

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Lehndorff Tandem Management Inc.  
("LTMI")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 98/353

**DATE OF HEARING:** September 29, 1998

**DATE OF DECISION:** November 2, 1998

**DECISION**

**APPEARANCES**

Caroline Fellin  
Marek Mitera

For LTMI  
The Complainant

**OVERVIEW**

Lehndorff Tandem Management Inc. (“LTMI”) appeals, pursuant to section 112 of the *Employment Standards Act* (the “Act”), a Determination by a delegate of the Director of Employment Standards dated May 12, 1998. The Determination is that LTMI has contravened sections 17, 18, 21, 40 and 42 of the *Act* and owes its former employee, Marek Mitera, \$11,253.09 in overtime wages, vacation pay, compensation for use of his vehicle, and interest.

**ISSUES TO BE DECIDED**

The matter of whether or not overtime wages are owed is at issue. LTMI argues that Mitera was a manager and it does not owe overtime wages for that reason. LTMI argues, in the alternative, that the Determination is wrong in that it awards overtime wages for work which was never approved.

The amount of compensation which Mitera is awarded for business use of his personal vehicles is at issue. LTMI did not respond to the delegate on this issue during the investigation. Now it disputes the extent of use and claims that, if any moneys are due, they can only be at the rate prescribed by company policy, which is 25 cents per kilometre, not \$125 per month, and that money paid for gas must be subtracted from the amount of compensation.

**FACTS**

The period of employment is March 1, 1994 to November 20, 1996. Mitera was, throughout that time, Maintenance Supervisor of LTMI’s International Plaza Complex. That large building complex consists of commercial office space; a health club including saunas, steam rooms, spas, and a 100 foot swimming pool; a garden; tennis courts; and 472 residential suites.

At the outset of the employment, LTMI employed two men for maintenance and repairs to the building, Mitera and Richard Barcham. Barcham did the work of general handyman. In January of 1995, Ken Lumley was hired as a helper.

Mitera's duties are a source of disagreement. LTMI claims that Mitera was a manager in that he was responsible for maintenance operations and supervised and directed employees. In that latter regard, it says that he was in charge of staff scheduling, directed and disciplined staff, recommended salary increases and assisted in hiring staff. Mitera, on the other hand, claims that he was little more than a mechanic. There is no evidence to indicate that Mitera was an executive who controlled and managed some important aspect of the business that is the International Plaza Complex. The evidence points to a mechanic with supervisory responsibilities. Mitera was responsible for work scheduling and the supervision and direction of employees. He had Barcham and then, Lumley as well, to supervise and schedule for work. There is no evidence that Mitera ever disciplined an employee, that he played a role in setting wages or salaries, or ever hired staff. The only person hired during the period of Mitera's employment was Lumley and he was hired by the Resident Manager, Alicia Fretter, on her own. And Mitera did not authorize overtime. That was done by the manager, Fretter.

Mitera's regular hours of work provided for an 8 hour day, Monday to Friday. Outside of his regular hours of work, he was required to attend to emergencies as they arose and assist with the servicing of the swimming pool on weekends. That led him to work beyond 8 hours on some days and beyond 40 hours in some weeks.

LTMI has a Policies and Procedures Manual. Mitera had a copy of it. The manual sets out that "working overtime is periodically necessary in all positions". It provides that salaried employees (Mitera was a salaried employee) are to take 1 ½ hours off for every hour of overtime worked. It states "All overtime must be approved in advance by the department manager" and that the policy "does not apply to management personnel".

LTMI claims that Mitera, as a manager, is not entitled to overtime compensation under either the *Act* or company policy, but only from June, 1996 on. LTMI says that it was at that point that it agreed to pay him overtime. Mitera, on the other hand, says that Fretter, at the outset of his employment, told him that there was no money in the budget for overtime pay, but that he should work overtime, that the budget would be revised, and he would then be paid for his overtime. There is no evidence to show that Mitera was told that he would not be compensated for working overtime. It is clear to me that Fretter, as resident manager, knew that Mitera was working overtime, yet there is no evidence that she, or anyone else at LTMI, made any attempt to put an end to it. I find that Mitera was allowed to work overtime as he did and that it was expected of him.

At one time, the International Plaza Complex owned a van. The van was used for hauling pumps, motors, fans and other heavy machinery, as well as various building supplies and fixtures including toilets and drywall. When it was no longer safe to drive, Mitera began to use his own van, and on occasion, his car and stationwagon for work. He says that he did that on being promised compensation but that he has never been paid for supplying

vehicles for LTMI, even though, he says, it meant that LTMI neither had to lease nor buy a van. And Mitera says that the gas which LTMI paid for was not for his vehicles but a power washer.

## ANALYSIS

There is no dispute over the hours worked. LTMI's argument is that Mitera did not gain the necessary approval before proceeding to work and, as the work was not approved, it cannot now be expected to pay for the work. It also argues Mitera was a manager and therefore not entitled to overtime.

The overtime entitlements of the *Act* are set out in Part 4 of the *Act*. Section 34 of the *Employment Standards Regulation* establishes that part 4 of the *Act* does not apply to managers. The *Regulation* defines "manager" as follows:

*"manager" means*

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

There is no evidence to indicate that Mitera controlled or managed the business that is the International Plaza Complex, such that he can be considered a person employed in an executive capacity. There is evidence to show that he was involved in the direction and supervision of employees. The question is, Did he do that to the extent that he can be considered a manager? The question turns on whether or not he was primarily employed in that regard.

In *Employment Standards Tribunal v. British Columbia (Director of Employment Standards)*, BCEST No. D479/97, the Tribunal has set out the factors which it will examine for the purpose of deciding the above. They are as follows:

- 1) the amount of time spent supervising and directing other employees;
- 2) the nature of the person's other (non-supervising) employment duties;
- 3) the degree to which the person exercises the kind of power and authority typical of a manager;
- 4) to what elements of supervision that power applies;
- 5) the reason for the employment; and
- 6) the nature and size of the business.

When I consider the above, and the facts as they are established in this case, I find that Mitera is not a manager as defined by the *Act*. His primary duties were those of a mechanic. He had little power to make final decisions typical of a manager in his role of Maintenance Supervisor. He spent little time supervising and directing other employees, and to the extent that he did supervise and schedule their work, he exercised little authority.

Mitera is covered by the general overtime provisions of the *Act*. There is no need to turn my attention to company policy as it provides for less than the standard set by the *Act*. It is the *Act* which prevails. The requirements of the *Act* are minimum standards and they cannot be waived, even through agreement.

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

Sections 43, 49, 61 and 69 do not apply as they apply to union employees.

Mitera worked a great deal of overtime. As the facts are presented to me, I have found that he was expected to work the overtime. I have also found that he was allowed to work the overtime that he did. Either is sufficient for finding that Mitera is entitled to overtime pay.

*35 An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows an employee to work*

*(a) over 8 hours a day or 40 hours a week, or*

*(b) if the employee is on a flexible work schedule adopted under section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.*

The Determination awards Mitera compensation for the business use of his vehicles. LTMI now complains of that. LTMI was advised by the Director's delegate of the Mitera's claim but it chose not to respond with a submission on the point. Now that the Determination has been issued, it wants to raise various issues, every one of which could have been raised with the delegate. I see no reason to allow it. As another Adjudicator has put it, appellants cannot be allowed "to 'sit in the weeds', failing or refusing to cooperate with the delegate ... and later filing appeals of the Determination when they disagree with it" [*Tri-West Tractor Ltd.* (1996) BCEST #D268/96].

## **ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated May 12, 1998 be confirmed in the amount of \$11,253.09. To that is added whatever further interest is owed pursuant to Section 88 of the *Act*.

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**Lorne D. Collingwood**  
**Adjudicator**