Employment Standards TRIBUNAL

An appeal

- by -

Manfred Purtzki Ltd., Dougals R.C.Tyce Inc., B.E. Carle-Thiesson Ltd.,
operating as Purtzki Carle-Thiesson, Chartered Accountants
("Purtzki Carle-Thiesson")

- 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.: 2002/19

DATE OF DECISION: April 11, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Manfred Purtzki Ltd., Douglas R.C. Tyce Inc. and B.E. Carle-Thiesson Ltd. operating as Purtzki Carle-Thiesson, Chartered Accountants ("Purtzki Carle-Thiesson") of a Determination that was issued on January 7, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Purtzki Carle-Thiesson had contravened Part 4, Section 40(1) and Part 7, Section 58(3) of the *Act* in respect of the employment of John Groenewold ("Groenewold") and ordered Purtzki Carle-Thiesson to cease contravening and to comply with the *Act* and to pay an amount of $18,236.05.

Purtzki Carle-Thiesson has set out three matters for consideration by the Tribunal in this appeal:

1. whether Groenewold was a manager;

2. alternatively, and in any event, whether the "regular wage" for Groenewold was calculated correctly; and

3. whether the directors/officers of the corporate partners of Purtzki Carle-Thiesson can be made liable under Section 96 of the *Act* for wages owed to Groenewold under the *Act*.

The Determination concluded that Groenewold was not a manager and that his "regular wage" should be calculated on the hours set out in the 'standard work hours' in the employer's personnel policy. The Determination also indicated, by way of a general statement in its final paragraph, that, "directors and officers of companies can also be required to pay wages owed to employees".

issue

The issue in this appeal is whether Purtzki Carle-Thiesson 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.

facts

Purtzki Carle-Thiesson is a Chartered Accountant firm. Groenewold was employed by Purtzki Carle-Thiesson from September 15, 1997 to November 30, 2000 as a Certified General Accountant. He earned a salary and bonuses of $72,000.00 in his last year of employment. He claimed entitlement to overtime wages for hours worked in excess of 8 hours in a day and 40 hours in a week.

During the investigation, Purtzki Carle-Thiesson took several positions in response to the claim by Groenewold, including that Groenewold was not entitled to overtime wages because he was a manager for the purposes of the *Act* and that the 'standard work hours' set out in the personnel policy did not apply to

Groenewold because he held a professional designation. Purtzki Carle-Thiesson contended Groenewold's "regular wage" should be calculated on actual hours worked.

The Determination concluded that Section 4 of the *Act* prevented Groenewold from being excluded from the minimum standards provided in Part 4 of the *Act*, which contains the hours of work and overtime provisions. The Determination calculated the "regular wage" for Groenewold from the 'standard work hours' in the employer's personnel policy. Two reasons are given in the Determination for that decision: first, the employer had confirmed during the investigation that personnel policy described the hours the Groenewold was expected to work; and second, that an analysis of hours worked by Groenewold showed that, except for the tax season - being a period from late February to the end of April, Groenewold's normal or average weekly hours of work was consistent with the 'standard work hours' outlined in the personnel policy.

On the question of whether Groenewold was a manager for the purposes of the *Act*, the Determination contained the following:

> Based on the information that the employer presented, it would appear that Mr. Groenewold worked as production manager for approximately 2 months. At the end of that time he asked to be relieved of some of those duties. The employer agreed and in exchange, he was assigned to assist with the review of files. In order for the employer to establish that Mr. Groenewold was a manager as defined by the Act, they would have to establish that his primary employment duties were the supervision and direction of employees. A review of the detailed time sheets kept by the employer showed that his primary employment duties were still related to his client files and the majority of time was spent on those files. As he kept daily time sheets reflecting how his time was spent and hours were billed, the employer was aware of this fact. There was evidence in these daily records that times was spent reviewing files and dealing production manager functions, but it was for a short period of time and clearly not his primary employment duties.

The Determination is not a Director/Officer Determination under Section 96 of the *Act* and contains no analysis or conclusion about whether any person is an officer or director of the employer or is responsible under Section 96 of the *Act* for the wages owed to Groenewold.

ARGUMENT AND ANALYSIS

The burden is on Purtzki Carle-Thiesson, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)).

I shall respond first to the matter of Section 96 of the *Act*. As noted above, the Determination is not a Director/Officer Determination. The Determination contains no conclusion and no analysis of actual or potential liability of a director or officer of the corporate partners of the appellant. The reference in the

Determination to potential liability of directors and officers is a general statement, neither confirming nor indicating that any liability has been imposed on any person. The question raised in this part of the appeal does no more than seek a declaration on a possibility. The Tribunal is given no authority to issue declaratory opinions on the *Act*. The Tribunal's authority over an appeal is found in Section 115, and is limited to allowing the Tribunal to confirm, cancel or vary the Determination or to refer it back to the Director. The Tribunal must also, of course, be convinced that there is some basis for doing so in the context of the Determination under appeal. No relationship to the point raised in the appeal and the Determination is present. I agree with the submission of the Director that this is not a matter that needs to be addressed at this time and dismiss this aspect of the appeal as premature.

The remainder of this appeal is substantially based on several assertions of fact, some of which contradict conclusions made in the Determination. For convenience, I shall list them as they appear in the appeal submission:

1) When Groenewold was promoted to Account Manager he agreed . . . that he would no longer be paid overtime. In place of overtime he was eligible for a bonus . . . . In addition, staff on the bonus program, such as John Groenewold, were given one extra weeks' vacation . . .

2) Groenewold was promoted . . . and was paid an increased salary to compensate him for the anticipated increased working hours.

3) As . . . Manager, there were no set hours a week . . . Groenewold was required to work . . . . [H]e had to work sufficient hours to get whatever jobs done that were required of him . . . .

4) While Groenewold was Production Manager and File Reviewer, his primary duties consisted of supervising and directing other employees . . .

5) Groenewold as an employee of the Firm . . . would only be paid [overtime] if the overtime was authorized by a Partner or other Manager . . . .

From these facts, Purtzki Carle-Thiesson argues that Groenewold was a manager for the purposes of the *Act* and not entitled to the overtime claimed. Alternatively, it is argued, if he was entitled to overtime, then under his employment agreement, his regular wages should have been calculated on actual hours worked, not on the standard hours of work found in the personnel policy. This argument challenges the finding of fact made in the Determination that the employer had confirmed the 'standard work hours' set out in the personnel policy were the hours Groenewold was expected to work. As well, it is argued that the extra week of vacation given to Groenewold when he fell into the category of 'professional' staff was in lieu of overtime and should be recognized as such in any calculation. Finally, Purtzki Carle-Thiesson argues that Groenewold was entitled only to 4% annual vacation pay and not 6% as calculated by the Director.

In reply, the Director says, in response to the above assertions and arguments:

1) Section 4 of the *Act* prohibits an agreement between an employer and an employee that contravenes the minimum requirements of the *Act*.

2) The information reviewed during the investigation indicated that Groenewold's primary duties were those of an accountant and that he spent the clear majority of his time working on client files.

3) There was no indication during the investigation that a written employment contract between Purtzki Carle-Thiesson and Groenewold existed.

4) There was no support for finding there was a Firm policy that any overtime had to be authorized by a Partner or other Manager.

5) There was no error in the finding of fact concerning confirmation by the employer of the hours Groenewold was expected to work.

6) The formula for calculating 'regular wages' for the purposes of the *Act* directs that an employee's 'normal' or 'average' hours of work be used. There is no reference in that formula for using actual hours worked, as suggested in the appeal. Groenewold's 'normal' or 'average' hours of work were used to calculate his "regular wage".

7) The information reviewed during the investigation did not indicate there was any connection between the third week of annual vacation and overtime. The documents suggested the third week of vacation was given to 'professional' staff because of their status.

8) Under the *Act*, annual vacation leave entitlement of 3 weeks would reflect a minimum annual vacation pay entitlement of 6% and unless some contrary conclusion was indicated, Groenewold was entitled to that minimum entitlement.

In his reply, Groenewold adds to the factual underpinnings of the conclusion that he was not a manager for the purposes of the *Act.* On the matter of the "regular wage" calculation, Groenewold notes the appeal submission of Purtzki Carle-Thiesson is unsupported by any affidavit or statutory declaration supporting the assertions that go contrary to the finding of fact made by the Director. Groenewold also says the position taken by Purtzki Carle-Thiesson is unsupported by an analysis of the terms of the personnel policy. Specifically, Groenewold notes that Paragraph 2 of the personnel policy, which is headed "Standard Work Hours", does not indicate it is intended to apply only to those employees without a 'professional designation' and submits that where a policy is intended to make a distinction in its application to those with a 'professional designation' and all other staff, such as paragraphs 3 and 4, it does so expressly. Not surprisingly, he agrees with the conclusion reached by the Director on these two points. Groenewold's submission also coincides with the reply of the Director on the argument that there is no evidence the extra week of vacation should be considered as being in lieu of overtime.

Groenewold says that it was not incorrect for the Director to have concluded that the agreement to give him 3 weeks annual vacation leave provides an annual vacation pay entitlement of 6% and that if Purtzki Carle-Thiesson intended for any part of the 3 weeks of vacation leave to be unpaid, that result should have been clearly set out in writing.

The final point raised in the reply filed by Groenewold expresses his own disagreement with calculations of the Director. He says the Director should have calculated overtime entitlement on the basis of the standard work hours found in the personnel policy, which, for reference, sets out the following:

2. Standard Work Hours

September and October	7.5 hours per day, 37.5 hours per week
November to April	8.0 hours per day, 40 hours per week
May to June	7.5 hours per day, 37.5 hours per week
July and August	7.0 hours per day, 35 hours per week

The problem with this submission is that it represents an appeal of the Determination which has neither been filed within the time allowed in *Act* nor in the form required for an appeal in the Rules established by the Tribunal and no reason has been provide why I should consider it at this stage. Consequently, it will not be addressed further.

Purtzki Carle-Thiesson has filed a response to the submissions of the Director and Groenewold.

As stated above, the burden on Purtzki Carle-Thiesson in this appeal is to demonstrate, from the available facts, that the Director erred in fact, in law, or in some manner of mixed fact and law. Purtzki Carle-Thiesson has failed to demonstrate any error in the Determination. The reference in Groenewold's submission to the Tribunal's decision *Horizon Fibreglass Products Ltd.*, BC EST #D444/97, is correct and quite appropriate to this appeal. The Tribunal is not simply an avenue for a re-examination of the facts underlying the Determination. The Tribunal must be persuaded that the Determination is wrong in light of the available facts and the statutory requirements. It is not for the Tribunal to second guess decisions reached by the Director and her delegates in the absence of a demonstrable error.

I have considered all of the arguments made by the parties. I will specifically comment on only a few of them.

On the question of whether Groenewold was a manager for the purposes of the *Act*, it is insufficient for Purtzki Carle-Thiesson, in the face of a conclusion made by the Director following an analysis of Groenewold's duties and time sheets, to merely contradict that conclusion without establishing any error in the underlying facts. The Determination is clear on the reasons for concluding Groenewold was not a manager. Purtzki Carle-Thiesson has not shown the Director was wrong on the facts or in their application to provisions of the *Act*.

Purtzki Carle-Thiesson has taken issue with the Director's conclusion concerning the extra week of vacation leave and with annual vacation pay rate used by the Director in calculating entitlement. Quite apart from the fact that their position is internally inconsistent, I agree with the positions taken by the Director and Groenewold, first, that the material supported a conclusion that the additional week was connected to Groenewold's status as 'professional' staff, and was not in lieu of overtime, and second, that it was a reasonable conclusion on the facts and was consistent with the minimum standards of the *Act* to have concluded that "3 weeks paid vacation per year", to which Groenewold was entitled under the personnel policy, was equivalent to 6% annual vacation pay entitlement.

Finally, Purtzki Carle-Thiesson has disputed the statement in the Determination about what was said during the investigation concerning Groenewold's hours of work. There might be some concern about this aspect of the appeal if discussion was the only 'fact' relied on by the Director when deciding Groenewold's normal or average hours of work. However, the statement attributed by the Director to the employer was also confirmed by a review of the recorded hours worked by Groenewold. The Director found his hours worked corresponded very closely to the 'standard work hours' found in Paragraph 2 of the personnel policy, except during the period described as the tax season, late February to the end of April. Purtzki Carle-Thiesson has not shown that finding was wrong. In my view that finding on its own provided sufficient justification for the conclusion reached and has not been affected by anything in the appeal.

The other decisions made by the Director are indicated by the Determination to have a basis in fact and accord with the applicable provisions of the *Act*.

This appeal must be dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 7, 2002 be confirmed in the amount of $18,236.05, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal