

An appeal

- by -

Ensemble Systems Inc.
("Ensemble")

- 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.: 2003A/132

DATE OF DECISION: July 22, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Ensemble Systems Inc. (“Ensemble”) of a Determination that was issued on April 28, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Ensemble had contravened Part 4, Section 40 and Part 8, Section 63 of the *Act* in respect of the employment of Mircea Magureanu (“Magureanu”) and ordered Ensemble to cease contravening and to comply with the *Act* and to pay an amount of \$1,797.23.

Ensemble says the Director erred in law in making the Determination and wishes to have it varied by the amount included as overtime wages.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal is whether the Director erred in finding Magureanu was entitled to overtime wages.

FACTS

Ensemble operates a software company. Magureanu was employed as a software engineer from May 1, 2000 to August 1, 2002 at an annual salary of \$40,000.00.

The Director concluded that Magureanu had been terminated without just cause and without notice. That finding is not appealed. The Director concluded Magureanu was entitled to compensation for length of service in the amount of \$1,538.46. That calculation is not appealed.

Payroll records submitted by Ensemble, which were preferred over a record of overtime hours submitted by Magureanu, established that the complainant had worked a total of 14 hours overtime, on February 10, February 17 and March 10, 2002, during the six months preceding the termination of employment.

The Determination was issued following a Director’s hearing. There is no analysis in the Determination about whether Magureanu was a “high technology professional”, as defined in Section 37.8 of the *Employment Standards Regulation* (the “*Regulation*”). It does not appear that issue was raised.

ARGUMENT AND ANALYSIS

The burden in this appeal to show an error in the Determination is on Ensemble. In the circumstances that burden requires them to show that Magureanu was a “high technology professional”, as defined in the *Regulation*, when he worked the overtime hours that were included in the Determination.

The Director has made no submission on the substantive issue raised in the appeal. A record has been provided, which includes an agreed statement of facts and documents that were entered with the agreed statement of facts. Ensemble has provided no additional evidence with the appeal.

Magureanu has filed a response to the appeal and argues that Section 37.8 of the *Regulation* was not in effect when the overtime was worked (February and March 2002). He is not quite correct about that. Section 37.8 of the *Regulation* was enacted in early 1999 and was in effect at the time Magureanu worked the overtime hours that were included in the Determination. However, at that time, the definition of “high technology professional” was different than what it presently is. Magureanu is correct in stating the existing definition does not have retroactive or retrospective application. Accordingly, whether he was a “high technology professional” in February and March 2002 must be decided on the definition which was in effect at that time.

At the relevant time, the definition of “high technology professional” in Section 37.8 of the *Regulation* read as follows:

“high technology professional” means a person who

- (a) is a computer systems analyst, manufacturing engineer, material engineer, Internet development professional, computer programmer, computer science professional, multimedia professional, computer animator, software engineer, scientific technician, scientific technologist, software developer, software tester, applied biosciences professional, quality control professional, technology sales professional (other than retail sales clerk), electronics engineer or any similarly skilled worker,*
- (b) in addition to a regular wage, receives a stock options or other performance based compensation package set out in a written contract of employment, and*
- (c) has one or more of the following qualifications:*
 - (i) a baccalaureate or licenciature degree;*
 - (ii) a related post-secondary diploma or post-secondary certificate;*
 - (iii) equivalent related work experience.*

The above definition is exclusive and the three elements to the definition are conjunctive, not disjunctive. This means a person was not brought within the definition unless he or she was employed in a capacity identified in paragraph (a), in addition to a regular wage, received stock options or other performance based compensation package set out in a written contract of employment and had one or more of the qualifications listed in paragraph (c).

Neither the material in the file nor the appeal indicates that Magureanu received stock options or other performance based compensation in addition to a regular wage. If he did not receive stock options or other performance related compensation in addition to his regular wage, one of the elements of the definition was absent and he could not have been a “high technology professional” for the purposes of the *Act*. If he did receive stock options or other performance based compensation in addition to his regular wage, it was Ensemble’s responsibility to bring that information to the Director at the Director’s hearing and to the Tribunal in this appeal. The failure to provide the Director with that information (if it existed) justified a conclusion that Magureanu was entitled to overtime wages and, by inference, was not a “high technology professional”. The failure to provide to the Tribunal some evidence that the Director was wrong in that conclusion justifies a dismissal of this appeal because Ensemble has not met its burden.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 28, 2003 be confirmed in the amount of \$1,797.23, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal