Ministry of Labour **Ministère du Travail**

Ontario

REASONS FOR DECISION

Employment Standards Act, 2000

Claim Number: **70096359-8**

Business Name: **Digital Extremes Ltd.**

Claimant Name: **Giles Whitaker**

Date Claim Filed: **September 2, 2011**

Standard(s) At Issue:

- **Overtime (section 22)**
- **Limits on hours of work (Section 17)**
- **Benefits (section 44)**
- **Reprisal (Section 74)**

Evidence, Decision and Reason(s) With Respect to Each Standard at Issue:

POSITION OF CLAIMANT:

The claimant states he was employed as a quality assurance tester for the employer who is a video game developer. The company also sells computers and games. The claimant's duties consisted of testing games and providing feedback to team members by problem-solving and providing suggestions.

The claimant states that he signed a contract with the company to act as a consultant. The written contract states he is hired for a specific period, from February 5, 2011 to August 19, 2011 and that he is to be paid $1076.92 on a bi-weekly basis and that statutory deductions will be made.

The claimant states that he regularly worked from

9:00 am to 6:00 pm with a one hour lunch break. The claimant alleges he was required to work on many occasions more than 8 hours per day as well as greater that 48 hours per week. The claimant states he was not paid overtime and that he would at times, not receive 11 hours off work in between shifts. The claimant alleges that his employment was terminated as a result of his refusal to work over and beyond the core hours.

The claimant also alleges that he did not receive company benefits while other employees did.

In support of his claim, the claimant provided a copy of his employment agreement, his Record of Employment, emails to and from his employer, as well as tracking records illustrating hours recorded by the claimant.

EMPLOYER'S POSITION:

The employer states that the claimant agreed in writing to work 12 hours days and that the claimant cancelled his agreement without a two-week notice on August 15, 2011. The employer states his regular hours were 10:00 am to 4:00pm with a one hour lunch. The employer refers to the *Employment Standards Act* which states that an employee must give 2 weeks notice when cancelling a written agreement.

The employer states that the claimant agreed, in writing, to work overtime with the understanding that overtime is 'voluntary'.

The employer also states that it believes that all employees are Information Technology Professionals as defined under the *Act* and are therefore, exempt from termination pay.

The employer provided copies of wage statements for the period of August 10, 2011 to August 19, 2011, a copy of the claimant's core responsibilities as a Quality Assurance staff member as well as copies of emails between Mr. Whitaker and his supervisor, [redacted]

OFFICER'S DECISION:

The facts of this claim are as follows: the claimant was employed from August 10, 2010 to August 19, 2011 as a quality assurance staff and received a bi-weekly salary of $1,076.84. His duties consisted of ensuring technical quality and playability of Digital Extremes' games through detailed testing and feedback to relevant team members. Documentary evidence includes a 'Consulting Services Agreement' between Digital Extremes Ltd. ("Client") and Giles Whitaker ("Consultant") which stipulates the term of the contract to be from February 5, 2011 until completion of service on August 19, 2011. The claimant's last day of work was August 19, 2011. I have determined that the claimant was a 'term or task' employee and that his term ended on August 19, 2011. there is insufficient evidence to conclude that the claimant's employment was terminated as a result of his refusing to work the additional hours and as such, I cannot deduce that a reprisal has occurred.

The employer states that all employees at their facility fall under the definition of Information Technology Professionals. Section 325 of the *Act* states:

'information technology professional" means an employee who is primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgement;'

The *ESA* Policy and Interpretation Manual published by Carswell also states:' a person using the hardware and software products developed and maintained by IT professionals would not themselves be considered IT professionals. For example, persons employed as computer animators would not likely be considered IT professionals as their work would involve using the systems and software created by IT professionals but would not involve developing or maintaining such systems or software.'..

'The exemption is limited to professional employees who use specialized knowledge and professional judgement in their work. Webster's Third New International Dictionary defines "professional" as a person "engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency" and "characterized by or conforming to technical or ethical standards of a profession or occupation". "Judgement" is defined as "the mental or intellectual process of forming an opinion or evaluation by discerning or comparing".

In accordance with the information provided above, the evidence indicates that the claimant was not an IT professional rather, he was employed in a capacity to test and troubleshoot programs developed by an IT professional and is therefore, not exempt to the hours of work provisions of the *Act.*

The next issue is overtime, Sections 5 of the Act states:

'5. (1) No contracting out — Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void. '

Section 22 of the Act states:

'22. (1) An employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each week or, if another threshold is prescribed, that prescribed threshold.
(2) Averaging — An employee's hours of work may be averaged over separate, non-overlapping, contiguous periods of two or more consecutive weeks for the purpose of determining the employee's entitlement, if any, to overtime pay if,
(a) the employee has made an agreement with the employer that his or her hours of work may be averaged over periods of a specified number of weeks;
(b) the employer has received an approval under section 22.1 that applies to the employee or a class of employees that includes the employee; and
(c) the averaging period does not exceed the lesser of,
(i) the number of weeks specified in the agreement, and
(ii) the number of weeks specified in the approval.'

Again, the ESA Policy and Interpretation manual speaks to this issue and states:

'Subsection 22(1) places a positive obligation on employers to ensure that employees receive the statutory minimum requirement with respect to overtime. An employer cannot satisfy that obligation or circumvent payment for overtime by raising any of the following defences:
... (iv) The employee contracted out of his or her right to overtime pay.'....

'An employer and an employee cannot agree to contract out of the overtime provisions. This is prohibited by s. 5(1) of the Act. An employee cannot agree to work overtime hours at a rate lower than one and one-half times his or her regular rate.'

Section 17 of the Act states:

'17. (1) Limit on hours of work — Subject to subsections (2) and (3), no employer shall require or permit an employee to work more than,
(a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; and
(b) 48 hours in a work week.
(2) Exception: hours in a day — An employee's hours of work may exceed the limit set out in clause (1)(a) if the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a day in excess of the limit and his or her hours of work in a day do not exceed the number specified in the agreement.
(3) Exception: hours in a work week — An employee's hours of work may exceed the limit set out in clause (1)(b) if,
(a) the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a work week in excess of the limit;
(b) the employer has received an approval under section 17.1 that applies to the employee or to a class of employees that includes the employee; and
(c) the employee's hours of work in a work week do not exceed the lesser of,
(i) the number of hours specified in the agreement, and
(ii) the number of hours specified in the approval.'

The documentary evidence indicates that the claimant did agree to work overtime on a 'volunteer' basis up to 30 hours per week. The claimant states that due to the wording in

his core responsibilities which include 'willingness to work above and beyond the call of duty' he felt obligated to work additional hours on a volunteer basis during 'milestone times' and affirmed in writing in an email addressed to [redacted] that he would work up to 12 hours on weekdays as well as 9 hours on Saturdays and Sundays to a total of 30 hours over and above his regular 40 hours.

On or about August 15, 2011, the claimant forwarded an email to [redacted] stating that he reviewed Ministry of Labour employment standards and discovered that he could not be made to work more than 8 hours per day and would no longer work more than 44 hours without being paid overtime pay.

[redacted] replied via email stating that the claimant need not work beyond his core hours and goes on to state "our company culture ids driven and maintained by the employees that are willing to make personal sacrifice so that our end product is the best It can be.....Digital Extremes has always done their best to provide the best amenities to support us during these challenging times....and they are well aware that overtime hours are voluntary to a degree....I just want to be clear that [redacted] has had my full endorsement for the hours he has had his department working throughout the project and I anticipate continued pressure on QA as we close in on finishing this game."

There is little doubt from the above statements that the company expects its employees to work in excess of their core hours (40 -44) without expectation of compensation in the form of wages during milestone times when the company must produce a game by a certain date. There is acknowledgement that overtime pay nor regular pay is to be paid for extra time worked by its employees that is required in order to complete the task by its deadline date.

The employer states that Mr. Whitaker was fully aware that overtime would not be paid and although this is an accurate statement, there is nothing in the *Act* that allows an employer to request or permit an employee to work in excess of 44 hours in a work week, without overtime pay. This is a clear violation of Section 22 of the Act as well as Section 5(10) which prohibits an employee and/or an employer from contracting out of the *Act.*

There also is no evidence of an overtime averaging agreement as per Section 22(2). Although an employer and employee can agree to work up to 48 hours per week, there is nothing to allow an employer to not pay overtime after 44 hours per week, unless an averaging agreement approved by the director of Employment Standards is received. The director must also approve any work beyond 48 hours per week as stated in Section 17(2) above.

Furthermore, Section 6 of Regulation 285 of the *Act* defines work as follows, according to *Carswell*:

'Section 6 of Reg. 285/01 sets out the circumstances in which work is deemed to be performed or not deemed to be performed. This provision is essential in determining the number of hours of work under this Part. (Note: Section 22 of Reg. 285/01 sets out special rules regarding when work is not deemed to be performed for residential care workers. See section 31.18 of the Manual.)
Section 6 provides as follows:
6. (1) Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,
(a) where work is,
(i) permitted or suffered to be done by the employer, or
(ii) in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours of work or requires the employer to authorize hours of work in advance;
(b) where the employee is not performing work and is required to remain at the place of employment,

(i) waiting or holding himself or herself ready for call to work, or
(ii) on a rest or break-time other than an eating period.

6. (2) Work shall not be deemed to be performed for an employer during the time the employee,
(a) is entitled to,
(i) take time off work for an eating period,
(ii) take at least six hours or such longer period as is established by contract, custom or practice for sleeping and the employer furnishes sleeping facilities, or
(iii) take time off work in order to engage in the employee's own private affairs or pursuits as is established by contract, custom or practice;
(b) is not at the place of employment and is waiting or holding himself or herself ready for call to work.'

In summary, I find that the claimant is entitled to overtime pay for all hours exceeding 44 in a work week. According to the wage statements, the claimant is paid a salary covering 80 hours bi-weekly in the gross amount of $1076.80. In order to calculate the hours worked, the claimant produced reports entitled 'Digital Extremes Issue Tracking.' Although the reports do not state specifically the precise hours worked, they do contain dates, times as well as the time that an issue is reported by an individual, i.e. February 10, 2011, Giles Whitaker created a report to indicate an issue at 12:31 am. I take the position that in order for this information to be recorded in real time, the claimant was obviously working and is therefore entitled to be paid in accordance with this report at the very least, up to the time the 'bug' was recorded.

Please review the attached worksheet with respect to the assessed amount.

Benefits: the claimant states he was not paid company benefits as were other employees at the workplace.

Section 44 of the Act states:

'44. (1) Differentiation prohibited — Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex or marital status of employees:
1. Employees.
2. Beneficiaries.
3. Survivors.
4. Dependants.
(2) Causing contravention prohibited — No organization of employers or employees and no person acting directly on behalf of such an organization shall, directly or indirectly, cause or attempt to cause an employer to contravene subsection (1).'

The claimant states that he was advised by the employer that he was not eligible for company benefits as he was considered an 'independent contractor'. There is no evidence that the claimant was not eligible for benefits due to his age, sex or marital status. This is irrespective of the fact that, from the officer's perspective, the claimant was not an 'independent contractor'.

I have found no contravention with respect to benefits.

Overtime: In order to calculate the appropriate overtime rate, the claimant's weekly salary of $538.46 is divided by 44 = $12.24 per hour, the premium rate has been calculated at $18.36 and is the rate calculated for all hours exceeding 44 in a work week.

The claim is assessed as follows:

Overtime pay: $949.95
Vacation pay thereon: $38.00

TOTAL: $987.95

Action(s) Taken by Officer:

VOLUNTARY COMPLIANCE IS REQUESTED FROM THE EMPLOYER IN THE AMOUNT OF $987.95.

Jocelyne Monk

Jocelyne Monk
Employment Standards Officer #632

V.11/2009

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Ontario

December 20, 2011

Giles Whitaker

Address masked out.

BY VERIFIABLE MAIL

Dear Giles Whitaker:

Re: Digital Extremes Ltd, Claim # 70096359-8

The employer is required to provide payment to you no later than December 14, 2011. If any portion of the payment relates to wages, a wage statement must be included, outlining all authorized and statutory deductions. If you do not receive this payment by the above date please contact the undersigned.

Please find enclosed payment from the employer reflecting an amount of $987.95 less any applicable authorized and statutory deductions, pursuant to s. 103(1)(a) of the *Employment Standards Act, 2000*.

The enclosed Reasons for Decision sets out my findings with respect to your claim. If you wish to apply for a review of my decision, you must file an application for review with the Ontario Labour Relations Board within 30 calendar days of the date this letter was served. The enclosed Employee Application for Review Information Sheet provides information on how to file an application for review.

Yours truly,

Jocelyne Monk

Jocelyne Monk
Employment Standards Officer #622

Telephone
Toll Free

Phone numbers masked out.

Enclosure: Payment
Reasons for Decision
Employee Application for Review Information Sheet

11/2009