An appeal

\- by -

Lions Concrete Ltd.
(the “Employer” or “Lions Concrete”)

\- 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

ADJUDICATOR: Ib S. Petersen

FILE No.: 2001/386

DATE OF DECISION: March 28, 2002

INTERIM DECISION

APPEARANCES:

Mr. Matthew Westfal	counsel, on behalf of Lions Concrete
Mr. Bryan Dut	on behalf of himself
Mr. Juan Carcomo	on behalf of himself
Mr. Francisco Garcia	on behalf of himself
Mr. Bernie Lemay	on behalf of himself
Mr. Chris Spencer	on behalf of himself
Mr. Dave Macguire	on behalf of himself
Mr. Nelson Tobar	on behalf of himself
Mr. Cruz Moises	on behalf of himself
Ms. Adele Adamic	counsel, on behalf of the Director
Ms. Diane Maclean	

OVERVIEW

This decision arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director issued on April 23, 2001. The Determination concluded that a large number of employees were owed $193,015.61 by the Employer on account of overtime wages and statutory holiday pay.

ISSUES AND PRELIMINARY MATTERS

The Employer appealed the determination and took issue, first, with the employee status of some of the complainants listed in the Determination, one question being whether three of those found to be employees were, in fact, managers for the purposes of the *Act*. The Employer argues that Mr. Jorge Esquivel, Mr. Tony Lopes and Mr. Jose Vieira are managers. Second, the Employer also questioned whether the amounts set out in the Determination were, in fact, payable in the 24 month period before the date of their complaint or termination. At the hearing, the Employer's counsel conceded, following a review of the Director's records during the morning break, that the amounts were, in fact, payable in that period. In the result, the only issue on the merits of the Determination, *per se*, is the management status of Mr. Esquivel, Mr. Lopes and Mr. Vieira.

In the days immediately prior to the hearing, and at the hearing itself, the Employer also raised two other matters.

One issue pertained to the constitutionality of the overtime and statutory holiday provisions in the Act. As I understand it, this issue--or ground of appeal--was raised in the days immediately prior to the hearing. The Employer argues that these provisions violate Section 2(d) of the *Canadian Charter of Rights and Freedoms*. In light of the following, I do not propose to set out

the Employer's argument in any detail. It was apparent that the Attorneys General of Canada and British Columbia had not been served in accordance with the *Constitution Questions Act*. The Employer requested an adjournment to allow proper service. The Director opposed the request and argued that the constitutional question could be severed from the issues relating to management status and amounts owed to some 70 employees.

In the circumstances, I decided that the constitutional issues could properly be severed as argued by the Director. Following submissions from the parties, I decided that the Employer had until close of business on Thursday, March 28, 2002, to serve the Attorneys General with notice of the challenge together with the particulars upon which the challenge is based. Counsel for the Employer agreed with that time limit. The Attorneys General and other parties will then have an opportunity to respond. The Employer further agreed to provide a copy to the Tribunal and counsel for the Director. As I indicated to the parties at the hearing, it was my intention to rule on the issue of management status. That decision is, of course, ultimately subject to any subsequent decision regarding constitutionality.

Second, the Employer also requested that I issue a summons for Ms. Julie Brassington and Mr. Dave MacKinnon, Industrial Relations Officers of the Employment Standards Branch. Ms. Brassington was the Delegate who issued the Determination now under appeal. This request was based on an argument--or ground of appeal--that there was bias on the part of the Director or that the investigation of the Employer was carried out for some improper purpose. The nub of the Employer's argument, at the hearing, was that Mr. MacKinnon had made comments perceived by the Employer to be threatening to the Employer and that he should be summonsed to allow the Employer to "explore the issue". The alleged comments were in the nature of an encouragement to become unionized. The Employer argued that this was sufficient to raise a *prima facie* case or that it raised a serious issue.

While the Employer did not expressly provide particulars for the basis for the summons to Ms. Brassington, at the hearing, an earlier submission, dated September 28, 2001, alluded to employee complaints that they did not wish to pursue a complaint against the Employer and that they felt pressured by the Branch to do so. At the case management meeting on November 9, 2001, the Employer agreed that it was not necessary for the Delegate to consider the employees wishes, but suggested that it was necessary to look at what prompted the industry audit and the conduct of that. The issue of a summons for Ms. Brassington was left unresolved from the case management meeting and the Employer did not make an application for a summons for her again until the hearing.

The Director opposed the request. The Director noted that the Determination against the Employer was a result of a broad based audit of the industry under the *Act*. The Director's counsel explained that she had canvassed the Director's files regarding Lions Concrete and that Mr. MacKinnon had issued a determination against the Employer in 1996 as a result of a broad based industry audit. Mr. MacKinnon did not have any involvement in the present

Determination. Counsel for the Director argued that the Employer had not established a connection to the Determination under appeal.

I agree with counsel for the Director. In my view, the Employer has not established any connection between the alleged comments of Mr. MacKinnon and the Determination under appeal. Even if I were to accept that Mr. MacKinnon had made the comments attributed to him, there are no particulars supporting a claim that the Director, or the delegate who made the Determination under appeal, was in any way biased or carried out her investigation for an improper purpose. As noted by the Director, and this was not in dispute, the Determination was the result of an industry-wide audit. Aside from the fact that the scope of the audit was extended from 3 months to 24 months based on findings of non-compliance with the *Act* and *Regulation*, there was nothing to suggest that Lions Concrete was in any way singled out for "special" treatment.

In my view, the Employer's argument comes down to this: the Employer wants to "explore" the possibility of bias or improper purpose. This amounts to a "fishing expedition". In short, there is, in my opinion, no connection, not even alleged, between the Determination under appeal and Mr. MacKinnon. As well, there is no basis for issuing a summons for Ms. Brassington to appear. In the result, I dismiss the Employer's request for a summons of Ms. Brassington and Mr. MacKinnon.

At the hearing I also indicated to counsel for the Employer that there was, in my view, in light of the particulars provided at the hearing, no basis whatsoever for pursuing the ground of appeal that the Director was biased or carried out her investigation for some improper purpose.

FACTS AND ANALYSIS: MANAGEMENT STATUS

Turning to the issue of whether Mr. Esquivel, Mr. Lopes and Mr. Vieira are managers, Section 1(1) of the *Regulation* under the *Act* defines, *inter alia*, "manager":

> 1. In this Regulation:
>
> "manager means"
>
> (a) a person whose primary employment duties consist of supervising and directing other employees; or
>
> (b) a person employed in an executive capacity.

I approach the definition of "manager" with the following principles in mind. It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). Moreover, my interpretation must

take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides (in part):

> 2. The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

The issue of management status has been addressed in a number of decisions of the Tribunal. In *Amelia Street Bistro*, BCEST #D479/97, reconsideration of BCEST #D170/574, a case referred to by both the Employer and the Director, the reconsideration panel noted, at pages 5 and 6:

> "... We agree that the amount of time an employee spends on supervising and directing other employees is an important factor in determining whether the employees falls within the definition of manager .... We do not, however, agree that this factor is determinative or that it is the only factor to be considered. The application of such an interpretation could lead to inconsistent or absurd results.
>
> The task of determining if a person is a manager must address the definition of manager in the *Regulation*. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business....
>
> Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, 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. It is irrelevant to the conclusion that the person is described by the employer as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.
>
> We also accept that in determining whether a person is a manager the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. The Director raises The Director raises a concern that an interpretation of manager which does not accept the limited scope of exclusion from the minimum standards of the *Act* could have serious consequences for persons in positions such as foreman and first line supervisor who spend a significant amount of time supervising and directing other employees but frequently do not exhibit a power and authority typical of a manager. As we stated above, the degree to which some

> power and authority typical of a manger is present and is exercised by an employee are necessary considerations to reaching a conclusion about the total characterization of the primary employment duties of that employee.
>
> Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgements about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded to a manager.... It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of manager. It is not sufficient simply to say that a person has that authority. It must be shown to have been exercised by that person."

While it is fair to say that the Employer and the Director emphasized different aspects of the decision, I agree that these are the applicable legal principles.

At the hearing Mr. Silva testified via telephone conferencing. While this is less than ideal--I had previously denied an adjournment application from the Employer--I was satisfied that he was able to fully testify on behalf of the Employer. At the conclusion of his testimony, he communicated with the Employer's counsel with the speaker-phone off.

Mr. Silva, the principal of the Employer, its president and "owner" for a number of years, testified in direct examination that Lions Concrete was in the business of concrete placing and finishing, from commercial-industrial to residential construction. He has been in the business in excess of 22 years. He explained that the industry is highly competitive and involves both union and non-union firms. From Mr. Silva's testimony, it was evident that he blamed the overtime provisions for the demise of the business. He explained that it was impossible to compete, having to pay overtime. Speaking from the point of view of his current position as a sales representative, he stated that prices were substantially below what they were elsewhere in the North American market. His competitors, whether unionized or not, did not pay overtime. He agreed, in cross examination, that Lions concrete did not make a written application to the Director for a variance. He stated that he tried to pay overtime for a period, but found that he "couldn't make it and shut [the business] down." In cross examination, he agreed that Lions Concrete had not filed for bankruptcy or made a declaration of insolvency. He also explained that he had a couple of meetings with his "steady" employees where overtime was discussed. He stated that he paid $1.00 or $2.00 additional per hour "for no overtime" and had had no complaints from his employees.

Mr. Silva characterized himself as an “administrator,” a role he, in cross examination, reluctantly explained as estimating, looking for work, setting up the work, dealing with the “cash flow” and other “money issues.” Mr. Silva was the person who decided which projects Lions Concrete became involved in. He had a core group of employees working for Lions Concrete. I understood that employees typically worked in crews of about seven employees. Mr. Silva knew this core group well, even on a personal level, having worked alongside them, and employed them on past projects or jobs. Mr. Silva explained that crews were assigned jobs based on the suitability of the “team.” On the evidence, the crews were generally put together by Ms. Silva.

Mr. Silva estimated pricing on projects on the basis of hours per crew and the number of pours required. Sometimes the projects turned out differently than Mr. Silva’s expectations, largely based on blueprints. In direct, Mr. Silva testified that he would “go by the site(s) once or twice a day, sometimes not at all.” In cross examination, he agreed that he went round to the site once or twice a day. The reason, he explained was that the project sometime was different on site as compared to the blueprints and he would sometimes “cut back a guy.” As well, the site foremen communicated with Mr. Silva via two-way radios. Through the radios, the foremen could communicate any problems on site to Mr. Silva, including staff requirements. Mr. Silva agreed that he was “hands on” though he was not present “every minute of the pour.” It was clear to me, on the evidence, that the business was very price sensitive.

Mr. Silva explained that Mr. Esquivel, Mr. Lopes and Mr. Vieira were site foremen who were responsible for work crews. He described them as “leaders of the crews.” They were involved with training of employees--there was a relatively high turnover with a number of “green employees.” He described the foremen as his “right hand people” upon whom he depended. On the other hand, he agreed in cross examination, that he did not consult with them with respect to the decision to shut down the business. His job was estimating and looking after the company. They represented Lions Concrete on site and resolved issues with employees. At the same time, there was no dispute that the foremen most of the time worked alongside the crews. It was the employer’s evidence that the foremen had the discretion not to work: “it was up to them if they needed to work [but] most of the time they did because they were hardworking people.”

He explained that the foremen generally came into the office in the morning and received a “job description” from Mr. Silva. This “job description,” Mr. Silva explained, provided the foremen with information about the nature of the job: the square footage, the amount of concrete to be poured, suspended slaps etc. so they “would know what they were up against” and “tell them what to do.” At the end of the day, or the following morning, the foremen again usually came into the office to fill out time sheets for their crew.

The foremen determined when to call in the “finishers”--it was their decision when these employees were needed on site. As well, they also had the authority--and exercised that authority--to “let guys go early” or send them home if they were sick. Mr. Silva testified that he never questioned their decision. Mr. Silva explained that the foremen occasionally hired on site and that he never questioned their decisions. They would simply fill out the time sheets for those

"casual hires" at the end of the day or the following morning. Mr. Silva explained that the Employer did not "fire" employees--they were simply not called in for work. The decision not to call in employees rested on input from the foremen who would tell Mr. Silva that an employee was "no good, too lazy, screws up" and he would not call that employee for work again. A couple of times, Mr. Silva testified, the foremen terminated employees on site. The foremen had a "big input" into crew size. If they needed more employees they would let Mr. Silva know or, sometimes, would arrange for transfers of employees between themselves.

The Employer argued that the evidence supports a conclusion that Mr. Esquivel, Mr. Lopes and Mr. Vieira were managers under Section 1(a) of the *Regulation*. The Employer argued:

1. Their most important function was supervising. This was their "job."
2. They were given broad parameters for the selection of tools, crew members and how the job was done. For example, they decided when to call in "finishers" for a particular job and had the authority to send employees home if they were not needed. They could also send employees, who were sick, home.
3. They were involved in hiring and firing. They hired casual employees without approval. As well, while the Employer never "fired" employees, the foremen decided whether employees would be called back for work. If they decided that an employee was not suitable for work, Mr. Silva would not call them.
4. While the foremen worked alongside the crew, in the context of the small crews and the tight schedule, the decision to do that was theirs. This is not inconsistent with a supervisory role.
5. The foremen were involved in training.
6. The foremen had input into wage rates.

While the Employer noted that Mr. Silva was the "ultimate boss," that still left room for the exercise of managerial discretion and judgement.

The Director's position was that Mr. Esquivel, Mr. Lopes and Mr. Vieira were not managers. The Director emphasized the following from the evidence:

1. Mr. Silva was experienced in the industry, having been in the business for some 22 years. He did not, as suggested, have to rely on the foremen.
2. The work came in through Mr. Silva and he set up the jobs.
3. Mr. Silva did the estimating work and decided if the work was appropriate for the business. He looked after the "money issues."
4. The foremen were working foremen.
5. Mr. Silva control via the two-way radios and daily visits to the sites.

This case has not been easy. I appreciate counsels' assistance.

It is clear on the evidence that the foremen did, in fact, have and did, in fact, exercise some supervisory responsibilities. I agree with the Employer's counsel that this is not a matter of "label," *i.e.*, the fact that they are called foremen is not important. As well, I agree that I must consider the totality of duties. The question under the *Act*, is whether supervising employees was their primary employment duties. As noted in the *Amelia Street* case, *above*, time spent exercising supervising is important, but not determinative. On the evidence before me, it is not clear how much time they spent on these duties as opposed to other duties. Given the tight time frames for jobs and the tight "budget" for projects, it is unlikely, in my view, that this was a substantial component of their employment duties. For most of the time, they worked alongside the crews.

As noted by the Director, management status is most often a question of degree and argued that an interpretation which does not accept the limited scope of exclusion from the minimum standards could have serious consequences for persons in positions such as foreman and first line supervisor who spend a significant amount of time supervising and directing other employees but frequently do not exhibit a power and authority typical of a manager. I agree with the Director's concern.

While I accept that the foremen, such as Mr. Esquivel, Mr. Lopes and Mr. Vieira, were involved in hiring, firing, discipline, authorizing time off, sending employees home etc., on balance--and, in particular, considering the evidence of Mr. Silva's role in the running of the business *vis-a-vis* that of the foremen, however, and considering the purposes of the *Act*, I do not accept that the foremen exercised "power of independent action, autonomy and discretion" or that they had "the authority to make final decisions." In my view, Mr. Silva was the person who had the power to make final decisions. He, and not the foremen, exercised "power of independent action, autonomy and discretion." Mr. Silva generally put together the crews based on his knowledge of the group of core employees. He determined which crews was suitable for which projects. He set up the work and work schedules. He provided relatively detailed instructions to the foremen as to the work that needed to be done through the "job descriptions." Mr. Silva attended the job site once or twice a day and remained in contact with the foremen via two-way radios. Through the radios, the foremen could communicate any problems on site to Mr. Silva, including staff requirements. Mr. Silva agreed that he was "hands on" (though he was not present "every minute of the pour.")

In the circumstances, there was, limited scope for independent action and judgement on the part of the foremen. Their involvement in hiring appears to have been mostly with respect to the occasional "casual hire" on site. There was some evidence that foremen had terminated employees on site, the general practice appears to have been recommendations by the foremen to Mr. Silva that he not call an employee in for work. While they could send sick employees home, Mr. Silva testified that employees who were sick for 2-3 days would call him and he would not

send them out unless he really needed them. Overall, in my view, they were foremen or first line supervisors, not managers.

In short, the appeal with respect to the status of Mr. Esquivel, Mr. Lopes and Mr. Vieira is denied. I find that they are employees for the purposes of the *Act*.

ORDER

I confirm the Delegate's decision, in her Determination dated April 23, 2001, that Mr. Esquivel, Mr. Lopes and Mr. Vieira are employees for the purposes of the *Act*.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal