



**DECISION OF ADJUDICATOR  
IN THE MATTER OF A HEARING  
PURSUANT TO s.s. 62.1 and 62.2 OF  
*THE LABOUR STANDARDS ACT, R.S.S. 1978, c. L-1*  
(as amended)**

APPELLANT: Allnorth Consultants Limited  
2100 Airport Drive  
Saskatoon, SK S7L 6M6

RESPONDENT: Director of Labour Standards  
Ministry of Labour Relations and Workplace Safety

DATE OF HEARING: March 23 and 24, 2015

PLACE OF HEARING: Board Room  
Cuelenaere, Kendall, Katzman & Watson  
#500 – 128, Fourth Avenue South  
Saskatoon, Saskatchewan S7K 1M8

1. INTRODUCTION

This is an appeal by Allnorth Consultants Limited (hereinafter referred to as "Allnorth") with respect to a Wage Assessment issued by the Respondent, the Director, Employment Standards Branch, Ministry of Labour Relations and Workplace Safety, on October 16, 2014. The Wage Assessment required the Appellant to pay to David Flavin \$40,109.89 representing pay for wages earned. The Wage Assessment was prepared pursuant to s. 2-74 of *The Saskatchewan Employment Act*, R.S.S. S-15.1 (as amended). During the course of Mr. Flavin's employment with the Appellant, the relevant legislation was the *Labour Standards Act*, R.S.S. 1978, chapter L-1 (as amended) and the focus of the Hearing was primarily the application of section 4(2) of that legislation.

This matter was heard before me on the above dates. Present at the Hearing was Robert Frost-Hinz, counsel for the Appellant. On behalf of the Appellant were Brennan Miller, Operations Manager, Chris Kotzer, Human Resources and Bryan MacFadden, Division Manager and Prairie Regional Manager. Representing the Department of Employment Standards were Doug Long and Wayne Mesenchuk. David Flavin, the employee, was also present.

## **II. PRELIMINARY MATTERS**

There were no preliminary objections. All parties agreed on the issues to be determined and agreed that all parties, including those giving evidence, could remain present throughout the Hearing. While generally the Appellant presents its case first, I believed that it made more sense to hear from the Employee first, to establish the basis for the Wage Assessment, prior to dealing with the Employer's perspective and reasons for the Appeal. Neither party took issue with this process.

## **III. THE ISSUE**

The primary issue in this Appeal was whether the employee, David Flavin was a manager of the Appellant, Allnorth Consultants Limited. If it is determined that David Flavin was a manager, then the exemption pursuant to section 4(2) of the *Labour Standards Act* would apply. If not, a secondary issue was the quantum of the Wage Assessment as the Appellant disagreed with the Department's figures. The Wage Assessment was arrived at on the basis that Mr. Flavin was not a manager and therefore was entitled to overtime pay. If the decision is such that Mr. Flavin was a manager, then the secondary issue would no longer be pertinent.

## **IV. FACTS**

The evidence was lengthy. That evidence was directed by and large to the first issue – whether Mr. Flavin was hired as a manager and whether he performed managerial duties to any degree. I will summarize only what is truly pertinent to this issue. Evidence pertaining to side issues, difficulties that Allnorth was experiencing due to a labour shortage or specific complaints of Mr. Flavin about Allnorth, while interesting, did not assist in the determination of the issue.

The Appellant depicted Mr. Flavin as a hardworking and capable employee. Mr. Flavin disparaged Allnorth, an attitude largely intended to depict his view of Allnorth's integrity. The result was that in some respects, the evidence of Mr. Flavin was colored and therefore not believable.

### **i. EVIDENCE OF EMPLOYEE**

David Flavin testified that Allnorth is an engineering consulting company working in the area of non-licensed survey work and material testing. He was hired by Allnorth in November, 2012 and was employed by Allnorth from December 3, 2012 to the end of July, 2013. Mr. Flavin was hired as a 'Survey Group Lead'. Initially he was hired to run the survey division of Allnorth out of its Saskatoon office. Mr. Flavin testified that expectation quickly evaporated and in fact he was just another, albeit senior, member of the survey group. His duties changed primarily because there were too few surveyors on staff and in order to keep jobs running he had to go into the field as a surveyor rather than carry out the duties of the survey group leader. Mr. Flavin worked long hours and he began to track his own hours, independent of Allnorth's timekeeping system, in order to put together a claim for overtime. Mr. Flavin frequently went to Brennan Miller wanting more compensation and while promises were made, no increases came to pass.

David Flavin testified that he did not supervise and direct other workers; as for mentoring, he only provided advice to the other surveyors as he had more experience. He did not evaluate any surveyors, rather everybody evaluated each other. In that context, he evaluated his co-workers. Mr. Flavin testified that in terms of promoting and hiring surveyors, he reviewed resumes submitted and provided advice on who to hire as the managers of the company were engineers, not surveyors. He participated in the interviews of prospective surveyors and made recommendations. He neither hired nor fired surveyors, nor had the authority to do so. Mr. Flavin denied carrying out budget requirements, indicating that he only received information emails. Mr. Flavin reiterated that he did not supervise or direct the other surveyors and that in fact, each employee did his or her own thing in the field, although he did assist with some scheduling.

On cross-examination, Mr. Flavin confirmed Exhibit EE2, the letter offering employment. He confirmed his extensive and impressive resume (Exhibit ER1). He knew that he would be earning \$120,000 per annum but that he would be eligible for bonuses and that these bonuses could be used to purchase equity in Allnorth and that this program was offered only to managers.

While Mr. Flavin denied having subordinates or directing surveyors less experienced than him, he conceded that he on occasion did assign surveyors to specific jobs and that his job was to ensure all work was completed accurately and on time. While Mr. Flavin initially testified that he did not view himself as something other than a field surveyor, a review of Exhibit ER2, wherein he specifically states that he is not or will not be a field surveyor indicates otherwise. Mr. Flavin also testified that "he was in charge of the survey team". When Mr. Flavin was asked whether he trained any surveyors, his response was "not really". When he was asked if he mentored the surveyors, he replied "not really". Yet Mr. Flavin agreed that there was no one but him who was in a position to do so.

On cross-examination, Mr. Flavin agreed that he played a role in business development, fostering new clients and utilizing his vast network of connections to promote more work for Allnorth. He prepared project estimates and proposals for new projects.

Mr. Flavin agreed that he evaluated and recruited new personnel to the survey team. No surveyor was hired without his recommendation and knowledge and in fact, Mr. Flavin sent out the letters with offers of employment. While these letters were signed by someone from Human Resources, he was the front line in terms of hiring new surveyors and made the initial verbal offers of employment. While he did not have the power to promote an employee, he would approach his superior when he felt an employee deserved a pay raise and in fact campaigned for a pay raise for employee AA. During the weekly productivity meetings with Bryan MacFadden, Brennan Miller and the group leaders, Mr. Flavin represented the voice of the surveyors.

While Mr. Flavin denied having the authority or ability to discipline or terminate employees, it was demonstrated during cross-examination that he did in fact do so. In particular, Mr. Flavin terminated employee AD and hired a replacement for him. Telling are the emails from Mr. Flavin in Exhibit ER6 wherein he is requesting Chris Kotzer of Human Resources prepare a termination letter for AD as he is "off the project as of today

and I have no work for him” and Exhibit ER7 where he states he has verbally offered JI a job. Further, Mr. Flavin emailed AD his termination letter (Exhibit ER8).

Mr. Flavin agreed that his job was to run the survey group within the Saskatoon office and that he did so, albeit in a general way, but denied supervising and directing the other workers. When confronted with Exhibit ER11 he admitted that he did make the entries in the surveyor’s work schedule. Also on cross-examination, Mr. Flavin agreed that he made the decisions as to which surveyors would work which jobs. He agreed that he knew their experience, so he was in a position to place them properly.

During his evidence, Mr. Flavin was evasive. He attempted to convey himself as simply another surveyor with Allnorth even when confronted with written indications to the contrary. Even so, it was clear that he carried out numerous managerial functions.

## **ii. EVIDENCE OF EMPLOYER**

The Appellant called two witnesses. The first was Bryan MacFadden, the Saskatoon Division Manager and Regional Manager for the Prairies of Allnorth. He is responsible for the Saskatoon area. Allnorth is a multi-discipline engineering company providing technical services in the areas of surveying, materials testing and environmental monitoring. Mr. MacFadden provided an overview of the corporate hierarchy in Saskatoon. As of December, 2012, it was determined that the company needed stronger group leads in Saskatoon. The groups were:

1. Survey;
2. Transportation;
3. Material Testing;
4. Industrial; and
5. Industrial Project Development.

David Flavin was hired as the Group Lead for Survey. Mr. Flavin was hired because the business was rapidly expanding and the company needed someone with his qualifications to help develop the survey component of the business. In essence, Mr. Flavin was the manager of the survey department. The offer of employment was submitted as Exhibit EE2. During the time Dave Flavin worked for Allnorth, he was the most senior surveyor and also the most experienced. When Allnorth was restructured in the spring of 2013, the only change was that Mr. Flavin reported to Brennan Miller and not Bryan MacFadden. Mr. MacFadden reviewed Exhibit EE2, the Offer Letter dated Nov 23, 2012.

Brennan Miller also testified. He reviewed the restructuring of Allnorth which took place in 2013. As a result of Bryan MacFadden spending more time in Fort MacMurray, Mr. Miller became Operations Manager. The Group Leads reported to him. Mr. Miller has a mining background with no survey work experience. When he took over, Mr. Flavin was already in place as the Survey Group Lead. As Survey Group Lead, Mr. Flavin was responsible for:

1. Survey discipline within the division, which would include hiring, disciplining and evaluation of personnel within the group as well as quality control and safety;
2. Participating in general operations;

3. Developing business with both new and existing clients; and
4. Managing survey projects, including working with other divisions.

In particular, Mr. Flavin was involved in the K & S Project and picked his own staff for that project. Mr. Flavin also cultivated and wanted Allnorth to be involved in a new project at the University of Saskatchewan. He put together the project proposal and Allnorth got the work. Mr. Flavin also identified potential clients in Vancouver and Yellowknife. Mr. Miller estimated that, at best, Mr. Flavin spent 15% of his time in the field. In January of 2013, business was slow and Allnorth was on the verge of layoffs. Business development was a key role for Mr. Flavin and he was very successful in that role.

Mr. Flavin supervised and directed the work of the team members under him. He spoke with every member of his team, every day. He prepared the staff schedule for survey projects, as well as selecting the survey members required for other projects.

While Mr. Miller would necessarily be involved in any discipline of an employee, Mr. Flavin warned and terminated a member of his team (AD). Mr. Flavin would discuss with Mr. Miller whether to hire surveyors and also their wages. While Mr. Miller might veto a wage offer, no team member was hired without Mr. Flavin's approval. Mr. Flavin was also responsible for recommending the promotion of team members. Mr. Flavin had independence in how he performed his duties and operated very autonomously.

It should be noted that Mr. Miller provided his evidence in an honest and fair manner. His evidence was trustworthy.

## V. DECISION

The requirement to pay overtime, during the time period relevant to this Appeal is set out in Part I, s. 6 of *The Labour Standards Act*, RSS 1978, c L-1, as repealed by *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (the "Act"). However, s. 4(2) of the Act states that Part I of the Act does not apply to "an employee who performs services that are entirely of a managerial character." The word 'entirely' does not mean completely and only, but rather 'continuously'. A hands-on manager such as Mr. Flavin can still fall within the exception created by the section.

The law in this area is well settled in Saskatchewan. In *Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards)* (1995), 136 Sask R 187 (QB) [*Westfair Foods*], Klebuc, J. stated:

[22] The word "entirely" was judicially considered by Wimmer J. in *Michael Hill v. Robert C. Begg, Keith O'Shea, and Mr. Mechanic Sales & Service (1982) Ltd.*, Sask. Q.B. No. 686/86, J.C. Saskatoon, December 29, 1987(unreported). There the plaintiff accepted employment as the manager of a garage service department which also required him to do some work as a mechanic. Upon the termination of his employment, the plaintiff claimed wages for overtime on the grounds that his services were not entirely of a managerial character. Mr. Justice Wimmer concluded the plaintiff fell within the exception contained in s. 4(2) for the following reasons:

. . . He reorganized the department, assigned and supervised the work and, in consultation with O'Shea, he effected some

changes in personnel. He was not accountable for his hours and did not punch a time clock as did other employees of the department. It is true that he did some mechanical work himself but that does not mean his services were not entirely of a managerial character within the meaning of section 4(2) of the Act. In my opinion, the word entirely in the section is to be understood in the sense of continuously in contra-distinction to from time to time. A "hands on" manager can still fall within the exception created by the section. I am satisfied that Michael Hill's services were continuously of a managerial character and that there existed no statutory obligation to pay him overtime.

I agree with his definition of the word "entirely" for the purposes of s. 4(2) of the Act and will apply it to the matter before me.

[24] What constitutes "of a managerial character" for the purposes of s. 4(2) of the Act will vary according to the facts of each case. Hence, an all-encompassing definition for the phrase is impractical. However, a reference to those characteristics and functions indicative of, or at least associated with management positions, as indicia for determining whether an employee's services are of a managerial character are, in my view, appropriate. The indicium making up such criteria can readily be extracted from case authorities, dictionary definitions, reports of arbitration awards and elga writings on employment law. The fundamental ones in my opinion are:

- (1) The supervision and direction of other workers;
- (2) The discipline of subordinates, individually or as part of a management team;
- (3) Evaluating the performance of subordinates;
- (4) Hiring and promoting of subordinate staff;
- (5) Some independence and discretion in performing assigned duties;
- (6) Supervision of a collective agreement, where the work place is unionized;
- (7) Negotiating remuneration individually rather than collectively;
- (8) Level of remuneration, vis-à-vis, non-managerial staff;
- (9) Participation in carrying out the employer's budgets and performance requirements.

This list is not intended to be all inclusive; nor must each criterion be found to exist before an employee's position can take on a managerial character; nor is each criterion entitled to equal weight. To the contrary, in my opinion only the functions of supervision and right to discipline are of fundamental importance and therefore of greater significance.

As indicated, Mr. Flavin attempted to avoid committing to any answers which did not support his position that he was not at any time a manager. Despite that, on cross-examination, he ultimately agreed that he supervised and directed the surveyors in his Survey Group, that he disciplined, fired, hired and recommended promotions for employees of Allnorth. As well, Mr. Flavin was very independent in performing his duties. While he did not necessarily at all times earn more than some of the surveyors who were on an hourly wage and working extensive overtime, nevertheless, Mr. Flavin

had a different level of remuneration, vis-à-vis the non-managerial staff in that he could apply his bonuses to purchase equity in Allnorth.

As is often the case with Appeals of this nature, a determination of facts is necessary and when the parties do not agree on those facts, the credibility of some evidence must be assessed. Where there were any discrepancies between the evidence of Mr. Flavin and that of Mr. Miller, I accept the evidence of Mr. Miller.

Based on the evidence, I find that Mr. Flavin was indeed a manager and primarily and continuously carried out managerial duties while employed with Allnorth.

As a result of this decision, there is no need to review the figures provided by Mr. Flavin and Allnorth in determining the accuracy of the Wage Assessment.

## VI. CONCLUSION

The appeal is allowed. Pursuant to s. 62.2(1)(B) and (C) of the *Labour Standards Act*, R.S.S. 1978, chapter L-1 (as amended), the wage assessment and the decision of the Director are revoked.

Dated at Saskatoon, in the Province of Saskatchewan, this 27<sup>th</sup> day of May, 2015.



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Leslie T.K. Sullivan, Q.C.  
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the “Act”).

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at [www.saskatchewan.ca](http://www.saskatchewan.ca).

#### **Right to appeal adjudicator’s decision to board**

**4-8(1)** An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator’s decision or order with any directions that the board

#### **Appeal to Court of Appeal**

**4-9(1)** With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

#### **Right of director to appeal**

**4-10** The director of employment standards has the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator’s decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.



Appendix A

David Flavin  
APPELLANT

and

Director of Labour Standards  
RESPONDENT

Exhibit List

Employer Exhibit	Item	Employee Exhibit	Item
ER 1	Resume David Flavin (pre-Allnorth)	EE 1	Incorporation Documents
ER 2	Emailing Chain between Brennan, David, Joel and Edgard, ending June 26, 2013	EE2	Tab B – Offer of Employment Letter
ER3	Allnorth Survey Group Leader Surveyor's description (Tab A) (Identification Only)	EE3	Tab G – EMS Records
ER4	December 18, 2012 letter re: Fred Lawrence	EE4	Tab M
ER5	June 3, 2013 letter re: Alan Donoghue	EE5	Email from Dave to Brennan
ER6	Emailing chain June 8/13 ending 10:38 a.m.	EE6	Tab I – Officer Worksheet
ER7	Emailing chain June 10/13	EE7	Summary of Calculations
ER8	July 16, 2013 letter re: Alan Donghue	EE8	October 26/13 – Letter to Darby Kreitz
ER9	Divisional Chart (before)	EE9	December 10/12 – No Authority to Bind Allnorth
ER10	Divisional Chart (after)	EE10	Allnorth Go/No Go Evaluation and Proposal Preparation
		EE11	Copy of Schedule he proposed
		EE12	Allnorth Productivity Chart (Identification Only)