

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

SSC Industries Ltd., Christopher R. Prince and Ronald W.A. Busch
("SSC", "Prince" and "Busch")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 96/074

DATE OF HEARING: May 2, 1996

DATE OF DECISION: May 13, 1996

DECISION

APPEARANCES

for SSC, Prince and Busch:	Christopher Prince Ronald Busch
for Smith:	In person
for the Director:	Diane MacLean

OVERVIEW

This is an appeal by SSC Industries Ltd. and its two directors, Christopher R. Prince and Ronald W.A. Busch (collectively "SSC") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from three Determinations, number CDET 000588, which was issued against the company, and DDET numbers 000054 and 000055, which were issued against the directors of the company. All were dated December 27, 1995 and all were based on the same reasons. The Determinations required SSC to pay to Brian Smith ("Smith") the sum of \$11,139.67 for unpaid overtime and vacation pay, unauthorized deductions from wages and severance pay. SSC appeals all aspects of the Determinations and says that nothing is owed to Smith.

FACTS

SSC is a manufacturer of solid surface counter tops for residential and commercial application. It operates a manufacturing shop which employs between five and nine persons, depending upon available work.

Smith was hired in August of 1988 as a fabricator to work in the shop. He was the first employee of this newly formed venture. There is no doubt when SSC hired Smith they recognized his considerable skill and knew he would become the shop foreman when such a position was warranted. That happened in June of 1990 and he remained shop foreman until April 13, 1995. As shop foreman, Smith was paid a salary, commencing at \$3,000.00 per month in June of 1990 and ending at \$3,350.00 per month on April 13, 1995. In the last month before becoming shop foreman, Smith was paid \$17.00 per hour.

Even though Smith was a skilled and valuable employee, he was not by any stretch a model employee. He has a substance addiction which, over the course of his employment, has been directly or indirectly responsible for considerable absenteeism and damage to company property. There were also several instances of use of drugs on company property, on company time. However, SSC has never warned or disciplined Smith about his conduct, although in October of 1994 SSC posted a general notice to employees stating drug and alcohol use in the workplace would lead to immediate dismissal.

On April 10, 1995 Smith was absent. He did not call until that evening. On April 11, 1995 Smith met with Prince and admitted an addiction problem, also telling Prince he was seeking professional help. Prince discussed the situation with Busch. They considered all of Smith's work history and decided to demote him from shop foreman to fabricator. On April 13, 1995, Prince met with Smith and told him he was being demoted from the position of shop foreman and his pay would be adjusted downward. Smith refused to accept the demotion and quit.

ISSUES TO BE DECIDED

There are two issues to decide: first, if SSC may raise the issue of whether Smith was a manager; and second, whether Smith was dismissed without cause.

ANALYSIS

The assertion Smith was a manager and not covered by the overtime provisions of the *Act* was raised by SSC for the first time at the hearing. It was not raised at any stage of the investigative process and, more importantly, it was not included in either the request or the reasons for appeal of the Determinations. Section 112(1) states:

112. (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.

Subsection (2) says the request must be served within 15 days of receipt of the determination. The purpose for placing time limits and procedural requirements in the appeal process is twofold: first, it meets the statutory purpose of ensuring a fair and expeditious determination of disputes arising under the *Act*; second, it ensures a closure on the matters in dispute, preventing "open-ended" claims and responses which would ultimately result in an unmanageable review process. For those reasons, I will not allow SSC to raise the issue of whether Smith is a manager for the purposes of the *Act*.

Even had I considered the issue, on the evidence and argument presented, I would not have found Smith to be a manager for the purposes of the *Act*.

On the second issue, I reach the following conclusions:

1. The monthly wage received by Smith was calculated on a 40 hour work week. I reject the argument of SSC that the monthly wage was based upon a 45 hour work week. If that were so, it would mean Smith took a pay cut equivalent to \$1.66 per hour (from the \$17.00 per hour he earned as a fabricator to the equivalent of \$15.34 per hour) when he became shop foreman in June of 1990. In light of Smith's value to SSC at that time, I find such a result unlikely and sufficient to put the 45 hour work week argument beyond the realm of probability. There are also other factors which lead me to reject the argument, including representations made by SSC to the delegate throughout the investigation process and the practice allowed by SSC respecting the employment of Smith of banking hours worked in excess of 40 in a week. The effective hourly rate for Smith on April 13, 1995 was \$19.33.
2. By operation of the transitional provisions of the *Act*, specifically Section 128(3), Section 66 applies to the demotion of Smith. Section 66 says:
 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

That determination has been made in this case.

3. Based on the reduction in his wage rate, the significant change in his responsibilities and the limiting of his authority, I agree with the director that the alteration of Smith's employment was "substantial" and should be considered a termination.

SSC has not established that it had sufficient cause, on the basis of some culminating incident, for the termination, which in this case was the demotion of Smith from the shop foreman position. Nor was SSC able to establish that Smith's addiction justified summary dismissal. While there was much on Smith's record to suggest cause for some disciplinary response, little of his conduct ever gave rise to any form of discipline and much of what SSC now complains of had been condoned for years, including Smith's recurring problems with substance addiction. On the evidence, apart from some absenteeism (in respect of which no formal action was ever taken by SSC), there was no apparent adverse affect on Smith's job performance or the business of SSC that could be related to the addiction.

The appeal of SSC is dismissed.

ORDER

The overtime calculation forming part of Determination number CDET 000588 was made on the basis of a monthly salary of \$3,555.00, converting to an hourly equivalent of \$20.51. At the hearing it was agreed by all parties that the monthly salary of Smith at the time of his termination was \$3,350.00, converting to an hourly equivalent of \$19.33. As a result, the overtime and vacation pay on overtime calculations will show those amounts as \$4,216.45 and \$252.99 respectively. The Determination should be varied to reflect that change.

Pursuant to Section 115 of the *Act*, I order Determination number CDET 000588 varied to show the amount owing as \$10,866.94. Determinations number DDET 000054 and 000055 are confirmed.

“David Stevenson”

David Stevenson

Adjudicator

Employment Standards Tribunal

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