

An appeal

- by -

Robert Sabine

- 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:** John Savage

**FILE No.:** 2007A/127

**DATE OF DECISION:** December 13, 2007

## DECISION

### SUBMISSIONS

Robert Sabine, for himself, the Appellant

Hans Suhr, for the Director of Employment Standards

Lawrence Robinson, for the Northern Rockies Regional District carrying on business as Town of Fort Nelson

### INTRODUCTION

1. Robert Sabine (“Sabine”) appeals pursuant to section 112 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the “Act”) a determination of the Director dated September 7, 2007, (the “Determination”).
2. The Determination found that the Northern Rockies Regional District, which carries on business as the Town of Fort Nelson, (“Fort Nelson”), contravened the Act by failing to pay wages on termination as required by the Act.
3. The Delegate found that Sabine is a manager and therefore Part 4 of the Act does not apply to his employment. Other parts of the Act do apply and Fort Nelson is obliged to pay all wages on termination.
4. The Delegate found that Sabine’s total annual salary was \$114,787.97. However, there had been a contravention of the Act, because on termination he was not paid all sums due. The Delegate ordered Fort Nelson to pay the wages owed and an administrative penalty.
5. Sabine appeals the Determination arguing that the Director erred in law in failing to find that, upon his termination, Fort Nelson should have paid him, in addition to the sums awarded, the wage equivalent to the hours recorded in what is described as an overtime bank.
6. Fort Nelson and the Director submit that there is no error in law in the Determination.
7. The Tribunal determined to hear the appeal by written submissions. Submissions were received from Sabine, from Fort Nelson, and from the Director.

### ISSUE

8. The only issue in this appeal is whether the Delegate erred in law in finding that Sabine was not owed wages equivalent to the overtime hours recorded in his overtime bank?

### LEGISLATION

9. An appeal to this Tribunal lies under Section 112 of the Act, which includes appeals on questions of law. In determining whether there is an error of law, the Tribunal has applied the test set out by the British

Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

10. The test set out in *Gemex* can be paraphrased as finding an error of law where there is:
  1. a misinterpretation or misapplication of a section of a statute;
  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 methodology that is wrong in principle.
11. In considering and analyzing the positions of the parties and the Determination of the Delegate, no reviewable grounds arise unless there is an error of law in the Determination that falls within this description.
12. The Director found that Sabine was a manager, a position that did not appear to be contested in the proceeding below. A manager is excluded from Part 4 of the Act by section 34(1)(f) of the *Employment Standards Regulation*, BC Reg. 396/95 as amended. Part 4 of the Act establishes standards for hours of work and the payment of overtime.
13. Although managers are excluded from Part 4 of the Act they are not excluded from other parts of the Act. Upon termination section 18 of the Act requires that all wages be paid within the time periods specified.
14. Sabine complained to the Director that he was not paid all the wages he was due upon termination because, *inter alia*, he was not paid an amount equivalent to or based upon the hours he had recorded in an overtime bank.
15. The Delegate was therefore required (1) to ascertain the terms of the contract of employment, (2) to interpret the contract to determine whether Sabine should have been paid for the hours recorded in the overtime bank, and (3) determine whether the terms of the contract were contrary to the Act or general law.

## **THE TERMS OF THE CONTRACT**

16. The Delegate reviewed the evidence concerning the contract of employment between Sabine and Fort Nelson. He concluded that on a balance of probabilities the provisions of the unsigned contract which became Ex. 7 in the proceedings were applicable.
17. The question of whether a certain document is or reflects the terms and conditions of a contract of employment is generally a question of fact. It is not a matter that is reviewable by this Tribunal on an appeal where in this context I am restricted to reviewing the Determination and record to determine whether it reveals errors of law.
18. It is not, for example, open to me to substitute for the Delegate's findings my own, even should I disagree with a finding of fact or a mixed finding of fact and law. An appeal to this Tribunal is not a hearing de

novo, nor does it allow the Tribunal to substitute its own findings for those of the Delegate unless such finding could not reasonably be entertained.

19. It is only if no reasonable person, acting judicially and properly instructed as to the relevant law, could come to the determination that a question of law arises: *Delsom Estates Ltd. v. Assessor of Area No. 11 – Richmond-Delta* 2000 BCSC 289.
20. It is clear from the submissions of both parties that the relevant terms of this contract were acted upon. Fort Nelson argued that, based on the evidence, the contract applied, even though it had not been signed. The Delegate reviewed the evidence concerning the posting of the contract on the website, and the parties' actions in relying on the same. In the circumstances, I can find no error of law in the Delegate concluding that the terms of this agreement applied, based on the evidence before him.
21. The relevant terms of the employment contract are as follows:

#### HOURS OF WORK

23. The Employee acknowledges that this is a management position, and as such, the Employees shall be required to devote whatever hours are reasonably required to fulfill the duties and obligations of the position.
24. The Employee acknowledges that in the normal course, said employee will be required to work a minimum number of hours per week in accordance with Schedule "D" to satisfy the requirements of the position.
25. Overtime in excess of the average minimum hours per week will be compensated by time off in lieu at straight time rates and/or cash payment of up to a maximum of one week's pay each year. The Employee is expected to manage his/her overtime bank accrual to ensure that the balance never exceeds 350 hours. In the event an Employee resigns, or the Employee's employment is terminated for any reason, the accrued banked overtime is forfeited.

#### INTERPRETATION OF CONTRACT

22. The Delegate reviewed the terms of the contract of employment. He found as follows:

“The contract clearly states that for a manager there are no defined hours of work and further that managers are expected to work whatever hours are necessary to fulfill the duties and responsibilities of their position. That contract further provides a benefit to management employees in that they could accumulate time in lieu for hours worked in excess of the minimum required but the ability to enjoy the time in lieu was predicated upon their continued employment. Management employees were also provided with the opportunity to receive a payout of a maximum of 1 weeks pay calculated at the minimum hours per week (42) each year for accumulated time in lieu. In the event that their employment was terminated for any reason, the contract clearly provides that the only monetary value to the accumulated hours was a maximum of 1 weeks pay calculated at the minimum hours per week (42). The evidence was that Mr. Sabine received the one week (42 hours) annual payout for accumulated hours for 2006 but had missed the deadline for requesting the payout in 2005. There was no evidence that Mr. Sabine raised any issue with either missing the payout in 2005 or accepting the payout in 2006.

There is no provision to permit banking of overtime on a "one for one" basis or for any banking of overtime for a manager, rather, pursuant to the provisions of the Regulation section 34, a

"manager" is specifically excluded from the provisions of Part 4 of the Act which contains the provision to permit the banking of overtime wages.

The evidence was clear that Mr. Sabine's annual salary was based upon a percentage of the salary paid to the Chief Administrative Officer and not based upon any "expected or normal" hours of work. Schedule "D" Remuneration attached to the contract of employment clearly specifies that there are "base hours of work" for each management position which are explained in section 24 as the minimum required hours. The "base hours of work" for Mr. Sabine's position was identified as 42 hours per week. The clear reading of all the terms and conditions of employment acknowledged by Mr. Sabine were that his hours of work were not defined but rather consisted of whatever hours were necessary to perform the duties of his position with a minimum of 42 hours being required each week. The fact that the employer permitted management employees to track hours of work and provided an additional benefit for hours in excess of the minimum required hours does not establish that Mr. Sabine's salary was predicated on working 42 hours per week."

23. The interpretation of the contract of employment is a matter of general law. The Delegate found that Sabine was a manager, had no set hours of work, and was paid a salary for the work performed.
24. An additional benefit under the contract was a leave entitlement that allowed Sabine to take time off equivalent to the time recorded over 42 hours a week, or receive the equivalent of one weeks salary, while he was employed.
25. In my opinion, the contract is equally clear on whether, when, and what benefit the employee could obtain from the leave entitlement provision:
1. *Except where the employee resigns or is terminated*, any time in the overtime bank is compensated in one of two ways: (1) by straight time in lieu, or (2) by cash payment of up to one week's pay each year.
  2. *In the event of resignation or termination* there are no entitlements to the employee.
26. In my opinion the Delegate did not err in law in his interpretation of the contract of employment. Since Sabine resigned, there was no entitlement under the contract to additional remuneration. The ordinary meaning of the terms of the contract expressly provide for the outcome found by the Delegate.
27. It remains to be considered whether the terms of the contract are contrary to the Act or general law.

## **ARE THE TERMS OF THE CONTRACT CONTRARY TO THE ACT OR GENERAL LAW?**

### ***A. Are the Terms of the Contract Contrary to the Act?***

28. Part 4 of the Act provides standards with respect to hours of work and overtime. There are also specific provisions regarding the banking of overtime wages.
29. Section 127(2)(a) provides that the Lieutenant Governor in Council may, by regulation, exclude a class of persons for all or part of the Act or regulations.

30. The Delegate found that Sabine is a manager. In his initial submission Sabine took no issue with this finding, however, in his final reply submission he did take issue with the finding. It is not appropriate to raise matters as issues for the first time in reply. That said, there is nothing in Sabine's reply submission that persuades me that the Delegate erred in law in making this finding.
31. Section 34(1)(f) of the *Employment Standards Regulation*, BC Reg. 396/95, as amended, excludes managers from the operation of Part 4 of the Act. There is nothing elsewhere in the Act that prescribes the hours of work, overtime, or overtime banks for managers. In the circumstances, in my opinion, there is nothing in the contractual provision in question that contravenes the Act.

***B. Are the Terms of the Contract Contrary to the General Law?***

32. Subject to statutes and the common law, persons of legal competence are at liberty to fashion their contractual relationships as they see fit. Sabine and Fort Nelson did so, and the terms and conditions of the employment contract reflect provisions that are of obvious benefit to both parties.
33. Sabine does not raise any specific Act, Regulation or legal principle in his argument before me. Sabine simply argues that the provision regarding the banking of overtime and the limited benefit it provided is unfair. The Delegate did not find this to be so, nor, as I see it, is there obvious unfairness to it. As I read the contract, there are no set maximum hours of work, but the overtime bank provision gave a limited benefit to an employee, where hours in excess of 42 in a week are worked.
34. The maximum monetary benefit while employed is one weeks' salary. Alternatively, while employed, an employee can take the hour equivalent in time off. The apparent intention of such a provision is to provide a benefit to persons while they are employed, but restrict the access to any benefit to persons who remain in employment, so, it creates an advantage to remain in the employment of Fort Nelson.
35. Sabine does not argue that there is any specific statutory law or common law principle to which the contractual provision is inimical. For example, it is not suggested, nor in my opinion could it be suggested, that the provision is so onerous as to be unconscionable or that it offends any principle of public policy.
36. While the provision describes the banked overtime as forfeit, cases in which courts have provided relief against forfeiture are limited to those where the provision in question is fundamentally at odds with the nature of the contract, or the contract provision is, in its specific context, unconscionable. As I interpret the contractual provision it is none of those things. It provides a benefit which is simply contingent on continued employment.
37. Subject to the Act, other statutory provisions and the common law, it is open to parties to make such bargains.

**SUMMARY**

38. As a manager Sabine's employment is not governed by Part 4 of the Act. The contractual provision providing a benefit but limiting the benefit to situations of continued employment is not contrary to the Act or common law.

**ORDER**

39. Pursuant to section 115 of the Act the Determination is confirmed.

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**John Savage**  
**Member**  
**Employment Standards Tribunal**