Employment Standards TRIBUNAL

An appeal

- by -

Island Pastoral Services Association
("Employer")

- 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: Mark Thompson

FILE No.: 2002/112

DATE OF DECISION: July 15, 2002

DECISION

OVERVIEW

This is an appeal by Island Pastoral Services Association (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by a delegate of the Director of Employment Standards on February 15, 2002. The Determination found that the Employer owed Carole Brookfield ("Brookfield") a total of $6,365.96 for overtime wages, vacation pay for regular earnings and overtime hours worked, plus interest. The Employer appealed the Determination on the grounds that Brookfield was a manager under the *Act* and thus not entitled to overtime wages. In addition, the Employer had exceeded the requirements of the *Act* in a number of aspects of the employment relationship. This decision was based on written submissions from Brookfield, the Employer, and the Director's delegate.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether Brookfield was entitled to overtime pay and associated vacation pay under the *Act*.

FACTS

Brookfield was the operations manager (or the office manager) for the Employer in Victoria, commencing January 1998. Initially, she was hired as a part-time office assistant, but the position was converted to full time in the fall of 1998, at an annual salary of $32,000. In support of its appeal, the Employer submitted a letter dated January 29, 1999 offering her the position of operations manager who would be responsible for the administrative aspects of the organization's work. She was required to have an automobile available and to provide "home based office facilities." The letter provided for 60 days notice of termination.

Brookfield's primary duties consisted of organizing fund-raising events for the Employer, which provides counseling services in the Victoria area. These duties required her to work outside of normal office hours, i.e., at night and on weekends. Brookfield produced notations of hours worked that she made contemporaneously on calendars. The Employer had no records of her hours worked, apparently in the belief that she was a manager under Article 34 of the *Employment Standards Regulation* (the "*Regulation*"). According to the Determination, the Employer acknowledged that she did not meet the definition of a manager under the Regulation during the course of her investigation. Both the Employer and Brookfield agreed that she occasionally took days off with pay to compensate her for overtime worked. The Director's delegate accepted Brookfield's records of the hours she worked, and the Employer did not present evidence at any point in these proceedings to contradict her.

The Employer terminated Brookfield on April 18, 2001. The Employer's board of directors notified her that the fund raising efforts in which she had participated had not produced enough income to justify continuing her position in late January 2001. Brookfield then told the Employer that her physician had advised her to take stress leave. She had accrued sick leave and remained on pay status until March 9, 2001. In February 2001, she went to New Zealand on vacation. When she returned from leave, after a

period of unpaid leave in New Zealand, she received 60 days' notice of termination. Although she did not work for the Employer during that time, she received full pay until the date of her termination.

The Determination found that Brookfield had not received overtime pay in 2000 and 2001, was entitled to vacation pay on her 2001 earnings and vacation pay for her overtime. With interest the Employer owed Brookfield $6,635.96.

During the investigation, the Employer argued that Brookfield had received compensation, including sick leave, an RRSP contribution and fringe benefits, normally reserved for managers. An Employer policy statement dated January 1983 provided for these benefits.. In addition, she had benefited from a paid notice period prior to her termination. The Director's delegate accepted Brookfield's record of her hours worked, including time off in lieu of overtime and concluded that she was not a manager under the Regulation. Therefore, Brookfield was entitled to vacation pay, overtime and associated vacations pay.

In its appeal, the Employer essentially reiterated its position that Brookfield's total compensation had exceeded the Act's requirements. In addition, she had produced records of her hours worked for only 5 of the 24 months of her employment, the busiest months for her fund raising efforts. The appeal further stated that Brookfield was a manager, with "executive authority, responsibilities and benefits." It further argued that she had not raised the issue of overtime pay until she filed her complaint. Had the Employer known that Brookfield was calculating her overtime, it would have required an accounting for her time.

After the appeal was filed, both parties submitted lengthy statements concerning Brookfield's performance. The Tribunal received some of these documents after the deadline for submissions. After reviewing the submissions, I find that they were not relevant to the decision in this case. Moreover, even if they had been relevant, to accept additional submissions after the Tribunal's deadline would undermine its orderly decision process.

ANALYSIS

Section 34(f) of the *Regulation* excludes a manager from Part 4 of the *Act*. Part 4 of the *Act* deals with hours of work and overtime. The *Regulation* defines a "manager" as follows:

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

The Employer presented no evidence that Brookfield was a manager as defined in the Regulation. She was the only full-time employee of the Employer during the period in question, so there was no question of her supervising other employees. The organization is small, and she performed administrative functions, not those of an executive. The definition of a manager flows from the duties of the incumbent, not the structure of her compensation. The Employer may have assumed that Brookfield's duties exempted her from the requirements of the *Act*. In several respects, Brookfield's compensation far exceeded the minima of the *Act*. However, Brookfield's position was a relatively junior one, and the Employer was obligated to inform itself of the Act's provisions before engaging her or any other employee. Evidence provided by the Director's delegate indicated that the Employer had employed persons as early as 1983. Brookfield met the requirements of the *Act* in filing her complaint. She was not obligated to raise her overtime entitlement with the Employer.

Section 4 of the Act stated:

> The requirements of this *Act* op the regulations are minimum requirements, and an agreement to waive any of these requirements is of no effect, subject to sections 43, 49, 61 and 69.

The four sections mentioned in Section 4 all referred to collective agreements and were not relevant to this case.

No evidence of any agreement between the Employer and Brookfield to waive any provision of the *Act* was introduced. In particular, the letter offering Brookfield employment did not mention hours of work. The Determination accepted Brookfield's evidence that she had taken time off as partial compensation for her overtime work. The Employer believed that Brookfield had made an agreement to waive the hours of work standards in the *Act*, but she obviously disagreed. Even had such an agreement existed, Section 4 of the *Act* would have nullified it.

ORDER

For these reasons, the Determination of February 15, 2002 is confirmed, pursuant to Section 115 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal