as payroll administrator she meets with all new employees to inform them as to the various company policies and procedures;
- she met with McKenna and explained to him the company policy on overtime wages and suggested that it usually is prudent to save 2 weeks of “extra hours” to cover the normal Christmas shutdown period each year;
- she became concerned about the number of hours being worked by McKenna and brought those concerns to the attention of Harris;
- Harris informed her that McKenna was the manager of the Fisheries department and knew what had to be done, further Harris was sure that McKenna had some financial obligations in regard to his move from P.E.I.;
- she again approached Harris in early December as she was concerned that McKenna’s requesting to be paid for his extra hours would mean that he would not have enough hours available to cover for the Christmas shutdown;
- it was decided by Harris and herself to include a note with McKenna’s pay reminding him of the upcoming Christmas shutdown;
- she felt that McKenna was a manager;
- McKenna never asked her about overtime pay;

Under cross examination by McKenna, McAllister stated:

- no other Fisheries department staff ever received overtime wages in accordance with the Employment Standards Act;
- McKenna was not treated in a different manner in regard to overtime wages as compared to other employees;
- hours submitted by McKenna were checked by herself for addition and checked by either Harris or by Steve Little (“Little”) the Operations Manager to ensure that proper job coding was assigned to the appropriate hours;
- she never asked McKenna to either check or approve hours submitted by other Fisheries department staff;
- she does not recall if McKenna ever initialed other Fisheries department staff’s diaries of hours worked;
- she was not sure if McKenna has the authority to purchase capital equipment as no need for such a purchase arose during his period of employment;
- all cheques were signed by either Harris or his wife;
- Harris would not sign a cheque unless he was satisfied as to the purpose for that cheque.

Owen Fehr (“Fehr”) testified and stated:

- he is the Timber Development Manager for FFC;
- he has worked for FFC since 1991;
- he had very little involvement in the decisions made to hire McKenna and to create a Fisheries department as he was away at school for most of the time;
- it was explained to him that FFC expected McKenna to develop the Fisheries department both externally for the clients and internally through the staff;
- as the Timber Development Manager he feels that his primary function is to manage all the people involved in the day to day projects he is involved in;
- he feels that all the functions involved in any project, project manager, technical specialists or site supervisor are all rolled together at FFC;
- he does not track time spent solely on supervising other employees versus time spent on other parts of his job;
- he feels that he fits the definition of manager as set out in the Act;
- there were about 30 employees employed by both divisions of FFC during the period of McKenna's employment;
- he would normally supervise 4 - 5 employees on a daily basis;
- only McKenna had the background to give technical direction on issues relating to fisheries;
- while he has never hired or fired anyone, he feels that he has the authority to do so.

In response to cross examination by McKenna, Fehr stated:

- people other than McKenna had the authority to hire/fire employees;
- McKenna did not recommend to Fehr that any employee should be hired or laid off;

In response to questions from the Tribunal, Fehr stated:

- he had not hired or fired any employees during his 8 years of employment at FFC although he did recommend an employee to Harris who subsequently hired that employee;
- he only had the opportunity to observe McKenna work in the field on one small project;
- his knowledge of McKenna's status as manager is based mostly on his understanding of how FFC operates;
- he was not involved in the interview or hiring of McKenna;
- he sometimes initials time sheets for employees if a problem has been found;

Steve Little ("Little") testified that:

- he is the Operations Manager at FFC;
- he has been employed by FFC for almost 10 years;
- he was involved in placing the advertisement for Fisheries Biologist/Technician and preparing a short list of suitable candidates;

- he reviewed all the resumes and initially discarded the resume submitted by McKenna as it was felt that McKenna was overqualified for the job;
- when FFC decided to set up a separate Fisheries department, he took another look at McKenna's resume as it was felt that McKenna would be ideal to manage the department;
- other fisheries employees were hired prior to McKenna starting work and they were told that McKenna would be the manager of the department;
- he considers himself as a manager although under the strict definition of the Act, he might not be one even though he does supervise other staff;
- he sees his own primary purpose as overseeing the staff associated with the various projects and the only way to properly supervise staff is to observe them;
- he estimates that more than 1/2 of his own time is spent on technical work;
- when he observed McKenna at work, he noted that McKenna would perform work in the same manner as he, Little, would;
- he felt the primary function of McKenna's employment was to develop the Fisheries department;
- since the departure of McKenna, FFC's Fisheries department has basically been dormant and FFC has not actively pursued any fisheries work;
- he viewed McKenna's role as very important to FFC and feels that FFC needed McKenna and the other managers in order to properly function.

In response to cross examination by McKenna, Little stated:

- no employee within the FFC group is paid overtime;
- most of the projects McKenna was involved in would be considered "operational" in nature;
- the 2 projects under McKenna's scientific direction were funded by FRBC;
- he initials time diaries for the fisheries department employees to ensure that the correct job codes are used;
- he has also initialed Fehr's time diaries to ensure correct job codes are used.

In response to questions from the Tribunal, Little stated;

- he has functioned as a project manager from time to time;
- he initials time diaries to confirm that the correct job codes are used;
- he has never directly hired or fired an employee, although on one occasion he did recommend to Harris to fire an employee.

## **ANALYSIS**

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, FFC.

Manager is defined in the *Employment Standards Regulations* ( the "Regulations" ) as:

"manager" means

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

The evidence was that McKenna did not hire or fire any employees, rather, the other employees of the Fisheries department were hired before McKenna even began working.

The evidence was that McKenna did not initial employees time diaries nor was he required to confirm that the appropriate cost codes were used.

There was no evidence that McKenna participated in "executive" decisions in regard to FFC, rather, McKenna received direction from Harris in respect to the overall direction to be pursued.

There was no evidence that McKenna's **primary** function was the supervision and direction of other employees, rather, the evidence was that McKenna spent most of his time involved in the technical or scientific aspects of his work.

The determination of whether an employee falls within the definition of manager is not a straightforward matter. Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon 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.

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decision, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matter as hiring, firing, disciplining, authorizing overtime, time off or 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. I do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to



reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

I note that despite the perception and characterization by FFC that McKenna was a manager, the evidence does not support such a contention.

For all of the above reasons and based on the evidence provided, I conclude that McKenna was not a “manager” as defined by the *Act*.

FFC has not established that the delegate of the Director erred in the Determination. The appeal is therefore dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated December 10, 1998 be confirmed in the amount of **\$5,001.44** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**