

An appeal

- by -

Civitas Urban Design & Planning Inc.
("Civitas")

- 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: Carol L. Roberts

FILE No.: 2003A/054

DATE OF HEARING: June 10, 2003

DATE OF DECISION: June 16, 2003

DECISION

APPEARANCES:

For Civitas Urban Design & Planning Inc	J.B. Rotstein, Barrister
On his own behalf	Mark Monterio (by teleconference)

OVERVIEW

This is an appeal by Civitas Urban Design and Planning Inc. (“Civitas”) of a Determination of a delegate of the Director of Employment Standards issued January 10, 2003.

Mark Monterio complained that he had not been paid overtime for two years. Civitas alleged that Mr. Monterio was a manager and thus not entitled to overtime pay.

Following an investigation, the delegate concluded that Mr. Monterio was not a manager, and ordered Civitas to pay Mr. Monterio compensation for vacation pay, overtime and accrued interest in the amount of \$15,484.60.

Civitas contends that the delegate failed to properly appreciate and consider the evidence, and to correctly apply the law to the facts, in arriving at that determination.

ISSUES TO BE DECIDED

Whether the delegate erred in law in

1. concluding Mr. Monterio was a manager;
2. failing to take into account 144 hours of paid time off when calculating overtime;
3. failing to take into account the terms of the employment contract; and
4. preferring Mr. Monterio’s assertions that he was entitled to overtime over that of Civitas;

Civitas also says that it has new and relevant evidence that was not considered by the delegate.

FACTS

The facts are not in dispute. Although the delegate set out most of the essential facts in the Determination, I heard additional evidence from Greg Chamberlain and Cherish Armstrong, two Civitas employees, and Civitas’ President and owner, Joe Hruda.

Civitas is a company specializing in the provision of urban planning and design to local and international clients. Mr. Monterio, who has a bachelor and masters degree in architecture, worked for Civitas from June 1, 1995 to December 20, 2001 as an urban designer.

Civitas has what was described as a flat organizational structure. All of the approximately 10 professional/technical and support staff report directly to Mr. Hruda.

Civitas employees work either independently or as a team on each of the company's projects, depending on the nature of the project. Mr. Chamberlain, is an urban planner who worked at Civitas with Mr. Montiero. He testified that he had greater administrative responsibilities than Mr. Montiero, and was responsible for determining what human resources were required for any particular project.

All of Civitas' projects were either fixed fee contracts, in which a specified amount was paid regardless of the amount of effort and time spent on it, or an hourly billed contract. Mr. Hruda's evidence was that Mr. Monteiro worked primarily on projects for which budgets were set by clients. According to Mr. Hruda, Mr. Montiero "was very proficient in how he scheduled work, and ensured budgets were respected as he had been integral to determining them."

Mr. Chamberlain's evidence about his duties and reporting relationship differed little from Mr. Monterio's duties as described by the delegate, which were not disputed. Those duties included promotional work, proposal writing, project management, team leadership, project budget control, supervision of staff who assisted him on projects, and client liaison.

Ms. Armstrong, the secretary/receptionist, testified that she was responsible for assisting "anyone who needed it" typing reports, editing texts, photocopying and other work of a secretarial nature. In particular, she testified that she assisted Mr. Montiero with large projects, doing report layout, graphic scanning and editing texts for him. She testified that she performed this work for other employees in addition to Mr. Montiero. She also testified that all reports went through Mr. Hruda before they were issued.

Mr. Montiero spent several weeks at a time away from the Vancouver office in charge of international projects. During those times, he had significant autonomy and the ability to make decisions affecting the project independently of direction from Mr. Hruda.

On November 20, 1997, all of Civitas staff, including Mr. Montiero, received a memorandum from Mr. Hruda stating that all overtime hours were to be approved in advance. A June 15, 1999 memo to "all", from "management", also specified that "All overtime on any project must be approved by Joe in advance". All staff were asked to initial the document. Mr. Montiero's initials, along with those of 7 other employees, were noted on the bottom of the memo.

Mr. Monterio was paid \$48,000 per year from 1995 to November 27, 1997, and an hourly wage from November 27, 1997 to June 1, 1999. Following discussions about Mr. Monteiro's interest in pursuing a career in urban design, Civitas and Mr. Monterio entered into an employment contract on June 1, 1999. The agreement identified Mr. Montiero's position and duties, and contained the following provision:

This agreement constitutes the entire agreement between the parties to this agreement and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, of the parties and there are no warranties, representations or other agreements between the parties except as expressed herein.

Other pertinent clauses read as follows:

4. In consideration of your performance of the obligations contained in this agreement CIVITAS will

- (1) pay to Montiero the fixed remuneration of \$55,000 per annum;

...

5. Montiero is employed on a full time basis for CIVITAS and it is understood that the hours of work involved will vary and be irregular and are those hours required to meet the objectives of the employment under the direction of the President.

Mr. Hruda testified that Mr. Montiero's salary was a 15% increase over his previous remuneration to reflect his increased responsibilities for such things as promotional work, proposal writing and project management.

Mr. Montiero testified that the parties also agreed that, rather than being paid overtime wages, he was to take time off in lieu. Mr. Hruda testified that he agreed that Mr. Monteiro could take time off in lieu of overtime work. Mr. Montiero contended that he could not take all the accrued overtime hours off because he was either called at home at night to discuss projects, or called back to the office. In his view, this was primarily because he assumed many of the duties of two senior employees who had left and not replaced.

Mr. Chamberlain testified that he also had a fixed salary contract based on a 37 hour week, and that he did not get written permission to work overtime. Mr. Chamberlain said that he kept a record of his time and tried to take time off in lieu of overtime, but that he didn't always get the benefit of that agreement since he was too busy to take the time off.

The evidence is that Mr. Hruda travelled extensively. When he was away from the office, the employees would report to him regularly by telephone, or upon his return. Mr. Chamberlain testified that while some design decisions were made without consulting Mr. Hruda, none of Civitas' "deliverables", or final design drawings and reports that accompany them (the completed project), were sent to a client without Mr. Hruda's review and approval.

During the last six months of Mr. Monterio's employment, Civitas experienced financial difficulties. Mr. Hruda, Mr. Chamberlain and Mr. Montiero developed a business plan to present to various agencies for financial assistance.

Civitas entered into a work share agreement with Revenue Canada as part of a business recovery plan for a two month period at the end of 2001. Mr. Hruda wrote as follows in reference to the Revenue Canada work share agreement:

... Mr. Montiero was informed that we in fact did not have sufficient level of billings to meet his salary during a period which covered about six months but that the firm was keeping him employed from a retained earning fund from past years which enabled us to survive this period without layoffs.... This gesture was a reflection of the firms acknowledgement of senior professionals special role in the company and the company's expression of appreciation for their past efforts. [reproduced as written](July 2, 2002 letter to delegate)

Mr. Hruda did not dispute that, according to the terms of the Revenue Canada agreement, management staff were not to share in the program.

The delegate concluded that, while Mr. Monterio did have some supervisory duties, there was no evidence that his primary duties consisted of supervising and directing other employees. She also

concluded that there was no evidence Mr. Monterio had any power of independent action in making decisions affecting the business.

The delegate found that, even though the employment contract indicated that Mr. Monterio was to take time off in lieu of overtime work, and that he was expected to work irregular hours for a fixed salary, there “did not appear to be an agreement to pay overtime pay for overtime hours as per the Act.” She concluded that Mr. Monterio did work overtime, but was not paid overtime wages.

ARGUMENT

Civitas argues that the delegate failed to fully consider Civitas’ operations and hierarchy. It contends that the delegate’s understanding of the nature of roles and tasks with an urban design company, and the activities Mr. Montiero undertook was flawed. It argues that Mr. Montiero was a manager or employed in an “executive capacity” as those are defined in section 1 of the Employment Standards Regulations.

Civitas contends that, if Mr. Montiero was not a manager, the delegate failed to appreciate the significance of a fixed term contract which was designed to compensate him for the irregular hours he was expected to work. It argues that Mr. Montiero never asked for overtime during the course of his employment.

Civitas further submits that the delegate failed to properly consider the effect of memos prohibiting Mr. Montiero from working overtime unless written permission was given. It says the delegate preferred Mr. Montiero’s evidence that overtime was authorized without hearing from Mr. Hruda, contrary to the principles of natural justice. It says that Mr. Monterio was not given that authorization. It says that although Mr. Montiero’s time sheets recorded his hours of work, that did not indicate an agreement to pay overtime without specific authorization to do so.

Civitas says that Mr. Monterio took 144 hours of paid personal time off in lieu of overtime over a two year period. Civitas argues that, simply because Mr. Monterio submitted time sheets in which he recorded his hours of work did not indicate an agreement to pay overtime without specific authority to do so.

Finally, Civitas provided a November 27, 1997 letter from Civitas to Mr. Montiero showing that Mr. Montiero was paid on an hourly basis in 1997, which was changed to an annual salary in June 1999. Civitas argued that the amount and mode of compensation demonstrated the significance of the change in Mr. Montiero’s role, which included the day to day management of the company.

The delegate contends that the Determination clearly sets out the reasons for the finding that Mr. Montiero was a manager and his entitlement to overtime. She contends that, by agreeing to Mr. Montiero’s time sheets, Civitas agreed that Mr. Montiero worked overtime, for which he was not paid.

She also says that she had no information or evidence indicating that Mr. Montiero had 144 hours of paid time off.

Mr. Montiero also submitted that the determination should be upheld.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- a) the director erred in law
- b) the director failed to observe the principles of natural justice in making the determination;
or
- c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that the Determination is incorrect rests with an Appellant.

Having reviewed the submissions of the parties, I am unable to find that the delegate erred in concluding that Mr. Montiero was not a manger.

Section 34(1)(f) of the *Regulation* provides that part 4 of the *Act* (that part relating to overtime wages) does not apply to a manager.

Manager is defined in section 1 of the Regulations as

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

The leading Tribunal cases on the issue of whether an employee is a manager are *429485 B.C. Limited, operating as Amelia Street Bistro* BC EST # D479/97, and *Northland Properties Ltd.* BC EST # D423/98. Civitas relied on *Sunshine Coast Publishers Inc.* BC EST # D142/98, and *Slesse Plumbing Ltd.* BC EST # D368/02, both of which refer to *Amelia Street*.

In *Amelia Street*, the Tribunal said that a conclusion as to whether a person falls within the scope of the managerial exclusion

...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 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 the perception of some third party.

The true test is the actual authority exercised by the employee, not the authority that might be set out in a position description.

The burden of establishing that a person is excluded from the protection of the *Act*, or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion. (*Northlands*)

I accept that Mr. Montiero had a significant degree of decision making autonomy within his area of expertise. He managed projects, wrote and supervised the production of design reports, and, from time to time, directed the work of secretaries, computer technicians and other professional consultants. However, his work directing other staff was incidental to his project management responsibilities. By Civitas' own submission, the only defined reporting relationships were those of all employees to Mr. Hruda. There is no evidence Mr. Montiero had any human resource duties, or any authority to hire, discipline or fire an employee, determine what hours they were to work, what salary they were paid, or what benefits they received. I am unable to find that Mr. Montiero's primary employment duties consisted of supervising and directing other employees.

Civitas conceded that, because it was a unique organization, Mr. Montiero's primary duties were in directing projects, resources and clientele rather than people, and that most of his contractual duties were of an "executive" nature.

In *Zellers Inc.* (BC EST # D429/02), the Tribunal noted that decisions considering section 1(b) of the *Regulation* conclude that the

concept of a person employed in an executive capacity connotes a person with real and recognizable authority relating to the conduct of the business... In order to be employed in an executive capacity, the person must have "duties in such capacity relate to active participation in control, supervision and management of business". This typically includes the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business.

There is nothing in the cases relied on by Civitas which contradict this conclusion.

I find that, like the employee in *Slesse Plumbing* who made job site decisions necessary for the efficient and proper conduct of work on a particular project, Mr. Montiero's responsibilities did not include power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business. (my emphasis).

There is no evidence the business decisions made by Mr. Hruda when the company was in financial difficulty were made with any input from Mr. Montiero. For example, there is no evidence that Mr. Montiero participated in deciding whether the retained earning fund would be accessed or whether employees should be laid off. Mr. Hruda's July 2, 2002 letter to the delegate suggests that these decisions were made by Mr. Hruda alone, as "the company".

While the evidence is that Mr. Montiero participated in developing a business plan in an attempt to ensure Civitas' economic survival, that, in and of itself, does not suggest any power to make decisions about the conduct of the business.

Mr. Hruda issued both overtime memos without any input from Mr. Montiero. Notably, the second memo was issued June 15, 1999, 15 days after Mr. Montiero's employment contract was presented to him. In my view, had Civitas considered Mr. Montiero a manager at that time, there would have been no need to include him in the distribution list because, as a manager, he would not have been entitled to overtime.

Furthermore, while I accept that Mr. Montiero was responsible for developing work plans for fixed fee agreements, there is no evidence he had any responsibility for developing an overall budget for Civitas' operations, or that he participated in any other key corporate decisions.

In summary, while I accept that Mr. Montiero had significant latitude in managing particular projects, and while I also accept that the company's business was project oriented, there is no evidence that Mr. Montiero actively participated in the control, supervision or management of Civitas.

I find that Civitas has failed to show that the delegate erred in concluding that Mr. Montiero fell within the definition of manager in the *Regulation*.

Having found that Mr. Montiero was not a manager, the delegate concluded that there was no agreement to pay Mr. Montiero for overtime. I am unable to find that the delegate erred in concluding that the contract of employment was contrary to section 4 of the *Act*. Parties cannot agree to contract out of the overtime provisions of the *Act*. Thus, even though Mr. Montiero signed the employment agreement of June 1, 1999, he cannot waive whatever rights to overtime he may have under the *Act* as a result of so doing.

Notwithstanding Mr. Hruda's direction to staff not to work overtime without his written approval, Civitas had Mr. Montiero's hours of work which demonstrated his overtime hours.

I find that, notwithstanding the terms of the agreement and Civitas' position, the parties agreed that Mr. Montiero could take time off in lieu of overtime hours. I arrive at this finding based on the evidence of Mr. Montiero and Mr. Hruda, supported by the evidence of Mr. Chamberlain. Mr. Chamberlain's evidence that he did not always obtain Mr. Hruda's written permission to work overtime parallels that of Mr. Montiero.

I accept Civitas' evidence that Mr. Montiero took 147 hours of personal time which has not been considered in the delegate's calculation of overtime. I have reviewed Mr. Montiero's personal time records, which were provided to the delegate, indicating his hours of work, and the days he took in lieu of his overtime hours. I find that the delegate erred in failing to calculate that time off in arriving at the amount owed to Mr. Montiero, and refer this issue back for recalculation.

ORDER

I Order, pursuant to Section of the *Act*, that the determination, dated January 10, 2003, be referred back to the delegate, on an expedited basis, to calculate the overtime wages owed to Mr. Montiero.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal