Employment Standards TRIBUNAL

An appeal

- by -

Emergency Health Services Commission
carrying on business as B.C. Ambulance Service
(the "Commission" or "BCAS")

- 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)

and

An application to be added as a party or intervenor

- by -

The Public Service Agency of the Government of British Columbia
(the "PSA")

TRIBUNAL MEMBER: Robert E. Groves

FILE Nos.: 2009A/052 and 2009A/073

DATE OF DECISION: December 14, 2009

DECISION

SUBMISSIONS

N. David McInnes	Counsel for Emergency Health Services Commission carrying on business as B.C. Ambulance Service
Joan M. Young	Counsel for Emergency Health Services Commission carrying on business as B.C. Ambulance Service
David S. Mulroney	Counsel for Rick Manuel
Rick Manuel	on his own behalf
Mary Walsh	on behalf of the Director of Employment Standards
Adele Adamic	Counsel for the Director of Employment Standards
Peter A. Gall, Q.C.	Counsel for the Public Service Agency of the Government of British Columbia

OVERVIEW

1. This is an appeal by the Emergency and Health Services Commission (the "Commission"), which provides ambulance services throughout British Columbia using the name BC Ambulance Service ("BCAS"). References hereafter to the "Commission" and "BCAS" will allude to the same employer.

2. The Commission appeals the decision of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated March 12, 2009 (the "Determination").

3. The Determination resulted from an investigation conducted by the Delegate following a complaint by Rick Manuel ("Manuel") that the Commission had failed to pay him wages for work performed while he was "on call".

4. The Delegate concluded that the Commission had contravened sections 17 and 58 of the *Employment Standards Act* (the "*Act*") and that it owed Manuel wages, annual vacation pay and interest in the amount of $471.39. The Delegate also imposed two administrative penalties of $500.00 relating to the Commission's failure to pay wages, and its failure to maintain proper employment records. The total found to be owed was therefore $1,471.39.

5. On April 22, 2009, following payment by the Commission of a sum by way of security, the Tribunal suspended the Determination until a decision was made on the appeal on the merits.

6. On May 22, 2009, the Public Service Agency of the Government of the Province of British Columbia ("PSA") applied to be added as a party, or as an intervenor, on the appeal.

7. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure* (the "Tribunal's Rules"), the Tribunal may hold any combination of written, electronic and oral hearings. My

review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

8. The complainant, Manuel, was employed by BCAS as a Superintendent in the Lower Mainland region from 2002 until 2005 (the "Lower Mainland Position"). In 2005, Manuel commenced employment as BCAS' Superintendent of Operations, Airevac/CCT Programs (the "Airevac Position").

9. The majority of BCAS' employees are unionized paramedics and dispatchers. As a Superintendent, Manuel was an excluded management employee, and a manager as defined in the *Employment Standards Regulation* (the "*Regulation*"). This means that any wages payable to Manuel must be calculated at his regular, or "straight time", rate of pay, as managers are excluded by the *Regulation* from enjoying the benefits of Part 4 and 5 of the *Act* relating to hours of work and overtime, and statutory holidays, respectively.

10. While there was no employment agreement, *per se*, setting out the number of hours Manuel was required to work in return for his annual salary, the Delegate determined that he was expected to work 8.75 hours per day, 4 days per week, for a total of 35 hours per week. In addition, he was required, on a rotational basis, to carry a pager for a one-week period, and to be on call after hours throughout the evening and at night, including on weekends.

11. As Manuel was but one of several Superintendents in the Lower Mainland Position, he was required to perform work while on call only occasionally. However, when he commenced the Airevac Position he discovered that the number of hours he was being required to work while on call increased significantly.

12. Manuel's complaint related to his being paid for the time he actually worked during the time he was on call in the Airevac Position. It did not include a claim for time he was on call when he was not performing work tasks, as he was not on call at a location designated by his employer. Rather, he was on call at his own residence. The definition of "work" in section 1 of the *Act* contains the provision that "[a]n employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence."

13. BCAS' position in response to the complaint was that Manuel's employment agreement required him to work all the hours necessary to perform the duties of the job, including the hours worked on call, for the salary paid. BCAS asserted that Manuel knew this when he accepted the Airevac Position, as it had been the historical practice within BCAS that Superintendents receive no additional pay for on call work.

14. While it was acknowledged that Manuel's wage statements reflected a 35 hour work week, and that his leave and benefit entitlements were based on these hours of work, BCAS argued that it was not determinative of his entitlement to additional pay for on call work.

15. Further, BCAS asserted that while its employees were not employees of the provincial government, it acts as an agent of government, and has adopted the policies of the PSA when dealing with the employment contracts of its excluded managers like Manuel. In particular, it referred to Section 12.1 of the PSA Terms and Conditions of Employment for Excluded Employees (the "PSA Policy"), which reads:

> 1. The hours of work for an employee/appointee shall normally be those of the full-time employees they supervise or with whom they work. It is understood an employee/appointee is expected to work the hours necessary to fulfill their job responsibilities, which may entail considerably more hours than

> those worked by their employees. However, greater flexibility will be afforded with respect to time off during work hours.
>
> 2. Terms and conditions of employment for leaves, allowances and benefits are calculated on the basis of a 35-hour week.

16. BCAS submitted that the "flexibility" referred to did not mean that Manuel's employment contract included a term entitling him to take time off work so as to bring his total hours worked, both regular and on call, down to 35 in a week. Any arrangements pursuant to which a manager might be granted time off, or indeed paid extra compensation, in respect of hours worked on call, or for other reasons, outside of the regular 35 hour week were, therefore, entirely discretionary, and *ad hoc*.

17. For Manuel, the fact that he had no written employment contract meant that his obligation to receive his salary in return for all hours worked, including hours worked on call, was at best unclear. Although the PSA Policy incorporated by reference into his employment contract was in written form, it was ambiguous on the key question of his entitlement to additional wages for on call work. His wage statements, on the other hand, showed his leaves, allowances, and benefits being provided to him on the basis that he was working a 35 hour week.

18. Manuel acknowledged that he might need to work some extra hours on occasion over and above his regular 35 hours per week in order to perform his job as a manager. However, he took the position that the on call work was a responsibility that was separate and distinct from his core obligation, and one for which he should be paid additional compensation.

19. The question the Delegate needed to answer, then, was whether Manuel's annual salary was intended to remunerate him for all the hours he worked, whether on call or not. If the answer was "yes", then Manuel was entitled to no further wages. If the answer was "no" in the sense that Manuel's salary was only intended to compensate him for the 35 "core hours" per week he regularly worked, the Delegate then had to decide what extra amount Manuel should be paid for the work he performed while on call. The answer to that question was complicated by the fact that neither BCAS nor Manuel had kept any records of the number of hours Manuel had actually worked on call during the period contemplated in the complaint.

20. In determining that Manuel was entitled to be paid for the hours on call when he actually worked, the Delegate made the following important finding of fact. She concluded that at no relevant time was Manuel informed that his salary was for all hours worked, without limitation. She made this finding because the evidence of the parties as to what was communicated to Manuel was contradictory, the PSA Policy was unclear, and the letter he received offering him the Airevac Position merely said this:

> I am pleased to offer you a lateral transfer to the above noted position. [...] Your appointment to this position is subject to a probationary period, the equivalent of six months full-time employment [...]. When you have completed 913 hours accumulated at straight time [...]. All other terms and conditions of employment remain the same.

21. Absent a specific, unambiguous, communication to the effect that Manuel's salary was for all hours worked, including hours worked when he was on call, the Delegate decided that she must consider the evidence "in its totality" in order to determine if that was a term of Manuel's employment contract to which the parties had agreed. The Delegate also stated that she placed more weight on the written communications of the parties, than the contradictory evidence regarding what Manuel might have been told during the hiring process.

22. One of the aspects of the factual matrix the Delegate thought relevant was the incorporation by reference of the PSA Policy into Manuel's contract of employment. The Delegate concluded that the PSA Policy did not

state, unequivocally, that Manuel's salary was to constitute payment for all hours worked. The Delegate also concluded that since the PSA Policy appeared to apply to individuals within the public sector who might, or might not, satisfy the definition of manager in the *Regulation*, the words employed should be interpreted so as to bring the employment arrangements to which they might refer in compliance with the requirements of the legislative scheme. For the Delegate, this meant that the language in the PSA Policy should not be interpreted to mandate payment of a fixed amount of salary for all hours worked, because such an interpretation, in the case of a person who was not a manager as defined in the *Regulation*, would violate the *Act*. Given that it was unlikely that the PSA Policy was intended to be read differently depending on whether the person involved was a manager for the purposes of the *Regulation*, the Delegate concluded that a reasonable interpretation of the word "flexibility" in the PSA Policy for the purposes of Manuel's contract of employment was that he would be entitled to reduce his work hours back to 35 per week if he worked while on call, and if that was not possible, he should be paid wages in lieu for his on call work.

23. Another aspect of the evidence on which the Delegate relied was the fact that Manuel's wage statements reflected a 35 hour work week, involving regular hours of work performed in the office. His salary was paid having regard to that work pattern reflected on the statements, and his leave, allowance, and benefit entitlements were calculated on that number of hours worked per week. The Delegate ascribed weight to this fact, but did not consider it to be determinative.

24. The Delegate also considered it to be important that while Manuel had been required to make himself available on call while he had been employed in the Lower Mainland Position, the number of hours he had actually been required to work while on call had been minimal, and could easily have been accommodated within the regular 35 hour work week if Manuel had chosen to engage the "flexibility" provision referred to in the PSA Policy regarding time off during regular work hours. She also pointed to the fact that BCAS had paid its managers for hours worked outside the normal 35 hour work week when those hours had become excessive.

25. The Delegate concluded that Manuel was entitled to rely on this past experience. This in turn led the Delegate to decide that there was an expectation, and therefore an agreement, that Manuel would be compensated for his hours worked on call beyond his regular 35 hour week. That compensation might take the form of time off from work, but if the number of hours worked while on call made that impractical, Manuel should be compensated with extra wages. The Delegate therefore decided that it could not reasonably have been in the contemplation of the parties that Manuel's annual salary was meant to compensate him for an unlimited number of hours of work while on call, which might never be capable of proper compensation in the form of absences from the office during his regular hours of work.

26. The evidence before the Delegate relating to the number of hours Manuel worked while on call during the period covered by the complaint was sparse. Neither BCAS nor Manuel had kept any records of Manuel's on call hours of work. BCAS produced telephone records that the Delegate concluded were the best evidence available to calculate Manuel's hours of work beyond 35 in a week. Having regard to that evidence, the Delegate determined that BCAS had failed to remunerate Manuel for 9 hours during the complaint period which, at his rate of pay measured hourly, together with vacation pay and interest, amounted to $471.39.

THE APPEAL

27. The Commission appeals the Determination, alleging that the Delegate erred in law by making findings of fact that were unsupportable having regard to the evidence before her, and failed to observe the principles of natural justice because she relied in part on information obtained independently.

28. The Commission submits that the Delegate misapplied applicable principles of general law regarding the formation of the employment contract between it and Manuel. It argues that the terms of Manuel's work were explained to him at the time of hire, that he understood them, and that it was notorious not only that managers like him were to work more than 35 hours each week, but that they would receive no extra remuneration for that work. The Commission says that the Delegate erred in law in crafting an employment agreement for Manuel containing terms he desired, but which were different from those to which he had actually agreed. It argues that Manuel's misunderstanding the terms of his contract does not mean that he ceased to be bound by them.

29. The Commission says that the Delegate erred in law in determining that Manuel's employment contract only called for 35 hours of work in return for the annual salary paid. It argues that there was insufficient evidence to support such a conclusion. Indeed, it asserts that the evidence confirms Manuel agreed to work more than 35 hours of work without additional wages. It says the Delegate erred in finding that Manuel knew he had to work more than 35 hours of work without additional compensation, but if the amount of time spent beyond 35 hours per week exceeded a *de minimis* level he was entitled to be paid for it. In any event, the Commission states, the amount of work beyond 35 hours per week proven in this case is within a *de minimis* threshold.

30. The Commission takes issue with the Delegate's interpreting the PSA Policy as if it applied to persons who were not managers for the purposes of the *Regulation* and then employing that interpretation as a basis for deciding that Manuel's contract of employment contained an obligation on the part of BCAS to compensate him for hours worked on call. The Commission says that the Delegate's embarking on this mode of analysis constitutes error because it was admitted that Manuel was a manager, and so any consideration of the application of the PSA Policy to persons who were not managers was not only immaterial, it also tainted the Delegate's construction of the PSA Policy as it applied to Manuel.

31. The Commission also submits that the Delegate's conducting independent research concerning the policies of the PSA on its website, and her receipt of email correspondence from Manuel, without providing it with an opportunity to respond to the information obtained by her in this way prior to her issuing the Determination amounts to a denial of natural justice.

32. In her submission, the Delegate states that she found no clear evidence, whether in oral or written form, demonstrating that Manuel was advised that he was to be paid a salary that was inclusive of all his hours of work. The Delegate says she found the evidence to be contradictory on this point, notwithstanding the evidence from officials within the BCAS to the effect that the requirement to work while on call without additional compensation was clear, and notorious. The Delegate then says this:

> The Delegate was required to assess the evidence provided and, upon doing so, arrived at findings of fact that were grounded in the evidentiary record. Restating one's position with respect to alleged facts does not demonstrate evidence was ignored or not duly considered, or that contrary findings could not have been derived.

33. Regarding the Commission's suggestion that the Delegate failed to observe the principles of natural justice, the Delegate asserts that the evidence she considered was the evidence submitted by the parties. She also asserts that the Director and his delegates possess broad powers when conducting investigations under the *Act*. The effect of the Director's choosing to investigate a complaint is to engage standards of procedural fairness that are somewhat different from those that are applied when the Director elects to resolve a complaint by means of a hearing. Moreover, there is no general requirement that the Director must advise parties in advance of the making of a determination as to the evidence the Director finds relevant, so as to permit the parties to make further submissions thereon.

34. Manuel submits that the Commission's appeal is at its heart an attempt to reargue the Delegate's findings of fact while characterizing those findings as rulings on points of law. He says that errors of fact, including questions relating to the sufficiency of the evidence relied upon by the Delegate when making the Determination, are not matters within the jurisdictional purview of the Tribunal.

35. As for the Delegate's discussion of the PSA Policy, Manuel submits that the Delegate found it lacked clarity, and so her comment that it might be unlawful if applied to persons who were not managers was entirely collateral, and so it constituted *obiter dicta*. Alternatively, Manuel argues that the Delegate was merely attempting to discern a lawful construction of the PSA Policy in light of a patent ambiguity.

36. Manuel argues that the Delegate's accessing the PSA website is of no moment because the parties referred to the policies of PSA in their submissions, and it was common ground that those policies applied to excluded employees, some of whom might be managers for the purposes of the *Regulation*, and some of whom might not. Therefore, it was entirely proper for the Delegate to review those policies on the PSA website during the course of her investigation; but if it was not, the fact that the PSA Policy might apply to persons who were not managers was not essential to the conclusion drawn by the Delegate in her Determination.

37. Regarding the suggestion by the Commission that the Delegate received email correspondence from Manuel which she did not disclose to the Commission pre-Determination, Manuel points out that the Commission's submission on appeal does not identify with precision what the evidence is to which objection is taken. Manuel says further that the Determination does not disclose with certainty that the Delegate relied upon any of the evidence in question.

THE APPLICATION TO INTERVENE

38. The PSA has applied to be added as a party to the appeal, or as an intervenor, with the right to lead evidence and make submissions.

39. The stated basis for this application is that the PSA provides human resources management services to government ministries and organizations, and the PSA is directly affected by the Determination because it interpreted the PSA Policy, which is applicable not only to Manuel, but also to several thousand excluded government employees.

40. The PSA wishes to lead evidence as to the meaning of the PSA Policy, and the way it is applied to excluded managers employed by the province. It says that this evidence is not in the possession of BCAS. It argues, therefore, that it is uniquely placed to make legal submissions concerning the correct interpretation of the PSA Policy, and the way the PSA Policy should interact with contract law. It expresses concern with what it regards as the "erroneous factual and legal findings" of the Delegate which, it submits, are "highly detrimental to the PSA."

41. The PSA submits that the Tribunal is the master of its own procedures, and therefore has the jurisdiction to add the PSA as an intervenor, just as other tribunals can do when they determine it is in the interests of justice to do so.

42. The Commission supports the PSA application.

43. The Director opposes the PSA application. He argues that a proceeding under the *Act* is a *lis inter partes*, and that intervenors must demonstrate not only that they have an interest in the proceeding, but that the proceedings will not be delayed unduly as a result of their participation, and that they can make a contribution

that the parties may be unable to provide. The Director asserts that BCAS, an employer separate from the PSA, is able to provide any submission that the PSA might wish to make.

44. The Director refers to section 103 of the *Act*, which sets out the sections in the *ATA* which apply to the Tribunal. The Director notes that section 33 of the *ATA* is not referred to in section 103 of the *Act*. Section 33 of the *ATA* refers to the powers of a tribunal regarding applications to intervene, and says this:

> 33 (1) The tribunal may allow a person to intervene in an application if the tribunal is satisfied that
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> (a) the person can make a valuable contribution or bring a valuable perspective to the application, and
>
> (b) the potential benefits of the intervention outweigh any prejudice to the parties caused by the intervention.
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> (2) The tribunal may limit the participation of an intervener in one or more of the following ways:
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> (a) in relation to cross examination of witnesses;
>
> (b) in relation to the right to lead evidence;
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> (c) to one or more issues raised in the application;
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> (d) to written submissions;
>
> (e) to time limited oral submissions.
>
> (3) If 2 or more applicants for intervenor status have the same or substantially similar views or expertise, the tribunal may require them to file joint submissions.

45. The Director points out that the *Act* contains no provision dealing expressly with intervenors. He acknowledges, however, that Rule 7 of the Tribunal's Rules says this:

> (1) The following persons are parties to an appeal or application for reconsideration:
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> (a) the appellant;
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> (b) the applicant;
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> (c) the respondent(s); and
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> (d) the director.
>
> (2) The tribunal may direct that any other person or group who may be affected by an appeal or application for reconsideration be added as a party, in which case the tribunal will specify the terms and conditions of their participation in the proceeding.

46. The Director says that the PSA is not Manuel's employer, and so it is not a party to this appeal. It submits further that if the legislature had intended to permit the Tribunal to add intervenors like the PSA to its proceedings it would have included a reference to section 33 of the *ATA* in section 103 of the *Act*.

47. If the PSA is permitted to intervene, the Director asserts that it should be limited to presenting arguments which engage the grounds of appeal set out in section 112 of the *Act*. In particular, the Director says that the Tribunal lacks jurisdiction to review the Delegate's findings of fact, and so the concern of the PSA regarding alleged "erroneous factual...findings" of the Delegate is misplaced.

48. Manuel also opposes the PSA application. He argues that if the Tribunal has the power to permit persons who are not parties to intervene, which he does not concede, the answer to the question whether a person

should intervene in a given case involves the exercise of discretion. In this instance, Manuel submits, the Tribunal should deny the PSA application because its interest in the *lis* rests solely on the risk that the Delegate's interpretation of language incorporated by reference into Manuel's contract of employment may be applied to identical language in the contracts of government employees that the PSA administers. Manuel asserts that this interest is insufficient to warrant the PSA's being granted intervenor status. He argues that if the PSA's interest in the outcome here is a sufficient interest for that purpose it would mean that persons would be entitled to intervene in other proceedings involving other parties where the issue at stake in the litigation is the construction of language appearing in a contract that is the same as the wording employed in a contract to which the proposed intervenor happens to be a party. Manuel submits that such a broad interpretation of what it means to possess a sufficient interest for intervenor status is untenable. There is no issue of statutory interpretation, or other public law interest at stake in such cases, and accordingly the PSA can bring no different perspective into focus which the Tribunal should consider before deciding the issues raised in the appeal.

49. Manuel also submits that the PSA should not be permitted to intervene because the PSA is not bound by the Determination, and even if it were, the comments of the Delegate regarding the PSA Policy were *obiter dicta*. He says further that evidence from the PSA is unnecessary because the PSA Policy is ambiguous on its face, the fact that it was unclear was what underlay the Delegate's analysis of the PSA Policy in the Determination, and it is irrelevant how the government applies the PSA Policy to its own employees. He also argues that permitting the PSA to prolong these proceedings through its leading of such evidence is inconsistent with the principles of efficiency and finality enshrined in the *Act*, and would, therefore, be highly prejudicial to him.

ISSUES

50. The issues presented are these:

- Should the PSA be joined as a party or permitted to intervene?
- Should the Determination be varied or cancelled, or the matter be referred back to the Director for consideration afresh because the Delegate erred in law or failed to observe the principles of natural justice?

Should the PSA be joined as a party or permitted to intervene?

51. I have noted the Director's submission that the proper conclusion to be drawn from a reading of section 103 of the *Act* and section 33 of the *ATA* is that the Tribunal has no jurisdiction to entertain an application by a non-party to be joined as a party, or to intervene. I note also that section 11 of the *ATA*, which is referred to in section 103 of the *Act*, permits the Tribunal to control its own processes and to make rules respecting practice and procedure in proceedings before it, including, in section 11(m), rules respecting the addition of parties.

52. In the circumstances, I do not feel it necessary to decide, as a matter of law, whether the Tribunal has the jurisdiction to permit the addition of parties, or intervenors, because I have decided that even if it does, the application of the PSA must be dismissed.

53. Whether, and if so on what basis, the Tribunal might permit a person to be added as a party, or as an intervenor, in appeal proceedings involves the exercise of a discretion following an examination of the circumstances presented in the specific case at hand. On occasions when the Tribunal considered the question of adding a party, or an intervenor, pre-*ATA*, it was of the opinion that the party seeking to be joined needed to demonstrate that it had a direct interest in the issues to be decided in the appeal, or that it

could assist the Tribunal to canvass a matter of sufficient general importance (see *Agro Harvesting Ltd.*, BC EST # D509/98; *Corner House*, BC EST # D254/98).

54. I am not persuaded that the PSA has shown a direct interest of the type that is required having regard to the authorities. I am also of the view that the issues raised in the Determination are not of sufficient general importance to warrant the joinder sought.

55. The conclusions the Delegate reached in the Determination were drawn from a consideration of the totality of the evidence relating to the terms of Manuels contract of employment. The PSA Policy was but one aspect of that factual matrix. An important reason why the Delegate examined other elements of Manuel's history and relationship with BCAS was that she found the wording of the PSA Policy to be unclear. That being so, the Delegate was entitled to consider the surrounding circumstances, because the words used in a contract always take their meaning from the particular context in which they appear.

56. Apart from the PSA Policy itself, the other aspects of the factual matrix influencing the Determination included the Delegate's finding that Manuel was never expressly informed that his salary was for all hours worked, the fact that Manuel's core duties required 35 regular hours of work in the office each week, his previous experience with BCAS that the number of on call hours worked would be modest and could be accommodated within his regular hours of work with time off in lieu, and the fact that BCAS had compensated managers in the past for hours worked beyond the regular 35 hours in a week.

57. It was as a result of all these factors that the Delegate decided that the word "flexibility" in the PSA Policy, as it applied to Manuel's individual circumstances, should be construed so as to imply an obligation to compensate him for the hours he worked on call. It follows, in my opinion, that the application of the PSA Policy to the specific circumstances of other persons in the government's service who are not employed by the Commission is of but marginal, if any, value to the determination of the issues on this appeal. Apart from the incorporation by reference of the PSA Policy, the other terms of their contracts of employment may be entirely different from those applicable to Manuel, and indeed from other employees of the government. If, as one might expect, the relevant employment circumstances of those other persons, taken together, are different from those experienced by Manuel, it may well be that the PSA Policy will be interpreted in an entirely different fashion should a dispute arise.

58. I am also of the view that to the extent to which the Delegate may be said to have commented regarding the manner in which the PSA Policy might be interpreted in the circumstances of an excluded government employee who was not a manager under the *Regulation*, those comments are of limited import for the purposes of deciding the PSA's application to be joined as a party, or to intervene. Those comments were *obiter dicta*. The PSA has never been a party to the *lis* between BCAS and Manuel. The Determination is not binding on it. Indeed, there is no statement by the Delegate in her Reasons for the Determination that the PSA is operating on behalf of the government in a way that violates the *Act*. Such a determination could only be made in the circumstances of a complaint by an employee of government in which the PSA is directly implicated. Whether the Determination is, or ever will be, detrimental to the PSA is entirely moot.

59. I agree with Manuel that there is no discrete issue of statutory interpretation, or other public law interest involved in this case so as to warrant the contribution of the PSA as an added party, or intervenor. The issue in this case is the Delegate's construction of the terms of the contract of employment between BCAS and Manuel. As such, the PSA's interest in the *lis* is the same as any other employer or entity providing human resources management services who might be making use of language in contracts of employment which is the same as that contained in the PSA Policy. Like them, the PSA will have read the Determination with

interest. However, I do not consider that interest to be the type of interest that is sufficient to ground a successful application to be joined as a party, or as an intervenor, in this appeal.

60. I am mindful, too, that a purpose of the *Act* identified in section 2 is that it should provide fair and efficient procedures for resolving disputes over its application and interpretation. Permitting the joinder of the PSA will increase the complexity of these proceedings, and its attendant cost. It will result in at least some delay. Since it will inject into the discussion the practices of the PSA when dealing with the employees of government it will expand the scope of the existing *lis* and to that extent, at least, take the litigation out of the hands of the BCAS and Manuel. In circumstances where, as here, the case for joinder is not strong, these factors weigh against the success of the application.

61. The application of the PSA is therefore dismissed.

Should the Determination be varied or cancelled, or the matter be referred back to the Director for consideration afresh because the Delegate erred in law or failed to observe the principles of natural justice?

62. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

63. Section 115(1) of the *Act* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

64. The Commission argues that the Delegate erred in law in making findings of fact that were unsupportable having regard to the evidence presented to her. In particular, the Commission asserts that Manuel knew, and agreed, that his salary was for all hours worked.

65. The grounds of appeal set out in section 112 of the *Act* make it clear that the Tribunal has no jurisdiction to interfere with a determination where it is challenged on the basis that a delegate made an error of fact unless that error amounts to an error of law. An error of fact that constitutes an error of law is a palpable and overriding error. It involves a finding of fact that is so unsupported by the evidentiary record that it is irrational, perverse, or inexplicable (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). The application of this test means that the Tribunal need not agree entirely, or at all, with a delegate's findings of fact in order for a determination to be confirmed. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video*, BC EST # D028/06).

66. I am not persuaded that the Delegate made errors of fact that amount to errors of law. The Delegate examined the circumstances surrounding Manuel's employment relationship with BCAS in detail, and with

care. As the Commission asserts, there was certainly evidence on the basis of which the Delegate could have concluded that the parties had agreed that Manuel's salary was for all hours worked, without limitation. The Delegate, however, accepted Manuel's evidence that no one informed him, clearly and specifically, that such terms would apply, and that he had never agreed to those terms for the Airevac Position. She found support for his position in the fact that neither the PSA Policy nor the letter Manuel received offering him the Airevac Position stated unequivocally that his salary would remunerate him for all hours worked. She also observed that Manuel's wage statements referring to a 35 hour work week, his past experience with on call hours while employed in the Lower Mainland Position, and the fact that BCAS had compensated managers in the past for hours worked in excess of 35 hours in a week did not support the position advanced by BCAS.

67. It is clear, therefore, that there was at least some evidence on which the Delegate was entitled to rely when making her findings of fact. The fact that the Delegate declined to accept some of the evidence submitted on behalf of BCAS is insufficient to establish an error of fact that amounts to an error of law, because there is no suggestion that the Delegate ignored the evidence or failed to consider the weight to be ascribed to it. It cannot be said, therefore, that the Delegate's findings of fact were irrational, perverse, or inexplicable.

68. The Commission submits that the Delegate also erred in law in considering what the proper interpretation of the PSA Policy would be if it were to be applied to persons who were not managers for the purposes of the *Regulation*, and then employing that construction to assist in establishing how it should be interpreted in Manuel's circumstances. In my opinion, the Delegate's analysis merely served to illustrate that the PSA Policy was ambiguous, because if its language was incorporated into a contract of a person who was not a manager, it could plausibly be interpreted to mean that the person was not required to accept a salary for all hours worked and would be entitled to reduce his regular work hours to account for any additional hours worked. Indeed, the Delegate was of the opinion that the language would need to be interpreted in this way in order for such a contractual arrangement to comply with the requirements of the *Act*. Having concluded that the language in the PSA Policy could reasonably bear such a construction, it was in my view open to the Delegate to decide that the language could bear the same wording for Manuel. This was so notwithstanding that the language might also be reasonably construed to mean that Manuel would receive his salary for all hours worked.

69. It was precisely because the Delegate determined that the PSA Policy language was ambiguous that she considered the other surrounding circumstances relating to Manuel's history and relationship with BCAS to inform the decision that she ultimately reached to the effect that Manuel's contract of employment did not contain a term that his salary was to be payment for all hours worked. I discern no error of law in the Delegate's examining the factual matrix within which the PSA Policy language came to be included in Manuel's contract of employment. In G. R. Hall, *Canadian Contractual Interpretation Law*, Lexis Nexis 2007, the learned author says this at page 15:

> Contractual interpretation is all about giving meaning to words in their proper context, including the surrounding circumstances in which a contract has arisen – usually referred to as the "factual matrix." Because language always draws meaning from context, the factual matrix constitutes an essential element of contractual interpretation in all cases, even when there is no ambiguity in the language.

70. And later, at page 16:

> The recognition by the courts over the past three decades of the importance of the factual matrix represents a move away from a more formalist and literalist approach to interpretation, focused on the words of a contract almost to the exclusion of all else, towards a recognition that ascertaining contractual intention can be difficult because words do not have immutable or absolute meanings. To the contrary, words often take their meaning from a multitude of contextual factors, including the nature of the relationship created by the agreement and the purpose of the agreement.

71. The Commission also challenges the Delegate's accessing the policies of the PSA on its website, and its receiving email correspondence from Manuel, without notifying the Commission and providing it with an opportunity to make supplementary submissions regarding the information she had obtained before she issued the Determination. The Commission says that this constitutes a failure to observe the principles of natural justice. I disagree.

72. It must be remembered that this case involves an investigation. The Delegate did not conduct a hearing before issuing the Determination. The content of the Delegate's obligation to proceed fairly in her investigation must be examined having regard to section 77 of the *Act*, which says this:

> 77. If an investigation is conducted, the director must make reasonable efforts to give the person under investigation an opportunity to respond.

73. It is important to note that it is "reasonable" efforts which must be made. The opportunity to respond is not characterized in absolute terms. While the common law principles of natural justice continue to inform the interpretation of this section, the Tribunal has made it clear that they must be tempered in the context of an investigation so as not to restrict, unduly, the activities of the Director in the performance of his statutory duties. In *Kyle Freney*, BC EST # D130/04, for example, the Tribunal said this:

> The Supreme Court of Canada has repeatedly stated that determining the content of the duty of fairness is a highly contextual exercise. The relevant factors are to be weighed and applied with a view to requiring public bodies to act with courtesy and common sense, in a manner commensurate with the interest at stake, but without imposing unrealistic institutional burdens on the public body...

74. This approach means that a party is not necessarily entitled to the entirety of the evidence that may have been presented to the Director. The crux of the statutory obligation is that a person under investigation has enough information to permit an informed response, not that every scintilla of information is disclosed. The question in each case is whether the party has been provided with sufficient particulars of a claim to make the opportunity to respond effective (see *Bero Investments Ltd.*, BC EST # D035/06; *Pursuit International Investigations Ltd.*, BC EST # D068/05).

75. I cannot accept that the Delegate's accessing the PSA website and her reviewing its policies regarding its excluded employees constitutes a violation of section 77 in the circumstances of this case. As I have stated earlier, the Delegate's interpreting the language of the PSA Policy as it might apply to an excluded employee of government who was not a manager was undertaken for the purpose of discerning whether there were meanings which could be ascribed to that language that were contrary to the position of BCAS that Manuel's salary was for all hours worked. That interpretive analysis was in my view permissible, whether the PSA Policy applied to all excluded employees in the government's public service, or not. That the Delegate viewed the PSA website therefore appears to me to be irrelevant.

76. The Commission has also adverted to the fact that the Delegate received email correspondence from Manuel which she did not disclose to the Commission for response prior to her issuing her Determination, and so, for this reason too, she failed to observe the principles of natural justice. The Commission has provided no details concerning the emails in question. The Delegate did refer in the Determination to emails received from Manuel. I assume that those are the emails the Commission questions. However, the Commission has provided no further submission identifying grounds on which I might base a conclusion that the Delegate's receipt of these emails and her failure to disclose them results in a failure to observe the principles of natural justice. As I have stated, it is not in all cases necessary for a delegate to make reasonable efforts to give a person under investigation an opportunity to respond that all documents and information be disclosed. In the absence of a more specific argument from the Commission, it is not apparent to me that the Delegate's

receipt of emails from Manuel has resulted in the Commission being deprived of the opportunity to respond to Manuel's complaint that section 77 requires.

ORDER

77. I order that the application of the PSA to be added as a party or as an intervenor be dismissed. Pursuant to section 115 (1)(a) of the *Act*, I order that the Determination dated March 12, 2009, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal