

An appeal

- by -

J.P. Metal Masters 2000 Inc.  
("J.P.")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2005A/17

**DATE OF DECISION:** April 19, 2005

## DECISION

### SUBMISSIONS

Lori Merritt	on behalf of J.P. Metal Masters 2000 Inc.
Dennis Foucher	on his own behalf
Cal Mitten	on behalf of the Director

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by J.P. Metal Masters 2000 Inc. (“J.P.”) of a Determination that was issued on January 19, 2005 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that J.P. had contravened Part 4, Section 40, Part 5, Section 46, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of Dennis Foucher (“Foucher”) and ordered J.P. to pay Foucher an amount of \$3829.41, an amount which included wages and interest.

The Director also imposed an administrative penalty on J.P. under Section 29(1) of the *Employment Standards Regulation* (the “Regulations”) in the amount of \$1500.00.

J.P. says the Director erred in law in finding Foucher was not a manager for the purposes of the *Act* and failed to observe principles of natural justice in making the Determination.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issue in this appeal is whether J.P. has shown there is an error in the Determination that allows or justifies the Tribunal’s intervention under Section 115 of the *Act*.

### THE FACTS

The appeal raises no issue over the findings of fact.

J.P. operates a structural steel and fabricating business. Foucher was employed as a “site manager” from May 16, 2005 to September 23, 2005. His rate of pay at the commencement of employment was \$18.00 an hour and increased to \$21.00 an hour on July 11, 2004, remaining at that rate until his permanent lay-off. Foucher was employed in respect of several construction sites at which J.P. had welders and helpers working. The Determination notes the following description from Foucher concerning his work functions:

All he did was check on whether work was done on site. He would run out and get whatever was needed to keep the work going. He worked at the BMW, UBC, SFU, Chilliwack and various

other construction sites. He considered himself to be a leadhand. The only policies he enforced were in regards to wearing hardhats and attending the weekly safety meeting, as required by WCB. The only off-site work he did was to complete ½ to 1 hour of paperwork at the office each day and additional paperwork at home.

The Director identified four issues in the Determination:

- Whether Foucher was a manager for the purposes of the *Act*;
- Whether, if he was not a manager, overtime wages were owed;
- Whether, if he was not a manager, statutory holiday pay was owed; and
- Whether Foucher was owed compensation for length of service.

The Director found that Foucher did not exercise the level of authority sufficient to bring him within the definition of manager in Section 1 of the *Employment Standards Regulation* (the "*Regulation*"). The Director made the following findings of fact in reaching that conclusion:

- The evidence did not show that Foucher ever made any decisions regarding hiring, firing, evaluating disciplining, setting or changing schedules, calling employees in to work, authorizing overtime, time off or leaves of absence.
- Foucher had a responsibility for ensuring company and Workers' Compensation Board policies were complied with on site.
- Foucher performed some training (of a limited nature).
- Foucher monitored 3-5 employees who worked on site.
- Foucher had limited authority regarding the use of company resources. While he had spending authority - and it was unclear whether his spending authority was limited to \$200.00 or \$500.00 - he was uncertain about the scope of this authority and cleared all purchases, with minor exceptions, through others.
- Foucher was not responsible for a budget.
- The owner of J.P., Jean-Paul Phillippon Sr., and the site superintendent, Dennis Bilodeau, determined the work processes and Foucher followed their instructions.
- There was no evidence Foucher was ever involved in bidding jobs or make any decisions about what work would be done by J.P., how it would be done or when it would be done. The chain of command was from Mr. Phillippon Sr. to Mr. Bilodeau to Foucher to the workers on site.

The Director found Foucher was owed overtime wages, statutory holiday and compensation for length of service.

The Director considered whether paragraph 65(1)(e) of the *Act* had any effect on the claim by Foucher to length of service compensation and found it did not. The Director did not consider Foucher to be an employee “employed at one or more construction sites” and based on that finding, did not consider it necessary to decide whether J.P. was an employer “whose principal business is construction”.

The Director’s decision on length of service compensation has not been appealed.

## ARGUMENT AND ANALYSIS

J.P. has the burden, as the appellant, of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
  - (b) *the director failed to observe the principles of natural justice in making the determination;*
  - (c) *evidence has become available that was not available at the time the determination was made.*

An appeal to the Tribunal is not a re-investigation of the complaint. Nor is it intended to be an opportunity to rectify what are perceived to be deficiencies in the presentation of a party’s position during the investigation process or to re-argue positions taken during the investigation process. On this latter point, it is apparent that a key objective of this appeal is to allow J.P. to provide evidence through Mr. Phillippon Sr. and Mr. Bilodeau that was not submitted during the complaint process. It is also apparent that the failure to provide such evidence during the complaint process was a conscious and deliberate decision by Mr. Phillippon Sr. - a decision from which the Tribunal will not provide relief.

J.P. says the director failed to comply with principles of natural justice in making the Determination. This ground of appeal appears to be based on the assertion by J.P. that Foucher was, contrary to the finding of the Director, paid for the Canada Day and BC Day statutory holidays. J.P. does not directly assert Foucher was paid for the Labour Day statutory holiday. The record seems to indicate Foucher worked that statutory holiday and was not properly paid. That alone justifies the imposition of the administrative penalty.

I am concerned, however, that the Director may have misunderstood the employer records and, as a result, Foucher may have been unjustly enriched in the amount of two days pay that he is not entitled to under the *Act*. I do not disagree with the Director that all the record shows concerning the Canada Day statutory holiday is that it was not paid. J.P. says, however, that the wages owed for that statutory holiday were paid, and recorded, on July 3. That method of recording payment for a statutory holiday does not comply with the requirement set out in Section 27(f) of the *Act*. On the other hand, one of the purposes of the *Act* is to promote the fair treatment of employees and employers. If Foucher has in fact been paid for that statutory holiday and for the BC Day holiday, it would not be fair to J.P. for him to receive the equivalent of two days’ pay because of a misunderstanding on the part of the Director about the employer records.

The Determination as it relates to those two statutory holidays will be referred back to the Director. This aspect of my decision should not be viewed as a direction that the Determination on statutory holiday pay must be changed, but it must at least be reviewed and clarified.

Turning to the second ground of appeal, J.P. says the Director erred in law by not finding Foucher was a manager for the purposes of the *Act*. The *Regulation* defines manager in Section 1:

*“manager” means*

- (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources; or*
- (b) a person employed in an executive capacity.*

The *Act* is remedial legislation and, as such should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objectives. The burden of establishing a person is excluded from the protection of the *Act*, or any part of it, is on the person asserting it and there must be clear evidence supporting such an exclusion.

I see no possible argument here that Foucher was employed in an executive capacity. The Tribunal has said that in order to be employed in an executive capacity, the person must have duties that relate to active participation in control, supervision and management of the business.

The Tribunal recently considered the wording of subsection (a) of the definition of manager in *Howe Holdings Ltd.*, BC EST #D131/04 and re-affirmed the view expressed by the Tribunal in *429485 B.C. Limited operating Amelia Street Bistro*, BC EST #D497/97, that the question of whether a person’s principal employment responsibilities consist of supervising and/or directing human or other resources will depend on a total characterization of that person’s duties, including consideration of the amount of time spent supervising and directing human and other resources, the nature of the person’s other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. There is no relevance to the job title given to an employee by the employer.

The evidence in this case was that Foucher made no decisions regarding hiring, firing, evaluating disciplining, setting or changing schedules, calling employees in to work, authorizing overtime, time off or leaves of absence. He had limited (and uncertain) authority regarding the use of company resources. He monitored the work of 3-5 employees but made no independent decisions relating to work processes or work performed.

On those facts, I am satisfied the Director made no error in law in finding Foucher was not a manager for the purposes of the *Act*.

In sum, the appeal is dismissed with the exception of statutory holiday pay for Canada Day and BC Day, which are referred back to the Director.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated January 19, 2005, be confirmed, subject to any variance in the amount of statutory holiday pay owing.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**