**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 -

Alnor Services Ltd.
("Alnor")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

| | |
|---|---|
| **ADJUDICATOR:** | Geoffrey Crampton |
| **FILE NO.:** | 98/444 |
| **DATE OF HEARING:** | November 4, 1998 |
| **DATE OF DECISION:** | November 23, 1998 |

## DECISION

### APPEARANCES

| | |
|---|---|
| George Wool | on behalf of Alnor Services Ltd. |
| Craig Yamashiro | on behalf of the Director of Employment Standards |

### OVERVIEW

This is an appeal by Alnor Services Ltd. ("Alnor"), under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination which was issued by a delegate of the Director of Employment Standards (the "Director") on June 18, 1998. The Determination requires Alnor to pay the sum of $12,549.53 to three former employees as follows:

| | |
|---|---|
| John Ellen | $6,283.36 |
| Patrice LeTourneau | $1,797.41 |
| Michael Nordli | $4,468.76 |

The Determination also identifies Patrick Chapman as one of four complainants but it does not contain an order requiring Alnor to make any payment in respect of Mr. Chapman.

On June 1, 1998 Alnor's solicitor made a payment to the Director in the amount of $3,028.80 in respect of Patrick Chapman's complaint. As a result of that payment, Alnor submits, it has met its obligations under the *Act* insofar as Mr. Chapman's complaint is concerned.

Each of the four former employees were employed by Alnor on a variety of work sites including three "fair wage" construction sites and each made a complaint under the *Skills Development and Fair Wage Act* ("*SDFWA*") and this *Act*. Under Section 8 of the *SDFWA*, the complaint and appeal procedures of the *Employment Standards Act* apply for the purposes of the *SDFWA*.

On October 30, 1998 the Tribunal received from the Director's counsel a set of amended calculation schedules (which had been sent to Alnor's counsel on October 20, 1998) and which showed the following amounts were owed to each employee:

| | | |
|---|---|---|
| Patrice LeTouirneau | $6,816.50 | |
| John Ellen | $8,707.09 | |
| Michael Nordli | $12,039.97 | |
| Patrick Chapman | $4,083.21 | |
| | | $31,646.77 |

The Director submits that the amended calculation schedules include amounts owing on account of statutory holiday pay and vacation pay which were not included in the original calculations. These

amounts, the Director submits, are statutory entitlements which were omitted inadvertently from the Determination and an error by the Director cannot deprive an employee of statutory entitlements.

Alnor's counsel wrote to the Tribunal:

> We cannot respond to the material (approximately 50 pages) by November 4, 1998.... the date of the hearing. The matters and issues that you have raised go beyond the Determination which is now under appeal.

Alnor offers several ground for its appeal:

- the Director erred in determining that Mr. Nordli and Mr. Ellen were not "managers" for purposes of the *Act* and, therefore, were not excluded from its hours of work and overtime requirements by way of Section 34(1)(f) of the *Employment Standards Regulation*, B.C. Reg. 396/95;
- Nordli, LeTourneau and Ellen received the benefit of company vehicles and the value of that benefit should be offset against any claim for overtime wages; and
- The Director denied Alnor a reasonable opportunity to respond to the complaints in question.

In making its appeal, Alnor requested that the effect of the Determination be suspended pending the outcome of its appeal. That request was addressed by the Registrar in a letter dated August 26, 1998 in which she ordered, under Section 113 of the *Act*, that "...Alnor deposit with the Director the full amount required to be paid... namely $12,549.50."

The Tribunal conducted a hearing at its offices on November 4, 1998 at which time evidence was given under oath or affirmation. Witnesses were excluded from the hearing until called to give evidence. The issue of *quantum* was deferred pending this decision on the merits of Alnor's appeal. No specific evidence was tendered by either party as to the employees' daily hours of work.

## ISSUES TO BE DECIDED

1. Were Mr. Nordli and Mr. Ellen "managers" for purposes of the *Act*?
2. Was Alnor denied a reasonable opportunity to respond?
3. Did the Director err in failing to consider the use of company vehicles as a "benefit" for purposes of the *SDFWA*?
4. Did the Director err in calculating the employees' entitlement to wages under the *Act* and the *SDFWA*?

**PRELIMINARY ISSUES**

***Director's authority to vary a Determination***

Alnor raises as a preliminary issue whether the Director has the jurisdiction to vary a Determination after an appeal has been made to the Tribunal under Section 112 of the *Act*. That exact question was decided by the Tribunal in *Devonshire Cream Ltd.* (BC EST #D122/97) in which the Adjudicator relied on the reasoning in *A.G. of Canada v. Von Findenigg*,(1983) 46 N.R. 549, as follows:

> I find that the Legislature could not have intended Section 86 of this *Act* to be used as a mechanism by the Director to interfere with Devonshire Cream's appeal rights or with the exercise by this Tribunal of its appellate functions under Section 108(2) of the *Act.* Once an appeal is filed, it is too late for the Director to exercise her jurisdiction under Section 86; such a limitation is implied by the presence of other provisions of the *Act*, including the right to appeal under Section 112 and the appeal powers of this Tribunal under Section 108(2) to "decide all questions of fact or law arising in the course of an appeal or review". Only with the approval of the appellant to withdraw the appeal could the Director then proceed with the exercise of her powers under Section 86 once an appeal was filed. Counsel says that the Director could make minor changes to a Determination such as a correction of a clerical error, but I disagree. Once the appeal is filed, all jurisdiction ceases under Section 86. Consequently, I find that the order varying CDET No. 004374 is a nullity and that Devonshire Cream is not, on this account, required to pay Ms. Kallman $3,291.78 for unpaid wages.

I agree with and adopt the reasoning in *Devonshire Cream Ltd.*

As a result, I made a procedural ruling at the hearing that I would hear the merits of Alnor's appeal and refer back to the Director the issue of *quantum*.

Also as a result of the reasoning in *Devonshire Cream* and the lack of Alnor's approval to amend its appeal to include Mr. Chapman as a party, the Director cannot rely on her authority under Section 86 of the *Act* to vary the Determination to include an order to pay wages to Mr. Chapman. As noted earlier, Alnor opposed the Director's attempt to vary the Determination by way of her October 20th correspondence as "....the matters and issues that you have raised go beyond the Determination which is now under appeal". Alnor also submits that its payment of $3,028.80 to Mr. Chapman on June 1, 1998 met all of its obligations to him under the *Act.* There was nothing from the Director (prior to her correspondence of October 20th.) to controvert that view.

***Opportunity to Respond***

Alnor submits that because it has not had an opportunity to respond (see: Section 77 of the *Act*), the Determination should be referred back to the Director.

The Director submits, and I agree, that the obligation placed on the Director under Section 77 of the *Act* does not create an open-ended right for a "person under investigation" to respond. Rather, Section 77 requires that the Director "....must make reasonable efforts to give a person under investigation an opportunity to respond."

In this case, the Director wrote to Alnor on March 16, 1998 to advise that she had reviewed its payroll records and, upon review, that "...wages and benefits paid to (Alnor) employees appear less than the entitlement due under the *SDFWA* and *ESA* for benefits and overtime" (sic). Alnor's counsel responded to the Director on March 26, 1998 and requested that he be permitted to respond more fully by April 15, 1998. In a letter dated April 2, 1998 the Director agreed:

> "...to provide you with an extension to April 24th to present your response. I will then consider your comments and any additional evidence you present on Alnor's behalf. If we do not reach an agreement as to the amounts owing to each employee by May 8, 1998 I will issue a Determination shortly thereafter."

Counsel for Alnor wrote to the Director on April 23, 1998 to provide his response *vis-à-vis* John Ellen, Patrice LeTouireau and Patrick Chapman. That correspondence included submissions on the "manager" and benefit" issues. The Director responded on May 22, 1998 and attached revised calculation schedules for each employee to capture accrued interest to date. Counsel for Alnor replied on June 1, 1998 and promised to submit a response on the "manager" issue "...within 10 days to 2 weeks." He also sent, on the same day, a cheque in the amount of $3,028.80 made payable to Patrick Chapman. The Director replied on June 4, 1998 to advise that she would issue a Determination shortly, "...as it appears that (Alnor) has no further evidence on this issue." The Determination was issued on June 18, 1998.

Under the circumstances described above, I have no difficulty in finding that the Director complied fully with the obligation placed on her by Section 77 of the *Act*. In making that finding I have considered one of the purposes of the *Act* is to promote fair treatment of employers and employees and another purpose is to provide fair and efficient dispute resolution procedures (see: Section 2). In that context, it is not appropriate, in my view, to prolong investigations and appeals unnecessarily. To do so would be both unfair and inefficient and would encourage employers to view unpaid wages as an inexpensive source of working capital.

The Director made a reasonable effort to give Alnor an opportunity to respond.

## FACTS

### *Foreman Issue*

Alnor Services Ltd. is a family-owned construction business which has been in operation since 1970. In the context of this appeal, Alnor was engaged in the installation of sewer and watermain pipes prior to construction of new buildings at Evergreen Baptist Home, Latimar School and the UBC/Triumf project. Albert Svab is the Prisident of Alnor.

The essence of the factual dispute in this appeal is that while Alnor submits that Mr. Ellen's and Mr. Nordli's duties brought them within the statutory definition of "manager", the Director determined that none of the four employees was a manager and, therefore, each was entitled to overtime wages under Part 4 of the *Act* (Hours of Work and Overtime).

Alnor employed two superintendents who were responsible for all of its construction sites and assigned a foreman to each site. There is no dispute that the superintendents' primary responsibilities were to carry out all administrative functions and to liaise with owners, engineers, architects, building inspectors and contractors to ensure that each project proceeds as planned. A superintendent usually visited each work site at least once daily to confer with the site foreman. If an unanticipated issue or problem arose while a superintendent was not on site, the foreman contacted him or Albert Svab by telephone to receive instructions and direction. A superintendent "always had final authority" about what happened on site, Mr. Svab testified. This was confirmed by Grant Wood's testimony.

Albert Svab also testified that while each foreman reported to a superintendent, the foreman was responsible for the operational aspects of each work site and the site was under his supervision.

Michael Nordli was given the title of foreman in March, 1996. John Ellen held the title from June, 1996 to July, 1996 and Patrice LeTouireau was a foreman from August, 1994 to July, 1996 when he resigned. There is no dispute that a foreman would tell other employees to finish work due to poor weather, although they would check with head office or a superintendent before doing so.

Alnor's foreman were not authorized to "hire and fire" employees although they could make a recommendation to the superintendent about such matters. A superintendent decided how many employees and which employees were assigned to each site and arranged for the timely delivery of materials and supplies as required on site. In short, a superintendent had "general overall control" of a work site while a foreman had "daily operational control", Mr. Svab testified.

There is no dispute that while Mr. Ellen and Mr. Nordli were given the title of "foreman", both of them also carried out "gradesman" duties: they "took shots" to ensure pipes were installed at the correct grade and in the correct place. In addition, Mr. Ellen was a heavy equipment operator. According to Mr. Svab, "taking shots" required no more than 10 minutes out of each hour and both Mr. Ellen's and Mr. Nordli's "primary job was much larger" than a gradesman job.

Alnor did not require its employees to work overtime and did not pay overtime wages to any employees who chose to work more than 8 hours per day or 40 hours per week.

Michael Nordli testified that his primary responsibility was, as a "gradesman", to make sure that piping "...went in correctly." If there were any problems he would contact a superintendent or Albert Svab for direction. His supervision of other (usually 2 or 3) employees consisted of "....yelling at them if they did anything stupid." He did not have authority to "hire and fire" or to lay off employees. Any formal disciplinary issues were dealt with by a superintendent. Mr. Nordli testified that his duties as a gradesman did not change when he was given the title of foreman and it was his duties as a gradesman which required him to tell other employees what to do.

John Ellen was a heavy equipment operator and a grademan before being appointed as a foreman on the UBC/Triumph project. His evidence corroborated that of Michael Nordli on all relevant matters.

Yannick LeRoi was employed as a foreman by Alnor on four different sites (Santos, Bognar, Adera and Gauvin). His evidence corroborated that given by Michael Nordli and John Ellen.

***Company Vehicles***

Alnor provided a company vehicle to certain employees based on an unwritten policy which was intended to recognize employees who "show responsibility, service to Alnor, and an on-going employment relationship", Mr. Svab testified. Michael Nordli, John Ellen and Patrice LeTouireau were each given a vehicle under that policy. Alnor paid the cost of insurance, maintenance and gas on all vehicles which were provided at no cost to employees who qualified under the policy. The costs incurred by Alnor in providing the vehicles was not reported or identified as a taxable benefit for income tax purposes. Each employee who was given a vehicle was required to sign a waiver that stipulated the vehicle was for business purposes only and no passengers were permitted. Employees drove the vehicles to and from their home to work sites throughout the Lower Mainland.

## ANALYSIS

***The Meaning of "Benefits" under the SDFWA***

Section 1 of the *Skills Development and Fair Wage Act, Development and Fair Wage Regulation* (BC Reg. 296/94), (the "*SDFWR*"), defines "benefits" as follows:

> **"benefits"** includes vacation pay, general holiday pay, sick leave, construction industry trust funds, medicare premiums, group life insurance, dental insurance, extended health benefits, long term disability insurance and employer contributions to pension plans other than the Canada Pension Plan, but does not include
>
> a) employer contributions to the Unemployment Insurance Commission, the Canada Pension Plan and the Workers Compensation Board, or

b) allowances for dirty pay, danger pay, first aid pay, shift differentials, overtime, standby, call-out, travel allowances, room and board allowances or other allowances provided to a worker;

It is significant that travel allowances are specifically not included in the statutory definition of "benefits".

Section 1 of the *SDFWA* defines "fair wages" as meaning ".... wages and benefits determined in accordance with the regulations." In each of the several schedules of the *SDFWR* – Fair Wage Minimum Rates – benefits are shown in Column 3 as $4.00/hour effective August 20, 1993. This hourly rate is consistent with the definition of "benefits" as being those benefit plans which, in the construction industry, are routinely costed on the basis of ¢/hour. The definition of "benefits" does not lend itself to an interpretation which would include the costs associated with using a company-owned vehicle. In addition, the various schedules in *SDFWR* establish minimum rates of compensation. As such, the minimum "fair wage" which must be paid under the *SDFWA* is just that, a minimum rate of compensation. Therefore, I can see no basis for permitting an employer to offset the cost of company-owned vehicles against the "fair wage" which must be paid under the *SDFWA* and the *SDFWR*.

Section 9 of the *SDFWA* requires employers to maintain and give to each employee a record of wages and benefits paid to each employee. Alnor did not, at any time, include the cost of company-owned vehicles as a "benefit" in its payroll records.

Section 21 of the *Employment Standards Act* prohibits an employer from withholding or deducting part of an employee's wages except as permitted by provincial or federal statute. Alnor does not rely on any such statutory provision in its submission that the cost of company vehicles is an "offset" to the wages it owes to the four employees.

For all of these reasons, I find that this ground of Alnor's appeal must fail.

***Were Mr. Nordli and Mr. Ellen "Managers"?***

A "manager" is defined in Section 1 of the *Employment Standards Regulation* (B.C. Reg. 396/95) as meaning:

(a) a person whose primary employment duties consist of supervising and directing other employees, or

(b) a person employed in an executive capacity;

Section 34(1)(f) of the *Regulation* excludes a "manager" from Part 4 of the *Act* (hours of work and overtime).

The seminal decision of the Tribunal on the statutory definition of "manager" appears in *The Director of Employment Standards* (BCEST #D479/97; Reconsideration of BCEST #D170/97).

The original decision of the Tribunal involved an appeal by 429485 B.C. Ltd operating as Amelia Street Bistro. For that reason, the decisions cited above have become known and are referred to as the Amelia Street Bistro cases. The following lengthy excerpt is taken from the reconsideration decision (BCEST #D479/97) and sets out the Tribunal's views on the definition of "manager", as follows:

> The task of determining if a person is a manager must address the definition of manager in the *Regulation*. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business. That point was made by the Tribunal in *Anducci's Pasta Bar Ltd.* (BCEST #D380/97)
>
> > Many of the duties to which the employer pointed as evidence of Lum's managerial status did not address the definition of manager in the *Regulation*. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees.
>
> **Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.**
>
> We also accept that in determining whether a person is a manger the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. The Director raises a concern that an interpretation of manager which does not accept the limited scope of exclusion from the minimum standards of the *Act* could have serious consequences for persons in positions such as foreman and first line supervisor who spend a significant amount of time supervising and directing other employees but frequently do not exhibit a power and authority typical of a manager. As we stated above, the degree to which some power and authority typical of a manger is present and is exercised by an employee are necessary considerations to reaching a conclusion about the total characterization of the primary employment duties of that employee.

> **Typically, a manger has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager.** We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.
>
> Also, when considering the reason for the employment of a person, it would be relevant that the person was hired to perform, and was continuing to perform, a job that would not normally be thought of as related to supervising and directing other employees.
>
> *(Emphasis added)*

Alnor submits that Michael Nordli and John Ellen were managers for purposes of the *Act.* I do not agree with that submission for the reasons which follow.

There is no evidence to suggest, and Alnor does not submit, that Mr. Nordli or Mr. Ellen were employed in an executive capacity. The issue is then more narrowly focused: did Mr. Nordli's and Mr. Ellen's primary employment duties consist of supervising and directing employees?

My review of the "total characterization" of Mr. Ellen's and Mr. Nordli's duties leads me to conclude that the Director did not err in determining that neither employee was a manager.

Both employees had non-supervisory duties as their primary responsibility. In the case of Mr. Nordli, his primary responsibility was as a gradesman. Mr. Ellen's primary responsibility was as a heavy equipment operator. Those were the jobs they were employed to do. The fact that both were given the title of "foreman" is not determinative (see: *Amelia Street Bistro,* BCEST #D479/97). It was as a result of these primary responsibilities that each was required to tell one or two labourers or pipe layers what to do at a construction site. For that reason, I do not accept the evidence given by Mr. Svab that "taking shots" required no more than 10 minutes of each hour during Nordli and Ellen's workday. As the President of Alnor, he did not observe, first-hand, how they carried out their duties. Neither of Alnor's two superintendents gave evidence on this point (Grant Wood did give evidence at the hearing but did not testify about the amount of time spent by the foremen on specific tasks in a typical day or week). Jeffrey Bender's evidence is consistent with my finding that Mr. Nordli and Mr. Ellen told him where to install pipe and if the grade was correct.

Neither Mr. Nordli nor Mr. Ellen were given nor exercised the power and authority that is typical of a manager. The superintendents decided what equipment and which employees would be assigned to each construction site and ensured that supplies were delivered as required to each sit. Mr. Nordli and Mr. Ellen could make recommendations to the appropriate superintendent with respect to employee discipline or assignments, but could not and did not make any final decisions on such matters.

In making these findings of fact I have placed no weight on the written statements to which Alnor's counsel objected at the hearing.

***Calculation of Wage Entitlements***

As noted above, in providing an overview of this appeal, I made a procedural ruling at the hearing that I would hear the merits of Alnor's appeal and defer making a decision on *quantum* by referring that issue back to the Director (see: Section 115 (1)(b) of the *Act*). Given my finding that Mr. Chapman is not properly a party to this proceeding, my order to refer back *quantum* issues to the Director applies only to Mr. Nordli, Mr. Ellen and Mr. LeTourneau.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination be referred back to the Director.

**Geoffrey Crampton**
**Adjudicator**
**Employment Standards Tribunal**

GC/bls