ONTARIO LABOUR RELATIONS BOARD

1616-11-ES Safaa Sabbah, Applicant v. **University of Ottawa** and Director of Employment Standards, Responding Parties.

Employment Practices Branch File No. **70073591-1**

BEFORE: Ian Anderson, Vice-Chair.

APPEARANCES: Safaa Sabbah and Batoul Salameh appearing for the applicant; Alain Roussy, Dr. Syed Sattar, Dr. Susan Springthorpe and Ms. Diane Dinelle appearing for the responding party; no one appearing for the Director of Employment Standards.

DECISION OF THE BOARD: February 5, 2013

1. This is an application under section 116 of the *Employment Standards Act, 2000*. Safaa Sabbah seeks termination pay and overtime pay from her former employer, the University of Ottawa.

2. Ms. Sabbah was employed in the position of "Junior Technologist" for the period March 1, 2009 to March 31, 2010 at a salary of $28,000 per year for 30 hours per week. She was employed in the lab of Professor Syed Sattar, the Centre for Research on Environmental Microbiology.

3. Ms. Sabbah testified on her own behalf. Prof. Sattar, Dr. Susan Springthorpe (the Director of Research for the Centre, and Prof. Sattar's "second in command") and Diane Dinelle (an Administrative Officer in the University of Ottawa's Human Resources Services department ("HRS") testified on behalf of the University.

Termination Pay

4. Prior to her employment, Ms. Sabbah had worked in Professor Sattar's lab as a graduate student, successfully completing her Master's degree. A reference letter from Prof. Sattar provides a summary of her accomplishments as a graduate student. Her thesis related to "studies on the microbicidal activities of chemicals for the remediation of environmental surfaces accidentally or deliberately contaminated with infectious bioagents". During the course of her work as a graduate student, Ms. Sabbah developed a "'universal' chemical neutralizer which was to be effective against a variety of microbicides while being harmless to the test microbes as well as their host cells". Prof. Sattar described this as:

> … an almost impossible task, which could not be successfully tackled by others in my lab. She managed to do it with sheer hard work and perseverance! The formula thus developed has many applications.

5. Ms. Sabbah wished to pursue a Ph.D. Prof. Sattar was happy to offer employment to Ms. Sabbah in the interim. Some work arising from Ms. Sabbah's studies as a graduate student under Prof. Sattar's supervision continued after her relationship changed to that of an employee in his lab. That work was no longer being done as a graduate student: Ms. Sabbah had completed her degree. Of particular importance to Ms. Sabbah, there was the possibility that the universal neutralizer which she had developed would be patented and she continued to work with Dr. Sattar on a paper in relation to it.

6. Ms. Sabbah commenced her employment with the University on March 1, 2009. However, a written contract in relation to her employment was not generated until June 25, 2009. It was signed by Ms. Sabbah on July 14, 2009. It provided in part:

> It is agreed and understood that this position is remunerated through the University of Ottawa by a granting agency and that the continuity of employment in this position as well as any future salary adjustments are dependent on the availability of funds from the granting agency and subject to other terms and conditions herein.

The duration of employment was described as follows:

> Your employment begins on March 1st, 2009 and ends on September 30th, 2009, at the latest, unless renewed in writing by the University of Ottawa before that date.

7. Whether this contract constituted employment for a fixed term or task need not be determined in this case. Ms. Sabbah's employment continued beyond September 30, 2009. While it appears that the University intended that this extended period of employment would be covered by successive fixed term contracts, this was not done.

8. Ms. Sabbah's employment was extended by the University on three occasions. These extensions were triggered by requests from Prof. Sattar's lab. In accordance with the usual procedure, the requests were directed to HRS. The requests are made electronically. HRS' procedure is to print off a document of the request on the date that it is processed by HRS (I will call this a "Renewal Form"). On September 22, 2009, HRS extended Ms. Sabbah's employment for the period October 1, 2009 to December 15, 2009; on November 30, 2009, HRS extended Ms. Sabbah's employment for the period December 16, 2009 to January 31, 2010; and on January 21, 2010 HRS extended Ms. Sabbah's employment for the period February 1, 2010 to March 31, 2010. Ms. Dinelle testified that a new written contract should have been created for each of these periods of time. Responsibility for doing so lies with HRS. HRS did not generate new contracts. Ms. Dinelle testified that this was as a result of staff shortages. Ms. Sabbah, however, continued to work in Prof. Sattar's lab and to be paid for doing so.

9. By a standard form memo dated February 12, 2010, Ms. Dinelle, of HRS, advised Dr. Sattar that Ms. Sabbah's contract would lapse on March 31, 2010 and requested that she be advised as soon as possible if Dr. Sattar wished to "re-activate" this contract. The memo was returned to Ms. Dinelle with an annotation from Dr. Springthorpe dated March 11, 2010 requesting that the contract be renewed to June 30, 2010. A Renewal Form was printed by HRS on March 22, 2010, extending Ms. Sabbah's employment for the period April 1, 2010 to June 30, 2010. Dr. Sattar and Dr. Springthorpe were asked, but neither could recall whether Ms. Sabbah was specifically told prior to the end of March 2010 that her employment was to be continued until the end of June 2010. Ms. Sabbah was not asked this question.

10. On March 23, 2010 a new contract was generated by HRS for Ms. Sabbah for the period February 1, 2010 to March 31, 2010. That contract, unlike the initial contract, included a paragraph regarding intellectual property rights which provided as follows:

> 9. **INTELLECTUAL PROPERTY**: Intellectual Property may include: technical information, know-how, copyrights, patents, models, patterns, drawings, specifications, prototypes, inventions, etc.
>
> As a condition of employment, you agree to assign ownership of all Intellectual Property you create, develop or produce pursuant to this agreement to the University of Ottawa. You agree to execute such additional conveyances and other documents conveying title or copyright to such Intellectual Property to the University of Ottawa as the University of Ottawa may require. Should any Intellectual Property assigned to the University of Ottawa be in form of copyrights, as an author of copyrighted intellectual property, you hereby permanently waive your moral rights as defined in the Copyright Act, in respect of such Intellectual Property.

As discussed further below, this paragraph was inserted in the contract in error. Unfortunately, however, neither Ms. Sabbah nor Dr. Sattar was aware of this until some time later.

11. A copy of the March 23, 2010 contract was sent to Ms. Sabbah. She was very upset by the inclusion of the paragraph with respect to intellectual property. She saw or came to see it as an attempt by Dr. Sattar, the University or both to appropriate her work on the universal neutralizer. By email dated March 26, 2010 Ms. Sabbah wrote Dr. Sattar (who was in Europe at a conference at the time) as follows:

> With lots of sadness I would like to inform you that I am not going to accept/sign that new contract which is for the first of February 2010 and ends the 31st of this month, March 2010. There are some issues with it I do not agree with. So, please consider that my last day as defined by the so mentioned contract the end of this month March 31st or earlier if you wish since there is no really contract between us.

12. By email dated March 26, 2010, Dr. Sattar responded:

> I am quite disappointed to read this. Would like to discuss the issue upon my return.

13. By email dated March 27, 2010, Ms. Sabbah responded:

> I am also quite disappointed things have to end that way. But, I had no choice but to take that decision as you know. We have to discuss all the issues upon your return. Let me know what time you want to do that, you are quite good at planning.

14. Dr. Sattar sent Ms. Sabbah a further email on March 27, 2010, copied to Dr. Springthorpe, asking that Ms. Sabbah discuss the matter of the contract with Dr. Springthorpe. By email dated March 29, 2010 to Dr. Springthorpe, Dr. Sattar wrote, in relevant part:

> Sue, I am not sure what spooked Safaa about the contract she received from the University. Please discuss the matter with her and reassure her she does not have to sign the contract if she feel[s] uncomfortable about any of the conditions in it. She is a good worker and it would be sad to let her go because of it.

15. Dr. Springthorpe met with Ms. Sabbah on March 29, 2010. She documented the meeting in an email dated March 30, 2010 to Dr. Sattar, copied to Ms. Sabbah. In the email Dr. Springthorpe noted that Ms. Sabbah's concern related to the insertion of the intellectual property paragraph into her contract. Dr. Springthorpe stated in part:

> This was not in a previous contract and Safaa certainly feels that it is not correct that she should have to do this. I have some sympathies with this position though I know it is usual or common for such a clause to be in employee contracts.

Ms. Sabbah had indicated that she thought that Dr. Sattar had put the clause in the contract. Dr. Springthorpe "assured her that you had probably never seen any of these contract wordings let alone tried to modify them which I am sure the University would not allow you to do." Dr. Springthorpe noted that fundamentally Ms. Sabbah was concerned with protecting her intellectual property in the universal neutralizer formulation and that Ms. Sabbah was looking for confirmation from Dr. Sattar in writing as to his intent. Dr. Springthorpe continued:

> As I understand it, she would like to be first author on a paper on the neutralizer, or a patent. However, I explained to her that a patent was unlikely because the University would likely not pay for it since the potential market is not huge. She also indicated, fuelled by others in the lab talking to her, that she thought you had been in talks about the neutralizer with one or more companies and that she was unhappy with this since she was not being told what was happening and she considered that it concerned her future prospects.

Dr. Springthorpe also noted:

> Safaa is hoping to have either a PhD supervisor or other prospects in place by May of this year and at present is unwilling to continue her employment here beyond end of April.

She also noted the issue of the "formal contract" remained and that Ms. Sabbah was not prepared to sign a contract with the intellectual property clause. Dr. Springthorpe had made a call to the University's human resources department (in Ms. Sabbah's presence) to inquire but had not heard back.

16. Ms. Sabbah wrote a responding email dated March 30, 2010, and copied to Dr. Sattar in which she stated:

> Thank you Sue, and I am hoping to hear from Dr. Sattar very soon. I have always respected him and I don't want to lose my trust in him. But, let me assure you, I am not going to be quiet at all if that trust is misused or not used the right ways.

17. Dr. Sattar wrote an email to Ms. Sabbah dated March 30, 2010, copied to Dr. Springthorpe:

> Just to assure that I respect your contribution to our studies and will not deprive of any credit that is due to you. That is simply not my style. I have not discussed the matter of the neutralizer with anyone for patenting or whatever except with folks at the university. That was before you started work on the project. As Sue has mentioned, the university is not interested in getting us a patent. We need to have the manuscript written and at that time we will review the matter of seeking a patent or submitting the paper for publication. As far as the contract is concerned, I had nothing to do with the wording about IP. I was not even aware that the university is now adding such a statement. I hope this clarifies matters. Bye for now.

18. Ms. Sabbah responded by an email of the same date. It states in part:

> [T]hank you Dr. Sattar, however I am still not going to sign the contract renewal for that IP condition. ….
> I still need to talk to you in person, and to make a written agreement about what you have just assured me in your message. And as Sue mentioned to you I prefer to leave the lab by the end of April this year.

19. At this point I find that Ms. Sabbah intended to work to the end of April, 2010. She had, however, made it clear that she was not going to sign the March 23, 2010 contract. In fact Ms. Sabbah did not work in the lab after March 31, 2010.

20. At 8:00 a.m. on April 1, 2010, Dr. Sattar sent an email to Ms. Sabbah and Dr. Springthorpe with respect to the project on which Ms. Sabbah was working. He

asked Ms. Sabbah to comment on a report which had been received in relation to that project. In effect, Dr. Sattar was proceeding on the basis that the employment relationship continued to exist. Ms. Sabbah had a negative reaction to this request. At 9:30 a.m. on April 1, 2010, Ms. Sabbah sent Dr. Springthorpe the following email:

> Please talk to Dr. Sattar and make him understand that I am not going to come again to the lab. I think he did not get it yet that I need a written agreement. I am very serious about that. I think he is still taking me for granted.

While not entirely clear, from the documents and evidence as a whole it appears that the "written agreement" which Ms. Sabbah wanted was one with respect to her intellectual property rights with respect to the universal neutralizer.

21. Dr. Springthorpe immediately emailed Dr. Sattar about Ms. Sabbah's most recent email and Dr. Sattar wrote an email to Ms. Sabbah asking her to clarify what she had in mind and expressing the hope that they could meet face to face. Ms. Sabbah responded:

> As you know Dr, I did not sign the contract and I did not hear from human resources yet why that condition of waiving intellectual property to the University was included in my contract. In my understanding unless I sign the contract you can not renew my position for April. I simply cannot assume that condition was added by accident, I have all the rights to protect my IP and my right to publish/patent as a first author. So I consider myself in conflict with the university until everything is cleared to me and I reserve all the right to defend myself against the university. Therefore at this point I cannot simply come to the university.

22. Dr. Sattar responded on April 1, 2010 repeating that he had nothing to do with the insertion of the IP clause into the contract and had never seen it before. However he continued:

> If you do not wish to sign that contract with that condition, it is entirely your decision. However, I will need to know that so that we can cancel your payment for the month of April.

23. This April 1, 2010 email from Dr. Sattar to Ms. Sabbah was the first statement that could reasonably be understood as indicating to Ms. Sabbah that her employment would be terminated unless she accepted the March 23, 2010 contract with the IP clause. In sending this email, Dr. Sattar was acting on the mistaken belief that the University had in fact decided to amend contracts to contain such a clause. Two hours later on April 1, Dr. Sattar sent an email to HRS stating his understanding that the new contracts included the IP clause, noting that it was "rather restrictive" and had caused concerns as certain of his staff were refusing to sign and this was putting the work of the lab in jeopardy. He asked for an explanation for the amendment.

24. At this point, therefore, Dr. Sattar was of the view that Ms. Sabbah had to sign the contract with the IP clause if she wished to continue to work. Ms. Sabbah refused to do so, and took the position that she had been "pushed" into resigning: that is that she had been constructively dismissed.

25. Positions then began to harden. Ms. Sabbah responded to Dr. Sattar in an email dated April 1, 2010 stating in part:

> I am very disappointed with the way I was treated by uottawa. My feeling is that I would never ever come back to such a place again neither to work or as a student.

26. Dr. Sattar responded on April 2, 2010 stating in part:

> Please note that the university did not single you out in the way the contract has been written. Right or wrong, the new wording, I believe, is in all new contracts. I have already expressed my concerns on the issue to the university administration.
>
> ….
>
> If your decision is final, I would request you to send me an e-mail message at your earliest convenience so that I could ask the university to formally terminate your employment here with effect from March 31, 2010.

27. Ms. Sabbah responded in a lengthy email dated April 3, 2010. Much of it is not relevant to the issue in dispute before me. It stated in part:

> [Y]ou do not need a letter of resignation from me, because in reality I was pushed to put in that situation I never meant to leave the as you know before at least some publication for my best future. [Sic.]

28. Dr. Sattar responded in a lengthy email dated April 4, 2010. It makes two points that are relevant to the dispute before me. First, Dr. Sattar noted that Ms. Sabbah's work on the universal neutralizer took place before she was an employee, while she was a graduate student. Accordingly he noted that the IP clause inserted into the contract might not apply. Second, he stated:

> I have no control over our university's rules with regards to termination of an employee's contract. It was my obligation to bring the matter of a mandatory two-week notice to your attention. On my part, I will simply inform Diane Dinelle that your employment here be terminated as of March 30, 2010. I believe that was the last day you came to the lab.

29. On April 6, 2010 Dr. Sattar did in fact send an email to Ms. Dinelle, copied to Ms. Sabbah and Dr. Springthorpe, which reads as follows:

> Please terminate the contract of Ms. Safaa Sabbah (employee # [omitted]) with effect from March 30, 2010, as her last day of work here. She has indicated to me by email that she no longer wishes to work here because of her disagreement with Clause #9 of the employee contract (dated March 23, 2010) which I believe she received on March 25. Please let me know if you need more information.
> Best regards.

30. Ms. Dinelle responded minutes later to Dr. Sattar, with copies to Dr. Springthorpe and Ms. Sabbah, as follows:

> I just wanted to let you know, that I just received an email, stating that they sent the wrong contract to this employee. Has anyone gotten back to you explaining this situation?

Dr. Sattar responded immediately to Ms. Dinelle, with copies to Dr. Springthorpe and Ms. Sabbah:

> No one has. That mistake has caused us a lot of grief here.

This was, to say the least, an understatement.

31. This was followed by a flurry of emails back and forth on April 6, 2010 from Ms. Dinelle, Dr. Sattar and Dr. Springthorpe, all copied to Ms. Sabbah. A new contract, omitting the IP clause, was generated dated April 6, 2010 and sent out on April 7, 2010. In accordance with the University's usual practice, it was sent to Ms. Sabbah at her place of work in the University: i.e. Dr. Sattar's lab. On April 7, 2010, first Ms. Dinelle and then Dr. Sattar spoke directly with Ms. Sabbah, offering apologies. Ms. Sabbah, however, advised Dr. Sattar that she did not wish to have her contract renewed. She took the position that her contract had ended as of March 31, 2010 and she did not have to send in a note of resignation.

32. It is clear from Ms. Sabbah's emails, and her testimony, that she believed and believes that the insertion of the paragraph with respect to intellectual property was not an accident. She simply refuses to believe all of the evidence to the contrary or to accept the sincerity of the apologies and assurances she was given. The evidence does not support her position.

33. The University filed numerous emails and other documents as exhibits at the hearing. Some of those documents have been described in detail above. Ms. Sabbah accepted the authenticity of all of the documents with the exception of one email. (In that email, Ms. Dinelle switched from English to French mid email. Ms. Dinelle explained that the environment within which she works at the University is fluently bilingual and that she sometimes switches from English to French without even thinking about it. I accept this explanation.) What the documents and the evidence of Dr. Sattar, Dr. Springthorpe and Ms. Dinelle establish may be summarized as follows.

34. The paragraph with respect to intellectual property was inserted without the request or knowledge of Dr. Sattar or Dr. Springthorpe. The insertion occurred because a new employee of HRS chose the wrong standard form contract to send to Ms. Sabbah. The employee made the same mistake with respect to nine other individuals. When the mistake was recognized, Dr. Sattar, Dr. Springthorpe and Ms. Dinelle each made apologies directly to Ms. Sabbah. Dr. Sattar also repeatedly recognized Ms. Sabbah's role in the development of the universal neutralizer. He did note, and Ms. Sabbah accepted, that the original idea was his. He also noted that Ms. Sabbah's work on the universal neutralizer had been done in his lab and under his supervision, and that it had built upon the previous work, albeit unsuccessful, of earlier graduate students. He gave Ms. Sabbah repeated, specific, written assurances that any intellectual property rights she had in the universal neutralizer would be honoured, including listing her as a co-inventor in a patent application which was submitted.

35. For completeness, I note that a contract dated April 14, 2010 was also generated by HRS for Ms. Sabbah for the period April 1, 2010 to June 30, 2010. Like the April 6, 2010 contract, it did not contain the IP clause.

36. In these circumstances is Ms. Sabbah entitled to termination pay?

37. The University argues that it was everyone's intention that Ms. Sabbah's employment continue beyond the end of March. It points to the emails from Dr. Sattar dated March 26, 2010 and to the emails of March 29 and 30, 2010 in which Ms. Sabbah confirms her intention to work until the end of April 2010. It argues that the test for constructive dismissal is an objective one. It states that a mistake was made with respect to the March 23, 2010 contract sent to Ms. Sabbah. It argues that had the contract not been sent, things would have simply continued as before: Ms. Sabbah would have continued to work.

38. The difficulty with this argument is that the March 23, 2010 contract was sent to Ms. Sabbah and the end result is that she did not continue to work past March 31, 2010.

39. The University argues whether there has been a constructive dismissal must be determined on an objective basis. I agree. The University argues the inclusion of the IP clause was a mistake. I agree. The University argues that as a result the IP clause should be ignored. I disagree.

40. The objective facts are that Ms. Sabbah had no reason not to believe that the March 23, 2010 contract she received on or about March 26, 2010 represented the terms and conditions under which the University was prepared to continue to employ her, not just to March 31, 2010 but, given her experience of continued employment after the expiry of her initial written contract of employment, beyond. The inclusion of the IP clause was a change in a fundamental term and condition of her employment. (It is also arguable that the attempt to revert back to fixed term contracts was also a change in a fundamental term and condition of her employment.) Dr. Sattar initially suggested to Dr. Springthorpe that Ms. Sabbah could continue to work without signing the new contract.

There was no evidence, however, that this was conveyed to Ms. Sabbah. Dr. Sattar, through Dr. Springthorpe, also sought clarification from HRS on March 30, 2010 as to why the IP clause had been inserted. This clarification, however, was not forthcoming in a timely way. In any event, on April 1, 2010, Dr. Sattar confirmed to Ms. Sabbah what Ms. Sabbah understood to be the case: if she wished to continue to work for the University after March 31, 2010, she had to sign the March 23, 2010 contract. He conveyed the same message to her again on April 2 and 4, 2010. Ms. Sabbah refused to sign the contract. Accordingly on April 4, 2010, Dr. Sattar also advised Ms. Sabbah that as a result he would advise the University that her employment was terminated. He did so on April 6, 2010. As of the time that Ms. Sabbah's employment was terminated for her refusal to sign the March 23, 2010 contract, she did not know that the IP clause had been included in error (nor, for that matter, did Dr. Sattar).

41. Ms. Sabbah refused to accept the fundamental change to the terms and conditions of her employment. Apart from her statements, she manifested this refusal by declining to work past March 31, 2010. She was, therefore, constructively dismissed as of that date. Alternatively, Ms. Sabbah's employment was terminated by Dr. Sattar on or before April 4, 2010 for refusal to sign the March 23, 2010 contract. In either event, on an objective analysis of the facts known to Ms. Sabbah and Dr. Sattar at the time, Ms. Sabbah's employment was terminated before either of them knew or should have known that the insertion of the IP clause into the contract of employment was in error.

42. I suggest no impropriety on Dr. Sattar's part. Quite the contrary. He had no control over or prior knowledge of the contents of the contract of employment between the University and Ms. Sabbah. He acted as expeditiously as reasonably possible to seek clarification from HRS. In advising Ms. Sabbah that her employment had come to an end, he was acting upon the understandable, albeit mistaken, belief that the March 23, 2010 document represented a new contract imposed upon Ms. Sabbah by the University.

43. Does the fact that Ms. Sabbah was advised on April 6 or April 7, 2010 that the inclusion of the IP clause was a mistake change the result? In my view it does not. For the reasons stated above, Ms. Sabbah's employment had already been terminated. I accept that an objective review of the emails on April 6 or shortly thereafter would or should have satisfied Ms. Sabbah that the inclusion of the IP clause was a mistake. There is also no question the University was then offering to continue to employ Ms. Sabbah under a contract that did not include the IP clause. It may well be that Ms. Sabbah acting reasonably should have accepted that offer of employment. However it is well established that there is no duty to mitigate with respect to termination pay under the Act. Accordingly, Ms. Sabbah was entitled to decline this offer of continued employment and claim her termination pay instead.

44. Ms. Sabbah was employed for 13 months. Accordingly, she was entitled to two weeks notice or termination pay in lieu. Ms. Sabbah was paid a salary of $28,000 per year. Her regular pay would have been $538.46 per week. Accordingly, I calculate two weeks termination pay to be $1,076.92. Vacation pay of 4% is owed on this amount, for a total of $1,120.

Overtime Pay

45. Ms. Sabbah filed a complaint with the Ministry of Labour on May 7, 2010 seeking overtime pay in addition to termination pay. There is no dispute that this was the first time that Ms. Sabbah in any way made a claim for overtime.

46. Ms. Sabbah's regular hours of work were 30 hours per week. She testified that she worked in excess of her regular hours of work on almost a weekly basis, stating that 30 hours per week was not enough for all of the work that she was doing. She filed a chart setting out the number of hours in excess of 30 she claims to have worked in each week of her employment by the University. That chart shows anywhere from 0 to 22 extra hours worked per week. She testified that she made the chart based on notations she had made on a calendar as to when she had to go into the lab on a given day. She had not, however, noted on her calendar when she returned from the lab or how long she spent in the lab. She was just focused on the work, not keeping track of how much time she spent doing it. She testified that the chart was an after the fact attempt by her to estimate the number of hours which she had worked. It was created after she filed her claim with the Ministry of Labour. She agreed that she had never sought or received prior authorization to work overtime hours. In part, in her view, this was a product of a "silent agreement" which she had with Dr. Sattar: she would finish work on the neutralizer and they would get a patent for it. In part it was because she knew that funding was tight and overtime would not be authorized.

47. Dr. Sattar testified fairly and candidly that Ms. Sabbah probably could not accomplish the work assigned to her in 30 hours per week. The nature of the work in his lab is such that it does not lend itself to "9 to 5" hours. Employees are expected to be flexible. He noted that Ms. Sabbah had made use of that flexibility to accommodate various family obligations to take time off. Nonetheless, he did not doubt that Ms. Sabbah had worked extra hours. He noted that was the nature of the work: the writing of manuscripts takes extra time and researchers take work home. In Ms. Sabbah's case, she took on writing up the universal neutralizer project. She had, however, never raised the issue with him prior to her claim following the termination of her employment. He did not contradict Ms. Sabbah's evidence that overtime would not have been authorized if requested. Rather, he testified that he had paid overtime to employees only twice over the years, and that was in special cases in which the employee had worked 30 days straight on a special project and funding was available.

48. Dr. Springthorpe testified that she thought Ms. Sabbah could have accomplished her assigned work within 30 hours per week, but that she did not know. Ms. Sabbah did not work 9 to 5. Dr. Springthorpe was not working with Ms. Sabbah and saw her irregularly. She did not keep track of Ms. Sabbah's hours.

49. Ms. Dinelle testified that the University followed its policy with respect to overtime (discussed further below). Overtime is only paid if authorized. She stated staff that work in a particular lab usually know at the outset whether the lab supervisor will

authorize overtime, because the ability to do so is strictly limited by the funds available to the lab.

50. In short, Ms. Sabbah's evidence was that she worked more than 30 hours per week, Dr. Sattar agreed that Ms. Sabbah probably could not complete her assigned work in 30 hours and had no reason to doubt that she worked more than 30 hours per week and Dr. Springthorpe had no direct knowledge of the number of hours worked by Ms. Sabbah. I conclude that Ms. Sabbah sometimes worked more than 30 hours per week.

51. Ms. Sabbah seeks overtime for hours worked in excess of 30 hours per week based upon the University's policies. The University has a policy with respect to "Work Hours, Overtime and Additional Work – Support Staff" which was filed as an exhibit (the "Policy"). There is no dispute that the Policy applied to Ms. Sabbah's employment. The Policy recognizes that employees may work "flex time". It provides that overtime is paid on the basis of the hourly rate of the position occupied by the employee for hours in excess of the employee's regular hours of work. Each hour is to be paid at a rate of time and one half the regular hourly rate, either in money or equivalent time off. A maximum of 50 hours of overtime can be banked.

52. In my view, however, Ms. Sabbah has no entitlement under the Policy. Paragraph 15 of the Policy provides in pertinent part:

> Only overtime hours explicitly and directly scheduled and approved by the immediate supervisor are considered legitimate overtime hours and can be paid under the terms and conditions in this policy. …. Unscheduled and unauthorized hours of work by staff at their own discretion or for personal reasons are not recognized and are not paid as overtime under this policy.

There is no dispute that any overtime hours worked by Ms. Sabbah were not authorized. Accordingly, she has no entitlement under the Policy.

53. Ms. Sabbah's entitlement to be paid for the hours she worked in excess of 30 hours per week, if any, therefore, arises from the Act. In general, and sufficient for this decision, the Act distinguishes between hours worked in excess of 44 per week, and those worked up to 44 per week. Accordingly, they need to be separately considered.

54. For the purposes of the analysis, I also note the following. There was no clear evidence before me as to the pay period established by the University. Accordingly, I will treat each week shown in Ms. Sabbah's chart as a separate pay period. Ms. Sabbah was paid an annual salary of $28,000. This is the equivalent of $538.50 per weekly pay period. There is no dispute that she was paid this amount.

Hours Worked Up to 44 per Week

55. Under the terms of her contract Ms. Sabbah's "work schedule" is shown as "30 hours per week" and she was paid an annual salary of $28,000 per year. I have found that

in some weeks she worked more than 30 hours. She did not receive any additional financial compensation for those hours. Did she receive the employment standard or a greater contractual benefit than the employment standard in relation to hours worked in excess of 30 hours per week, but not in excess of 44 hours per week? In my view the answer to this question requires determining whether she was a salaried employee in substance as well as form or whether she was in fact an hourly paid employee. The distinction is important for the purposes of the Act for the following reason: hourly paid employees are entitled to be paid straight time for all hours worked up to 44; salaried employees are only entitled to receive their salary irrespective of the number of hours worked up to 44.

56. The term salary is of ancient pedigree. Historically, it referred to a periodic payment of a fixed sum for services rendered by a person of the "higher class". By contrast, a person of the "lower class" was paid wages for hours worked. The flavour of this distinction is captured in *Fahlman v. Independent Northern Laboratories Ltd.*, [1971] S.J. No. 72 (Sask. Q.B.):

> 5. …. The nature of the remuneration is evidence of the nature of the employment. This feature was dealt with by McCardie, J. in Moriarty v. Regent's Garage Company [1921] 1 K.B. 423 at pp. 444-5:
>
> "The Act of 1870 therefore treated 'salary' in the definition clause as one if its subject matters. The Act has been applied in the widest possible manner, as is shown in the authorities collected in *Chitty's Statutes*, vol. i., pp. 393-4. Now comes the question what is a 'salary'? I agree that the word is difficult to define. I may refer to two statutory provisions, the first in s. 33 of the *Bankruptcy Act, 1914*, which provides for preferential payments in bankruptcy. Many decisions have been given on that section or the similar section in previous statutes, but those cases must all be read in the light of the words used in the section, 'the wages or salary of any clerk or servant'; and therefore it is not enough for a man who seeks preferential proof in bankruptcy to say that he received a salary; he must go further, and show that he was a clerk or servant within the meaning of the section. It is important to remember this in considering the decisions on that section. The other statutory provision dealing with salaries is what is now s. 209 of the *Companies (Consolidation) Act, 1908*. There, the words are the same as those in s. 33 of the *Bankruptcy Act, 1914*, and the same observation therefore applies to the decisions on s. 209. While I agree as to the difficulty of defining the word 'salary' we must arrive at a general notion of its meaning, although even then it may be difficult to mark the point where 'salary' merges into 'wages,' or when the particular form of payment ceases to be 'salary' in the general sense of the word. In *Stroud's Judicial Dictionary* under the word 'salary' there is this quotation from *Termes de la Ley*: "Salarie' is a word often used in our bookes, and it signifies a recompense or consideration given unto any man for his paines bestowed upon another man's businesse.' That was the old and broad meaning. It has undoubtedly now acquired a narrower signification, which is well suggested in the ordinary dictionary definition. I take the following definition of 'salary' from the Imperial Dictionary: 'The recompense or consideration stipulated to be paid to a person periodically for services, usually a fixed sum to be paid by the year, half year, or quarter. When paid at shorter periods the recompense is usually called pay or wages; thus, a judge, governor, or teacher receives a salary; a labourer receives wages.' That

> dictionary meaning is in accordance with the judicial view so far as expressed upon the matter. In *Gordon v. Jennings* (1882), 51 L.J. (Q.B.) 417, 418, where the question was as to the meaning of the word 'wages' in the *Wages Attachment Abolition Act, 1870*, Grove J. said: 'In the first place the word 'wages' is some indication of the object of the Act - for though it might be said to include payment for any services, in general the word 'salary' is used for payment of services of a higher class, and 'wages' is confined to the earnings of labourers and artisans.' That I think gives the broad notion of the generally prevailing meaning. The same view has been taken in New Zealand, for I find in *Bedwell's Australasian Judicial Dictionary*, under the word 'salary,' a useful extract from the judgment of Williams A.C.J. *In re Industrial Conciliation and Arbitration Act, 1908* (1909), 28 N.Z.L.R. 933, 540: 'The term 'salary' is ordinarily used to signify the periodical remuneration paid to professional men, clerks, or persons whose duty it is to superintend, and who have in every case an appointment of some permanency. It is never ordinarily used as signifying the remuneration of manual labour or of any labour when the element of permanency is absent.'"
>
> ....
>
> 7. The test to be applied in order to ascertain the class to which the employee belongs was stated by Buckley, L.J. in *Simmons v. Heath Laundry Co*. [1910] L.J.K.B. 395 at p. 400:
>
> "I do not know whether it is possible to approach more closely to an answer to the question as to what is a contract of service under this Act than to say that in each case the question to be asked is, What was the man employed to do? Was he employed upon the terms that he should within the scope of his employment obey his master's orders, or was he employed to exercise his skill and achieve an indicated result in such manner as in his judgment was most likely to ensure success."
>
> 8. This statement was quoted by Turgeon, J.A. in the Cassidy case, supra, at p. 646, to which he added these remarks:
>
> "In the first case the relationship of master and servant exists and the man is a 'workman' within the meaning of the Act; (*The Workmen's Compensation Act*) in the second case he is not."

57. In modern usage, a salary remains a fixed periodic payment for services rendered. In most other respects, however, the application of the term has evolved. The period of payment is more likely to be weekly or bi-weekly than by the "year, half year, or quarter". Recipients of salaries are no longer limited to those of the "higher class". Perhaps more significantly, as in this case, "regular hours" for a salaried position are now often specified. This begs the following question: how does an employee who is paid a salary of $700 for a regular work week of 35 hours differ from an employee who is paid $20/hour and regularly works 35 hours per week?

58. Put differently, the nature of the remuneration is no longer determinative of the nature of the employment. Other characteristics are important in determining whether an employee is in substance salaried rather than hourly. The most obvious would appear to

be whether there is a variation in the compensation paid for the period if there is a variation in the number of hours actually worked in the period. A decrease in compensation for a period in which a "salaried" employee works *less* than the specified number of regular hours may suggest that the person is really being paid something akin to an hourly basis. On the other hand, what if a "salaried" employee who works *more* than the specified number of regular hours receives or may receive an increase in compensation for the period? Does that mean that they are in fact an hourly employee? It is not uncommon for employers to have policies, similar to that of the University in this case, which in some circumstances result in premium pay or banked hours for hours worked in excess of the employee's regular hours. These could be construed as recognizing the hourly nature of such employment. It would seem perverse, however, if an agreement to pay a premium for authorized hours would create an obligation to pay straight time for unauthorized hours which, as discussed below, would be the implication of concluding that the employee was really being paid on an hourly basis.

59. Other questions arise in relation to the modern salaried employee. For example, what if the employee usually works more than the "regular" number of hours, as Ms. Sabbah alleged in this case? Should that, somehow, affect the determination of whether or not the individual is a salaried employee, or is the individual's recourse to allege that the "regular hours" constitute a contractual term and seek some form of remedy for breach of contract?

60. These are not easy questions and not ones which were addressed by the parties to the proceeding before me. There was, however, no dispute that Ms. Sabbah received a "salary" which did not vary by pay period. I note also that Dr. Sattar's evidence was that there were some weeks in which Ms. Sabbah worked less than her normal 30 hours per week. This was not inconsistent with Ms. Sabbah's own chart which records 5 weeks in which she worked "0" hours in "excess" of her normal hours. Accordingly, based on the evidence before me, I find that Ms. Sabbah was a "salaried" employee. Accordingly, she received what she was entitled to receive under her contract for hours worked up to 44 per week. Did she receive the minimum amount required by the Act?

61. Section 11(1) requires an employer to "establish a recurring pay period and a recurring pay day" and to pay an employee "all wages earned during each pay period". The meaning of "wages" is defined in section 1. For the purposes of this decision it suffices to note that its meaning includes "monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied".

62. Payment of compensation to employees by way of salary is contemplated by the Act. Section 15 imposes different record keeping requirements with respect to salaried employees. Section 15 provides in relevant part:

> (1) An employer shall record the following information with respect to each employee, including an employee who is a homeworker:
>
> ….

> 4. The number of hours the employee worked in each day and each week.
>
> (3) An employer is not required to record the information described in paragraph 4 of subsection (1) with respect to an employee who is paid a salary if,
>
> (a) the employer records the number of hours in excess of those in his or her regular work week and,
> (i) the number of hours in excess of eight that the employee worked in each day, or
> (ii) if the number of hours in the employee's regular work day is more than eight hours, the number in excess;
>
> ….
>
> (4) An employee is considered to be paid a salary for the purposes of subsection (3) if,
>
> (a) the employee is entitled to be paid a fixed amount for each pay period; and
> (b) the amount actually paid for each pay period does not vary according to the number of hours worked by the employee, unless he or she works more than 44 hours in a week.

The meaning ascribed to salary by s. 15(4) is expressly stated to be for the purposes of s. 15(3). There is no general definition of the word "salary" in the Act. In fact, section 15 is the only place in the Act where there is an express reference to "salary" at all.

63. Section 1 defines "regular rate" as follows:

> "regular rate" means, subject to any regulation made under paragraph 10 of subsection 141 (1),
>
> (a) for an employee who is paid by the hour, the amount earned for an hour of work in the employee's usual work week, not counting overtime hours,
>
> (b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;

64. The effect of the definition of "regular rate" is to convert the compensation paid to salaried employees into an hourly rate calculated by reference to the number of non-overtime hours actually worked by an employee in a given week. Notably, it is not calculated by reference to the normal number of hours to be worked by employee pursuant to his or her contract. This "regular rate" is then used in the Act for the purposes of determining: entitlement to overtime pay (see section 22); entitlement to public holiday pay (see sections 24, 27, 28 and 30); and whether an employee has been laid off in a week for the purposes of the termination pay and severance pay provisions of the Act (see sections 56 and 63 respectively).

65. Nothing in the Act entitles a salaried employee to receive additional compensation for hours actually worked in a week which exceed his or her normal hours but are less than 44 hours in a week. Rather, as implicit in the definition of regular rate, the amount of regular compensation such an employee is entitled to receive remains constant while the employee's regular rate for the week declines proportionate to the increase in the number of non-overtime hours actually worked.

66. The only employment standard which applies to the amount of compensation paid to salaried employees in relation to the first 44 hours worked in a week is the obligation to pay at least the prescribed minimum wage found in Part IX of the Act, which consists only of section 23. Section 23 provides, in relevant part, as follows:

> (1) An employer shall pay employees at least the prescribed minimum wage.
>
> ….
>
> (3) Compliance with this Part shall be determined on a pay period basis.
>
> (4) Without restricting the generality of subsection (3), if the prescribed minimum wage applicable with respect to an employee is expressed as an hourly rate, the employer shall not be considered to have complied with this Part unless,
>
> (a) when the amount of regular wages paid to the employee in the pay period is divided by the number of hours he or she worked in the pay period, other than hours for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to the prescribed minimum wage; and
>
> (b) when the amount of overtime pay and premium pay paid to the employee in the pay period is divided by the number of hours worked in the pay period for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to one and one half times the prescribed minimum wage.

67. The prescribed minimum wage applicable to Ms. Sabbah's employment for the period May 7, 2009 to March 30, 2010 was $9.50 per hour: see O. Reg. 285/01 s. 5(1.2), para. 5. While Ms. Sabbah's employment terminated effective April 1, 2010, the evidence before me was that she did not work on March 31, 2010. Accordingly, the applicable minimum wage at all material times was $9.50 per hour.

68. The first 44 hours worked by Ms. Sabbah in any weekly pay period were subject to section 23(4)(a). Her regular wages for each of these pay periods was $538.50. If that number is divided by 44 hours, the result is $12.24/hour. This exceeds the minimum wage of $9.50/hour. Accordingly, the employer has complied with the requirement of section 23(4)(a).

Hours Worked in Excess of 44 per Week

69. Pursuant to the University's Policy, which formed part of Ms. Sabbah's contract of employment, she was entitled to receive a premium for authorized hours worked in excess of her normal 30 hours per week. Pursuant to the Act, she would, in essence, be entitled to receive time and a half for all hours worked in excess of 44 in a week: see Part VIII of the Act, and in particular sections 22, 22.1 and 22.2. Further, this amount must be at least one and a half times the minimum wage: see Part IX of the Act, section 23. Does the Policy or the Act apply to Ms. Sabbah's claim for overtime?

70. Section 5(2) provides:

> If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

In *United Food and Commercial Workers Union, Local 1977 v. Zehr's Markets, a Division of Zehrmarket Ltd.*, [2009] O.L.A.A. No. 63, Arbitrator Albertyn adopted a two step approach to making the determination under section 5(2). This approach was affirmed by the Divisional Court in dismissing an application for judicial review: [2010] O.J. No. 13. The first step is a global comparison of the general overall provisions in relation to the subject matter in the contract with those in the Act. However, since section 5(2) requires that the greater benefit be provided to "an employee", consideration must be given to the application of the contract on an individual basis. Thus, as a second step, one must consider whether the application of those contractual provisions results in a greater benefit to the employee in question.

71. With respect to the first step, the Policy requires explicit approval of overtime hours in order to attract a premium. By contrast, work in fact performed by an employee, even though not authorized by the employer, is work for the purposes of Act: see O. Reg. 285/01 s. 6(1)(a)(ii). On the other hand, under the Policy entitlement to premium compensatory time-off or pay arises after specified normal work weeks. The Policy discusses an average normal work week of 35 hours for support staff and an average normal work week of 40 hours for staff of "Protection Services" and the "Housekeeping Division of the Physical Resources Services". In both cases the number of hours in the average normal work week is less than the 44 hour threshold for overtime pay established by section 22 of the Act. If the comparison were restricted to balancing of just these two factors, it is at least arguable that on a global comparison basis the Policy provides a greater benefit than the employment standards with respect to pay for regular and overtime hours. On the view I take of this matter, however, I do not need to decide that issue.

72. Assuming without deciding on a global comparison basis the Policy does provide a greater benefit than the comparable employment standards, I am not satisfied that the Policy provided a greater benefit as applied to Ms. Sabbah. It is true that Ms. Sabbah's

regular hours were 30 hours per week. The Policy, therefore, would result in a premium to her in relation to all authorized hours worked in excess of 30. This is a substantial advantage over the 44 hour threshold set out in the Act. If there were some reasonable prospect that some of the hours worked by Ms. Sabbah in excess of her regular 30 hours would be authorized then I might conclude that application of the Policy to her resulted in a greater contractual benefit, even if she received no premium compensation with respect to other hours worked but not authorized. But on the evidence before me I conclude both that it was expected that Ms. Sabbah would work more than her regular 30 hours and that there was in essence no prospect that any of those hours would be explicitly authorized or scheduled as overtime hours. Accordingly, I conclude that the Policy as applied to Ms. Sabbah did not provide her with a greater benefit than the employment standards with respect to the same subject matter.

73. In the result, section 5(2) does not operate to bar the application of the relevant employment standards to Ms. Sabbah's employment. I turn now to consider those employment standards.

74. As noted, Part VIII deals with overtime pay. Section 22(1) provides:

> 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.

75. As noted above, "regular rate" is defined by section 1:

> "regular rate" means, subject to any regulation made under paragraph 10 of subsection 141 (1),
>
> (a) for an employee who is paid by the hour, the amount earned for an hour of work in the employee's usual work week, not counting overtime hours,
>
> (b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;

Since I have concluded that Ms. Sabbah is not paid by the hour but rather is a salaried employee, the applicable clause is (b). For each hour worked in excess of 44 in a week (i.e. her overtime hours), she is entitled to one and one-half times her weekly salary ($538.50) divided by the number of non-overtime hours actually worked (44). That is she is entitled to $18.36 per overtime hour worked.

76. The difficulty is in determining the number of hours worked. While Ms. Sabbah's chart does record many weeks in which she worked more than her regular 30 hours, given the after-the-fact manner in which the chart was created there are obvious concerns with the reliability of the numbers. While I am prepared to conclude that Ms. Sabbah worked in excess of 30 hours some weeks, I am not prepared to conclude that she worked in excess of 44 hours in any week. Accordingly, she has no entitlement to overtime pay.

Disposition

77. For the reasons stated, I find that Ms. Sabbah is entitled to: $1,120 representing two weeks termination pay and vacation pay thereon. The University of Ottawa is to pay this amount to the Director of Employment Standards in trust for Safaa Sabbah. If this amount is not paid within 30 calendar days of the date of this decision, this decision will become an order to pay in favour of the Director of Employment Standards in trust for Safaa Sabbah, attracting the statutory administrative fee of $112.00. The total amount of the order to pay will be $1,232. In addition, pursuant to section 119(12) of the Act, I direct that if this decision becomes an order to pay, then interest will be payable at the rate and calculated in the manner determined by the Director under subsection 88(5) of the Act.

"Ian Anderson"
for the Board