Employment Standards TRIBUNAL

An appeal

- by -

Arun Datta
(the "employee")

- 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: Ib S. Petersen

FILE No.: 2001/527

DATE OF HEARING: September 21, 2001

DATE OF DECISION: September 21, 2001

DECISION

APPEARANCES:

Mr. Peter Parsons	on behalf of the Employer, Indalex Limited
Mr. Arun Datta	on behalf of himself

OVERVIEW

This matter arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on June 26, 2001. The Determination concluded that Datta was owed no money by the Employer on account of overtime wages.

The delegate's findings and conclusions may be briefly set out as follows. The Employer is an aluminium manufacturing company, employing over 110 persons. Datta worked for the Employer from June 12, 2000 to October 10, 2000 as a manufacturing manager. His remuneration included a salary of $75,000 per annum. The Employer took the position before the Delegate that Datta was a part of senior management and was not entitled to overtime wages. Datta was of the view that the Employer failed to give him adequate support and that other managers were paid overtime. The Delegate considered the definition of "manager" (Section 1, *Employment Standards Regulation* (the "*regulation*") and found that Datta was a manager for the purposes of the *Act*. Accordingly, he was excluded from part 4 of the *Act* (Hours of Work and Overtime) (Section 34(1)(f) of the *Regulation*). The Delegate then considered whether Datta was entitled to overtime based on his contract of employment. He concluded that he was not.

FACTS AND ANALYSIS

The Employee appeals the determination and, as the appellant, has the burden to persuade me that the Determination is wrong. In my view, Datta did not meet that burden.

At the hearing, Datta explained his view of how the Employer's organization had changed in the relatively short time span he worked there. He did not, however, disagree that he was a manager. In fact, even if I were to accept his version of the facts, he had supervisors reporting to him and, at least, one manager. Despite being requested to do so, Datta did not address, in any meaningful manner, the jurisprudence traditionally relied upon by the Tribunal in determining management status, generally exercising the "power and authority typical of a manager" (see, for example, *429485 B.C. Ltd. (c.o.b. Amelia Street Bistro)*, BCEST #D470/97, reconsideration of BCEST #D170/97). In cross-examination, Datta agreed that he was responsible for the plant when the vice-president of manufacturing was out of or away from the plant. He agreed that he was

"responsible for the production aspect." He did not take issue with his exercise of managaement functions.

In cross-examination, as well, Datta agreed that within the first week of employment he brought the issue of overtime to the attention of Simon Knight, vice-president of manufacturing, and was told "only you and me are not paid overtime." Datta explained that he thought that meant that senior managers would not receive overtime. It appears that he agrees that he was a senior manager at the time. He also agreed that he never expected to be paid overtime when he was hired. There was nothing, verbally or in writing, to support that there was an agreement between Datta and the Employer which provided for an entitlement to overtime.

I indicated to Datta that I had some difficulty with the basis of his appeal. In my view, there was little—if anything—to support an argument that the Delegate erred in interpreting and applying the definition of "manager," or erred in his determination with respect to Datta's contractual entitlement, or that there was some "unlawful" discrimination. During the course of the hearing, I requested that Datta clarify the basis for the appeal. In my view, he did not do so. Particularly, with respect to the allegation of discrimination, it appeared that the basis for his complaint was his view that other managers were paid overtime.

After Datta had completed his case, I asked counsel for the Employer if he wished to make a "no evidence" or an "insufficient evidence" motion. He indicated that he did.

Surfwood Supply v. General Alarms, [1976] 3 W.W.R. 93 (B.C.S.C.), holds:

1. if a motion is a true "no evidence" motion, no election to call evidence is required; however,

2. if the motion is for "insufficient evidence," the applicant should invariably be put to the election.

It was clear that counsel for the Employer reserved the right to call evidence, should I deny the motion. The Employer had brought two witnesses to the hearing.

I considered the motion and granted it. While Datta may have some dispute with the minutiae of the determination, it was-–following hearing his evidence and submissions—clear that there was no basis for disturbing the Delegate's conclusions. First, there was nothing before me to support that Datta was not a manager for the purposes of the *Act*. First, as noted above, Datta did not dispute that he was a manager and, importantly, he did not address whether he exercised the "power and authority typical of a manager." He complained of re-organizations within the work place which, it may be inferred, changed his status downwards. All the same, based on the evidence before me, he was still a manager for the purposes of the *Act*. Second, there was nothing before me to support a contractual right to overtime wages. Datta's claim that he was discriminated against was unfounded. It basically boiled down to this: other managers were paid overtime, he should be paid overtime. Even assuming that other managers were paid

overtime is true, it still does not follow that Datta is entitled to it. That, in my view, is a matter of employment contract. Datta was employed at a certain salary level with certain benefits, other managers were employed at certain other salaries and other benefits. There is nothing unlawful in this and it does not, in the circumstances, support his claim.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 26, 2001 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal