

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

G. A. Borstad Associates Ltd
("Borstad")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Carol Roberts

FILE NO.: 96/533

DATE OF DECISION: December 9, 1996

DECISION

This appeal was by way of written submissions by Gary Borstad for the Appellant.

OVERVIEW

This is an appeal by G. A. Borstad Associates Ltd. ("Borstad"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued on August 20, 1996 (Determination #003742), and varied on September 6, 1996. The Director found that the employer had contravened Section 17(1) of the *Employment Standards Act* in failing to pay wages within a specified time period, Section 40(1) in not paying overtime wages for employees not on a flexible work schedule, and Section 58(1) in not paying vacation pay. The Director found no contravention of Section 63(1) and determined that no further action would be taken under Section 76(2). The Director ordered that Borstad pay \$10,5917.25 (as varied) to the Director of Employment Standards.

ISSUES

Several issues were raised on appeal. The first was whether Borstad was excluded from hours of work and overtime requirements. The second is whether the *Employment Standards Act* has jurisdiction over work not performed in BC. The final issue was whether an employee was excluded from hours of work and overtime requirements. Borstad also alleged that calculation errors were made in two of the determinations.

Borstad seeks to have the determinations cancelled.

FACTS

The Determination arose out of a number of complaints filed by employees of Borstad, which led to a complete audit of the company's payroll records. Following the investigation, the Director made several determinations which are the subject of the appeal. I have set out each determination separately.

Exclusion from Part 4 of the Act

The Director determined that Borstad was not exempt from Part 4 of the *Act* pursuant to the provisions of subparagraph 34(1)(b)(v) of the Regulations, which exclude persons employed in geophysical surveying while exploring for minerals other than oil or gas, from the hours of work and overtime section in the *Act*.

The Director found that although the work performed by the employees could fall within the definition of geophysics, as Borstad was not exploring for minerals, the company was not exempt from the requirements of Part 4.

Work Performed Outside BC

The Director determined that the time spent by employees in work performed for Borstad outside of the Province of BC was covered under the Act.

The Director's findings, which were not disputed by Borstad, were that the business office and work location of each employee was in Sidney, BC. He found that although most of the work was performed at that location, some of the field work was performed outside the province.

The Director compared the amount of time spent within the province to the time spent outside the province and found that the amount of time spent outside the province was not significant. Borstad agreed that the total amount of time spent outside the province was approximately 20%.

Finally, the Director considered the purposes of the Act, specifically, Section 2(a) to ensure wage protection for employees of a BC company. In arriving at his determination, he concluded that the objectives of the Act would be frustrated if employees were forced to file claims in each of those jurisdictions.

Allen and MacLeod

The Director also issued separate determinations for six individual employees (as varied), two of which were appealed.

Blair Allen

Blair Allen worked as a systems analyst for Borstad from June 1, 1993 to July 21, 1995. Scott Allen worked as an operator/analyst from May 11, 1994 to August 18, 1995. The Director reviewed the payroll records for each employee and determined that overtime wages were owed to both employees. Borstad alleges a calculation error for these determinations.

Wes MacLeod

Wes MacLeod ("MacLeod") was hired by Borstad in March 1995 as a scientist. His employment was terminated on November 20, 1995. The Director determined that MacLeod was entitled to overtime wages on the basis that he was an employee. The Director found that MacLeod did not supervise employees, did not have authority to hire and fire, did not authorize overtime wages, and did not have authority to sign company cheques. Before making his determination, the Director reviewed the Record of Employment (ROE) and spoke with other employees regarding MacLeods' supervisory responsibilities in arriving at his determination.

ARGUMENT

I have set out the arguments made by Borstad in respect of each of the separate determinations.

Exclusion from Part of the Act

Mr. Borstad claims that the company does in fact use geophysical surveying while exploring for minerals.

Mr. Borstad submitted documentation which demonstrated that the company has been involved in several remote sensing activities related to mineral exploration, including a project for FMC Gold Inc. in 1991, a sand and gravel mapping project around the island of Mauritius, and recent activities using short wave infra-red remote sensing to explore for gold, copper and other deposits on behalf of several mining companies.

On the basis of this evidence, Mr. Borstad contends that the company is exempt from the provisions of Part 4 of the *Act*.

Work Performed Outside BC

Mr. Borstad argues that the Director's determination in finding that work performed outside British Columbia is covered under the *Act* is in error. Although Borstad concedes that approximately 20% of the work performed is outside BC, approximately 80% of the overtime hours are worked outside BC Mr. Borstad argues that payment of overtime wages in compliance with BC legislation would adversely affect the company's revenues.

Borstad also notes that the wording of Section 8 of the Workers Compensation Act specifically refers to work outside the province. He suggests that because the Employment Standards Act does not make a similar distinction, work conducted outside the province is not covered under the provisions of the *Act*.

Allen and MacLeod

Borstad contends that the calculations should have been based on the final six months of employment, not on the previous two years. Mr. Borstad argued that the employment of both employees ended several months prior to the new *Act* coming into effect, and argues that it is not fair or reasonable that the complaints be dealt with under the new *Act* solely on the basis that they were not filed until the new *Act* was in place.

Borstad noted that the new *Act* did not come into effect until November 1, 1995, several months after each of the employees had ceased to work for the company. He argued therefore, that the calculation of overtime wages should fall under the provisions of the previous *Act*, which would limit the amount payable to six months.

MacLeod

Borstad also argued that employee MacLeod is exempt from hours of work and overtime requirements on the grounds that he was a manager.

Mr. Borstad contends that MacLeod supervised five projects and managed five others. Part of his responsibility in managing those projects included establishing budgets, supervising staff to ensure that projects were completed on budget, writing reports, and client liaison. Borstad agrees that MacLeod did not have authority to hire and fire, but argued that he had significant input into those decisions. Borstad also contends that MacLeod identified himself as a manager and signed contracts on the company's behalf.

Borstad further alleges that the only employees contacted by the Director on the issue of MacLeod's responsibilities were former, as opposed to current, employees.

Borstad seeks to have the Determination cancelled.

ANALYSIS

I have reviewed the written submission from Mr. Borstad and the documents submitted by him in support of the appeal, the Determination and submissions from the individual employees in arriving at my decision.

I shall address each of the grounds separately.

Exclusion from Part 4 of the Act

Part 4 of the *Act* sets out the requirements for hours of work and overtime wages. Section 35 provides, in essence, that an employer must pay overtime wages in accordance with section 40 if an employee works over 8 hours a day or 40 hours a week.

Section 40(1) sets out the overtime wages for employees not on a flexible work schedule.

Section 34 of the *Employment Standards Act Regulation* provides that Part 4 does not apply to

- (b) a person, ... employed in any of the following activities while exploring for minerals other than oil or gas
 - ...
 - (iii) geological mapping
 - ...
 - (v) geophysical surveying or manual stripping.

As indicated in company promotional literature, Borstad is a company specialising in "research, development and application of remote sensing technology for fisheries and oceanographic use." It offers "...a full range of airborne and satellite services including data acquisition, analysis, reporting, mapping and training..." Further, the literature indicates that Borstad is "...one of a very small group of international companies with expertise in the new area of 'imaging spectroscopy',...This sensor is ideally suited for small scale or repetitive mapping and monitoring projects...and for research projects involving algorithm development over both water and land. "

The company is primarily involved in the application of remote sensing instruments and techniques in oceanographic, and fisheries studies. It also uses a Compact Airborne Spectrographic Imager (CASI) for mapping and monitoring services. Although I accept that it has also conducted geophysical surveying for locating sand and mineral deposits, I find that the company is not in the business of "exploring for minerals" as required by the *Act*.

The evidence supports the contention that Borstad's sensor technologies, specifically the full spectrum imager, is used by companies involved in the business of mineral exploration. However, even though Borstad's technology may have been used by mining companies in various parts of the world to assist them in identifying mineral deposits, it does not change the primary character of the work of Borstad Associates. The use by those mining companies of Borstad's remote sensing expertise does not transform Borstad into a company 'involved in the business of mineral exploration'. Its primary business is remote sensing techniques, mainly in oceanographic application.

Even if I am incorrect in determining that Borstad is not involved in the business of mineral exploration, I am unable to conclude that Borstad's activities are considered to be geological mapping or geophysical surveying.

The terms 'geophysical' and 'geological' are not defined in either the *Regulations* or the *Act*. Although the Director conceded that Webster's Collegiate Dictionary's definition of geophysics could include the type of work performed by Borstad, I disagree. Several factors are relevant to the consideration of whether the activities performed by Borstad employees fall within these definitions.

At the relevant times, no geologists, geophysicists or physical geographers were employed by Borstad. None of the staff or management were members of the Society of Exploration Geophysicists. All of the major projects conducted from 1983 to 1994 indicate the use of remote sensing in oceanographic and fisheries studies, not the earth sciences.

I am unable to find that the Director's determination is in error and deny the appeal in this respect.

Work Performed Outside BC

I find that the work of Borstad's employees, regardless of where that work was performed, is protected by the *Act*.

Section 2 (a) of the *Act* provides that one of the purposes of the *Act* is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment.

Section 3 provides that the *Act* applies to all employees, other than those excluded by regulation, regardless of the number of hours worked.

Borstad's employees were not excluded from the application of *Act* by *Regulation*.

Borstad is a provincially registered company with a registered office in Victoria. The permanent home of each of the employees is in BC. The work performed by those employees occurs primarily in British Columbia.

From time to time, the employees perform work on behalf of, and for the benefit of Borstad, in locations other than British Columbia. However, there was no dispute to the finding that approximately 20% of the total time was spent outside the province. All of the work outside the province involved mapping techniques using a CASI from the air. Once those images were captured, the employees returned to BC to analyze and classify the data.

Section 8 of the *Worker's Compensation Act* provides compensation for workers injured outside the province, where the place of residence of the employer is in BC, where the residence and usual place of employment of the worker is in the province, and the employment is such that the worker is required to work outside the province. This section does not assist Mr. Borstad in his claim that the *Employment Standards Act* should not apply to the company's employees.

Allen and MacLeod

Section 74 of the Act, which came into force on November 1, 1995, provides that complaints in respect of wages must be delivered within six months of the last day of employment.

Allen

Scott Allen's last date of employment was August 18, 1995. His complaint was filed January 8, 1996. Blair Allen's last date of employment was July 21, 1995. His complaint was filed November 23, 1995. Both complaints were filed within the six month time period.

Section 128 (3) of the Act (the transition provision) states that "If, before the repeal of the former Act, no decision was made by the director, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act."

As both complaints were treated as if they were filed under the new Act, I deny the appeal.

MacLeod

Borstad contends that MacLeod was a manager and was exempt from the overtime provisions of the Act.

Mr. Borstad claims that MacLeod was primarily responsible for project management and also spent time writing proposals and searching out new work. Mr. Borstad claims that MacLeod was responsible for the 'technical management' of the company for approximately 11 weeks, and signed a contract on the company's behalf, which he argues are indicators of MacLeod's position as a manager.

After considering the evidence and submissions of the Appellant, I am unable to conclude that the Determination is in error.

A manager is defined in Section 1 of the *Employment Standard Regulations* as a "person whose primary employment duties consist of supervision and directing other employees", or "a person employed in an executive capacity".

Even though MacLeod may have had considerable project management responsibility, the undisputed evidence is that he was not responsible for hiring, firing or disciplining staff, or for corporate budgeting. Nor did he participate in the control, supervision and administration of business affairs. In the course of managing specific projects, MacLeod had some responsibility for managing staff, but that was ancillary to the overall management of the project. Proposal documents submitted by Borstad indicate that MacLeod was responsible for 'co-ordinating and supervising CASI data collection' and 'overseeing the processing, classification and product generation'. The legislation specifically provides that a manager is a person whose **primary** employment duties consist of supervision or directing other employees. As MacLeod did not exercise that responsibility, he was not, for the purposes of the *Act*, a manager.

Consequently, I deny this aspect of the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that Determination #0002376 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal