

173-15

DECISION OF ADJUDICATOR

**IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 2-75 AND 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT**



APPELLANTS: VCM Construction Ltd., 4003 Arthur Rose Avenue, Saskatoon, SK S7P 0C8;
and Raymond A Van de Woestyne, being a Director of VCM Construction
Ltd., 415 Chotem Rise, Saskatoon, SK S7N 4M4

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

Date of Hearing: September 29, 2015
Boardroom 9.3, Sturdy Stone Centre, Saskatoon, SK.

Introduction:

The respondent was represented by Ron Byers, Employment Standards Officer from the Ministry of Labour Relations and Workplace Safety, Employment Standards. The appellant VCM Construction Ltd., was represented by Amy Gibson of the MLT law firm. The respondent Raymond A Van de Woestyne, a Director of VCM Construction Ltd., was not represented and did not appear at the hearing.

There were no objections as to my jurisdiction to hear the matter. I would like to thank both Ms. Gibson and Mr. Byers for their very able arguments.

Issues:

There are three issues in this hearing:

1. Is Ms. Olsen a manager and therefore not entitled to overtime pay pursuant to *The Saskatchewan Employment Act*?
2. What is the effect of the provision that purports to prohibit overtime in Ms. Olsen's employment contract?
3. In the event that Ms. Olsen is to be paid overtime, what is the proper number of overtime hours to be used to calculate wages owing?

Facts:**Employer Evidence**

Stefanie Swan, Kirsten Knutson and Rick Steer testified on behalf of the employer. Each gave their evidence in a straightforward manner and I accept the testimony of each of them as factual.

Ms. Swan was educated as a Civil Engineer and has been VCM's vice-president for the last 3-4 years. She supervises all employees, oversees accounts and reports directly to VCM's president who is Raymond Van de Woestyne.

Tammy Olsen worked for VCM Construction Ltd., ('VCM') from July 17, 2013 until November 24, 2014. Her salary was \$96,000 per year. She was employed by VCM as the company's Corporate Safety Officer ['CSO'].

Ms. Swan was involved in Ms. Olsen's hiring and salary negotiations. Ms. Swan drew a chart (Exhibit ER-2), which shows VCM's corporate structure. ER-2 shows that the CSO reports directly to Ms. Swan, as do the Construction Manager, the Office Manager, the Preconstruction Manager and the Controller. Each of these positions has another level of employee below them on the corporate hierarchy. Site Safety positions are below the CSO. Project Manager positions are below the Construction Manager. Clerical positions

are below the Office Manager. Estimators are below the Preconstruction Manager and AP/AR personnel are below the Controller. Finally, Field Staff are below a position identified as 'Field Superint.' who in turn is below the Project Manager. Of all these positions, only the Site Safety, Field Staff and 'Field Superint.' positions are considered hourly employees by VCM. All the rest are on salary.

Ms. Swan testified that she negotiated Ms. Olsen's salary with her. Copies of emails related to this negotiation are included in ER-1 at Tab 2. The negotiation was successful and Ms. Olsen and VCM signed an employment contract, a copy of which was entered as Exhibit ER-1 at Tab 3, with a codicil at Tab 4. Ms. Swan couldn't remember whether she or Ms. Knutson drafted the employment contract. In any event the contract was drafted by the employer. Ms. Swan testified that Ms. Olsen's salary was about average for the employees VCM considered to be management.

Ms. Swan described Ms. Olsen's role at VCM. Basically Ms. Olsen was the senior safety person with the company. She was responsible for VCM's internal safety audits, which included holding interviews with office and field staff, doing site inspections, as well as completing and sometimes developing appropriate paperwork to document compliance. All of these activities, and others, were important to VCM in maintaining its COR Safety designation. Ms. Olsen also met with sub-contractors as well as staff at work sites and made choices regarding proper safety procedures to be followed at the work site. If a sub-contractor disagreed with Ms. Olsen's decisions, and threatened to walk off the job site, someone else from VCM would come in to deal with the situation. Ms. Swan testified that Ms. Olsen would make good suggestions to keep the crews safe, but that sometimes these suggestions were changed as a result of Ms. Swan's thoughts.

The employment contract (ER-3) at clause 3.3 says:

The standard work week is Monday to Friday, excluding all Public Holidays.

The Employee's standard hours of work shall be between 8:00 a.m. to 5:00 p.m. An unpaid lunch period of 60 minutes shall be available to the Employee, along with two coffee breaks (one in the morning and one in the afternoon) comprising of 15 minutes each.

I asked Ms. Swan why a managerial salaried employee would have a lunch break referred to as "unpaid lunch period of 60 minutes". This terminology (i.e. 'unpaid' lunch break) is inconsistent with the nature of a salaried position. Ms. Swan quite frankly said she had never thought of why the contract referred to an unpaid lunch period of 60 minutes, and that she had simply always used a version of this employment contract.

The employment contract also purports to establish regular work hours of Monday to Friday, 8:00-a.m. to 5:00 p.m. In practice however, Ms. Swan testified that salaried employees like Ms. Olsen were not held to these hours. They enjoyed a certain amount of

flexibility in the hours they worked. At times they were also able to attend to personal appointments without being docked pay. Ms. Swan testified that Ms. Olsen was to email her if she had to miss any work. Several such emails are located at Exhibit ER-1 Tab 9. Ms. Olsen's time sheets for the dates corresponding to the emails are at Exhibit ER-1 Tab 10. Ms. Swan went through these emails and time sheets and indicated that she did not believe Ms. Olsen's time sheets always accurately reflected the hours Ms. Olsen worked. Ms. Swan was not able to testify as to the actual hours Ms. Olsen worked. Ms. Swan testified that she never gave pre-approval to Ms. Olsen to work any overtime hours.

VCM's Controller is Kristin Knutson. She has held this position for approximately five years. She has a B. Comm. as well as a CMA designation. She testified that as part of her employment duties she received time sheets from the 'office staff', including Ms. Olsen. Each of the salaried office staff is paid 1/24th of their annual salary on the 15th and on the last day of every month. These office employees are to turn in their time sheets on the first Monday following the period the pay relates to. The time sheets are important so that, among other things, VCM can charge employee time to certain clients (in those cases where VCM had a 'cost plus' contract with the client) and track time charged to the general VCM code.

Time sheets completed by Ms. Olsen were filed as Exhibit ER-1 Tab 10 (A-J). More than eight hours per day are recorded on several of Ms. Olsen's time sheets. Ms. Knutson indicated that the first time Ms. Olsen submitted her timesheets, she told Ms. Olsen that VCM required that any overtime be pre-approved. Ms. Knutson believed that Ms. Olsen understood the requirement for pre-approval of overtime hours. Ms. Olsen continued to submit time sheets claiming in excess of eight hours per day. Ms. Olsen was not paid overtime for these hours. Ms. Knutson did not discuss the requirement for pre-approval of overtime hours with Ms. Olsen again. She said the reason she did not discuss this with Ms. Olsen was that it was easier to process the time sheets without paying overtime than to 'fight with' Ms. Olsen. She felt Ms. Olsen had understood her previous instructions, despite the fact she was not following them. I accept all of Ms. Knutson's testimony as truthful.

Rick Steer is VCM's Senior Construction Manager. He reports directly to Ms. Swan, as indicated on Exhibit ER-2. He has worked for VCM in a variety of positions for approximately 18 years, and has been in his current position for approximately 7-10 years. He oversees all the construction projects, helps other project managers, hires and takes care of numerous hourly employees among other duties. He worked directly with Ms. Olsen on all or almost all of the VCM projects Ms. Olsen worked on during her time with VCM. Mr. Steer testified that Ms. Olsen had the flexibility to go to various job sites and correct things that did not appear correct from a safety point of view. On one occasion a sub-contractor communicated to Mr. Steer that Ms. Olsen had shut down their job site due to what Ms. Olsen, but apparently not others, thought was a safety violation. Mr. Steer resolved the situation.

Mr. Steer was involved in VCM providing Ms. Olsen's services as a CSO to a company called ERCO. Basically Ms. Olsen would act as a CSO for ERCO. ERCO and Mr. Steer (on behalf of VCM) negotiated a list of specific services (contained in an email, see Exhibit ER-1, Tab 14) that Ms. Olsen would provide. ERCO would pay VCM \$88 per hour for the first eight hours of Ms. Olsen's work day. ERCO would pay VCM \$125 per hour for any time Ms. Olsen worked in excess of eight hours per day Monday to Friday, and for any time worked on the weekends. VCM would of course continue to pay Ms. Olsen's salary, and she would continue to be a VCM employee, although ERCO would determine the actual hours she worked. Mr. Steer was not aware of the actual hours Ms. Olsen worked, but said the ERCO job 'probably' required her to work some time in excess of eight hours per day, as well as some time on the weekend. Mr. Steer testified in a straightforward manner, and I accept all of his testimony as truthful.

Employee Evidence

Ms. Olsen testified that she earned \$96,000 per year while at VCM, and that this salary was about average for a CSO with her experience. She testified that she was the only person at VCM with her CSO designation. Her duties included reviewing VCM's safety practices including the documents to be completed, investigating how injuries had happened in the event of a Workers' Compensation claim, attending Occupational Health and Safety meetings, visiting job sites and assisting both VCM staff and subcontractors with safety procedures. This required her to spend a significant amount of time driving from job site to job site. She prepared or updated a safety manual and site procedures manual. In addition she provided ongoing training to new and existing staff, conducted an annual internal safety audit, reviewed and signed off on weekly safety documents, and entered data into a spreadsheet in furtherance of maintaining VCM's COR designation. She had planned to offer safety courses to VCM employees and possibly to others who VCM would contract with. She promoted her ability to hold such seminars during her salary negotiations as a point in favor of her being paid a higher salary than she was originally offered. This was contained in an email from Ms. Olsen to Ms. Swan dated June 4, 2013 and contained in Exhibit ER-1 at Tab 2. Ms. Olsen testified that she did not supervise any employees. She testified that she assisted in the preparation of a budget line for safety training. As a result of her safety training, she was aware of what safety courses would be appropriate to offer, and what specific equipment should be purchased. Ms. Swan and perhaps others approved any amounts actually included in the budget. Ms. Olsen also testified that she was never paid any overtime. I fully accept Ms. Olsen's testimony with respect to all of the above as truthful.

Exhibit ER-1, Tab 9 contains nine emails from Ms. Olsen in which she indicated she was taking time off during the day, would be coming in late or would be leaving early. In addition it contains one note from a chiropractic centre indicating that Ms. Olsen had been seen at that clinic on April 24. Tab 10 contains timesheets for each of the ten dates relevant to the documents contained in Tab 9. In each case Ms. Olsen claimed to have worked more than 8 hours. When cross-examined on this Ms. Olsen simply said she didn't remember the particulars, but reiterated that she must have worked the hours indicated

on the time sheet. Ms. Olsen had the ability to work late or early, as she was not bound by the hours of work listed in the contract, and so in each example could have worked the number of hours submitted on the time sheet.

When asked about pre-approval of overtime in cross examination, Ms. Olsen said she believed all of her overtime hours had been pre-approved because with only minor exception she had not been told to change the time sheets. Ms. Swan earlier had testified that she never pre-approved Ms. Olsen to work any overtime hours. I reject Ms. Olsen's evidence in this regard. I found Ms. Olsen to be evasive regarding the hours she recorded on her timesheets. I also found her to be evasive regarding whether or not she had obtained pre-approval for working overtime. I conclude that Ms. Olsen never requested nor received pre-approval for any of the overtime hours she claimed.

Decision:

Issue 1 - Is Ms. Olsen a manager and therefore not entitled to overtime pay pursuant to The Saskatchewan Employment Act?

Part 2 of *The Saskatchewan Employment Act* is the legislative basis for the requirement that employers must pay overtime to employees in certain circumstances. Those circumstances include situations where the employee works more than 8 hours per day or 40 hours per week. In some circumstances, not relevant here, the employer may schedule employees to work 10 hours per day for 4 days per week without triggering overtime.

2-18(1) Unless an employee is working in accordance with a modified work arrangement or in accordance with an averaging authorization that satisfies the requirements of section 2-20, an employer shall pay the employee overtime for each hour or part of an hour in which the employer requires or permits the employee to work or to be at the employer's disposal for more than:

(a) 40 hours in a week; or

(b) either of:

(i) eight hours in a day if the employer schedules the employee's work in accordance with clause (2)(a); or

(ii) 10 hours in a day if the employer schedules the employee's work in accordance with clause (2)(b).

(2) for the purposes of determining the 40 hour per week maximum pursuant to subsection (1), the employer may require or permit the employee to work or be at the employer's disposal for either:

(a) eight hours in a day for no more than five days in a week; or

(b) 10 hours in a day for no more than four days in a week.

There was no modified work arrangement or section 2-20 averaging authorization in this particular case. Nor was this employee scheduled to work 10 hours per day for 4 days per week. Therefore, if 2-18 applies to Ms. Olsen she is entitled to be paid overtime for all hours worked beyond 8 hours per day and 40 hours per week.

There is what I will call a 'management exception' to the requirement to pay overtime. *The Employment Standards Regulations* (Chapter S-15.1 Reg 5) says:

3 (4) Except for sections 2-15 and 2-16, Subdivisions 2 and 3 of Division 2 of Part II of the Act do not apply to an employee who performs services that are entirely of a managerial character.

2 May 2014 cS-15.1 Reg 5 s3.

Therefore if Ms. Olsen is 'an employee who performs services that are entirely of a managerial character' she is not entitled to any overtime. If she is not 'an employee who performs services that are entirely of a managerial character' she is entitled to overtime for hours worked beyond 8 hours per day and 40 hours per week.

The evidence is clear that Ms. Olsen was an employee of VCM Construction Ltd., from July 17, 2013 until November 24, 2014. The evidence is also clear that Ms. Olsen performed services, which I will group together under the general label of 'safety services' for the employer. The application of this test therefore depends upon whether or not these safety services are 'entirely of a managerial character'.

In *Hill v. Begg*, [1987] S.J. No. 824 Wimmer J. considered the legislative predecessor to what I have called the management exception. He held that:

"...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".

This holding has been cited many times, including by Klebuc, J (as he then was) in *Westfair Foods Ltd. v. Saskatchewan (Director of Labour Standards)* (1995), 136 Sask. R. 187 (Q.B.) [*Westfair Foods*]. Therefore if throughout her employment with VCM Construction Ltd., Ms. Olsen *continually* performed services of a managerial character, even though she may have performed other services, which were not of a managerial nature, she may within the management exception to the requirement to pay overtime.

The Saskatchewan Court of Queen's Bench has considered what it means for services to be of a managerial character. In *Westfair Foods* (above), the Court held:

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 legal 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.

Ms. Olsen performed very important functions for the employer. As a CSO she necessarily exercised a certain amount of autonomy. She enjoyed a certain amount of flexibility in the hours she worked. She also enjoyed a certain amount of flexibility in when she would visit various job sites and in how she would evaluate the safety procedures being used. In other words, she had a certain amount of control over when she would attend at particular work sites. This means that Ms. Olsen had 'some independence and discretion in performing assigned duties'. However in the context of Ms. Olsen's job I do not consider this to be an indicator of managerial duties. Ms. Olsen is a person with specialized knowledge regarding workplace safety – for a time she was the only such person within the employ of the employer. It is quite logical that an employee hired for her specialized knowledge, who had to move about from work site to work site, would be allowed some flexibility in her hours worked and in the way she applied her specialized knowledge.

Ms. Olsen also met with sub-contractors as well as staff at work sites and made choices regarding proper safety procedures to be followed at the work site. If a sub-contractor disagreed with Ms. Olsen's decisions, and threatened to walk off the job site, someone else from VCM, like Mr. Steer, would come in to deal with the situation. Additionally, as Ms. Swan testified, Ms. Olsen could make safety suggestions to keep the crews safe, but those suggestions could be changed by Ms. Swan or Mr. Steer. I conclude that in her employment Ms. Olsen would make safety suggestions, but did not have the power to implement those suggestions. That power lay with others such as Ms. Swan and Mr. Steer.

Ms. Olsen was able to negotiate her remuneration with Ms. Swan, who was the employer's representative. It is certainly not unusual for non-management employees to engage in fairly minor negotiation of wages prior to employment – after all, by definition there is no collective bargaining agent in a non-union environment. Ms. Olsen was a prospective employee with specialized knowledge. The evidence, which I accept, was that her remuneration was about average for a CSO as well as being about average for VCM management. There is nothing surprising about an employee with specialized knowledge making about the same salary as some management personnel.

Ms. Swan asked Ms. Olsen for her input into determining the appropriate amount for the employer to include in its budget for safety equipment and safety training. Again this is a matter within Ms. Olsen's specialized knowledge. It makes sense that Ms. Swan asked Ms. Olsen for her opinion. In order to set a budget one would have to determine what the anticipated costs would be. With respect to the safety aspects of the budget, this would involve determining the cost of equipment, and the number and type of education sessions to be provided. While such information could be gathered in a variety of ways, one simple way would be for Ms. Swan to simply ask her CSO for the information. It appears to me from the evidence that Ms. Olsen's involvement in the budgetary process was limited to simply providing Ms. Swan with information, so that Ms. Swan could make budgetary choices.

There is no evidence that Ms. Olsen supervised any staff. While it is true that 'Site Safety' personnel appear below her on the company hierarchy chart (Exhibit ER-2), there is no evidence that Ms. Olsen had authority to supervise, direct, evaluate, hire, fire or discipline any staff. Therefore much of the *Westfair Foods* indicia, including those aspects considered most fundamental for determining if an employee is within the management exception, are not present.

Ms. Olsen's duties, such reviewing VCM's safety practices, completing safety documents, investigating the cause of injuries and Workers' Compensation claims, attending Occupational Health and Safety meetings, visiting job sites, assisting VCM staff and subcontractors with safety procedures, working on a safety manual and site procedures manual, providing safety training to staff, conducting annual internal safety audits, reviewing and signing off on weekly safety documents, compiling data in furtherance of maintaining VCM's COR designation and planning safety courses are all important safety related duties. They are not, in and of themselves, duties of a managerial character.

In sum, applying the criteria laid down in *Westfair Foods*, I conclude that Ms. Olsen does not come within the management exception to the legislative requirement to pay overtime. Ms. Olsen not a manager and therefore is entitled to overtime pay pursuant to *The Saskatchewan Employment Act*.

Issue 2 -What is the effect of the provision that purports to prohibit overtime in Ms. Olsen's employment contract?

This brings me to the second issue. What is the effect of the provision that purports to prohibit overtime in Ms. Olsen's employment contract? If I am correct that Ms. Olsen does not come within the management exemption, the employment contract is meaningless insofar as it purports to prohibit overtime. Ms. Olsen's entitlement to overtime is prescribed by Part 2 of *The Saskatchewan Employment Act*. Employees and employers are not able to contract out of the provisions. If I had found that Ms. Olsen was within the management exemption, I would have found that the provision of the employment contract which purports to prohibit overtime was effective. There is no need to discuss that analysis as I found that Ms. Olsen is not within the management exception.

Issue 3 - In the event that Ms. Olsen is to be paid overtime, what is the proper number of overtime hours to be used to calculate wages owing?

This leads me to the third and final issue. If Ms. Olsen is to be paid overtime, what is the proper number of overtime hours to be included? Ms. Swan expressed the opinion that she did not believe that Ms. Olsen's time sheets always accurately reflected the hours Ms. Olsen worked. Ms. Swan candidly admitted she was unaware of the actual number of hours Ms. Olsen worked.

Employers, including VCM Construction Ltd., are required to keep certain records. These records include records of the number of hours employees worked every day and every week [*The Saskatchewan Employment Act*, s. 2-38 (1) c (vi)]. Ms. Olsen's timesheets were entered as Exhibit EE-1. These time sheets form part of the employer's records. The employer was aware that the sheets recorded overtime hours being worked by Ms. Olsen, and yet, with only minor exception, continued to accept them without requiring any changes. These timesheets constitute the only evidence presented at the hearing of the hours Ms. Olsen worked. As a result I am compelled to accept them as accurate.

The Ministry of Labour Relations and Workplace Safety used the hours recorded on the timesheets (Exhibit EE-1) and the actual amounts paid to Ms. Olsen as recorded on her Direct Deposit Payroll Advice sheets (Exhibit EE-2) to create a spreadsheet (Exhibit EE-3) indicating the overtime amounts due to Ms. Olsen. There is a minor difference of 99 cents between this amount (\$12,160.08) and the amount of Wage Assessment #7389 (\$12,161.07). The amount of Wage Assessment #7389 is the same as the amount of the Inspection Summary (Exhibit EE-4). Mr. Byers explained this difference as a rounding error, which was a result of the Ministry using two different programs to calculate the amount owing. I accept this explanation for the minor discrepancy. Given that the amount of the discrepancy is trivial, and that a reasonable explanation was offered for it, I conclude that the calculations completed by the Ministry of Labour Relations and Workplace Safety in Exhibit EE-3 are accurate.

Conclusion:

Wage Assessment #7389 is confirmed in the amount of \$12,160.08.

Dated at Saskatoon, Saskatchewan this 15th day of October, 2015.



Doug Surtees
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.

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.