EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Douglas Bensley operating as Smoother Movers, and Smoother Movers Limited, associated corporations pursuant to Section 95 of the *Act*
("Bensley")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NOS.: 1999/362 and 363

DATE OF DECISION: August 11, 1999

DECISION

OVERVIEW

This decision addresses appeals pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Douglas Bensley operating as Smoother Movers (the employer) ("Bensley") and Smoother Movers Limited, associated pursuant to Section 95 of the *Act* ("Smoother Movers Limited") of two Determinations which were issued on May 27, 1999 by a delegate of the Director of Employment Standards (the "Director"). The first Determination concluded Bensley had failed to pay a former employee, Colin Jackson ("Jackson"), all wages owing and had, as a result, contravened the *Act*. The Determination ordered Bensley to cease contravening the *Act*, to comply with its requirements and to pay an amount of $2033.79 The second Determination associated Smoother Movers Limited with Bensley under Section 95 of the *Act* and ordered Smoother Movers Limited to cease contravening the *Act*, to comply with its requirements and to pay an amount of $2033.79.

The two Determinations were issued following a decision of the Tribunal, BC EST #D094/99, which concluded that an earlier Determination, naming Smoother Movers Limited as the employer, had not correctly identified the employer and referred the matter back to the Director for further investigation of the identity of the employer.

The appeals contend the Determinations are wrong in several respects:

1. Jackson was a manager and as such was not entitled to statutory holiday pay;

2. The Director did not do a proper calculation of wages earned by Jackson and did not include $2324.15 that had already been paid to him; and

3. The Director was wrong to name Smoother Movers Limited as an associated corporation.

The Tribunal has decided an oral hearing is not necessary in order to deal with these appeals.

ISSUES TO BE DECIDED

The issues here are whether the Bensley and/or Smoother Movers Limited have shown that Jackson is a manager for the purposes of the *Act*, whether the Director was wrong to treat Bensley and the Smoother Movers Limited as associated corporations for the purposes of the *Act* and whether Bensley and/or Smoother Movers Limited has shown the Director erred in calculating the amount owed. The burden of showing that the Determinations are wrong is on Bensley and/or Smoother Movers Limited.

FACTS

The following facts are relevant to the appeals:

1. Jackson was employed by Bensley from November 22, 1996 to November 15, 1997. His starting wage was $9.00 an hour and that rate increased to $9.75 an hour on December 13, 1996.

2. At the time he was hired, the job Jackson applied for was posted in the government employment bank office in North Vancouver as an "Office Assistant" position.

3. During the investigation, Bensley claimed Jackson was a manager. He provided the following list of duties and responsibilities:

> opening the office daily
> crew call - selecting other employees to go to specific jobs
> deciding whether certain applicants were suitable to work
> hiring employees and taking applications, hiring friends to work
> preparation of payroll
> distribution of paycheques to employees
> preparing bank deposits and banking duties
> tracking invoices
> answering phone calls and conducting sales, quote rates, book jobs, negotiate prices, dealing with customers and confirming bookings, collect deposits, collect mail, sign letters, booking estimates
> making decisions regarding truck availability and work load in determining how many jobs could be booked or when jobs had to be turned away
> managing customers move times and dates, cancelling or rescheduling a job
> preparing records of employment

It should be noted that Bensley also contended another employee, Murray White, had substantially similar duties and responsibilities.[1]

2. When Jackson's Record of Employment was issued at the end of his employment, Bensley stated his occupation as "manager".

3. The Determinations reached the following conclusion on the facts:

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[1] Appeals relating to two Determinations made by the Director regarding White have also been made by Bensley and/or Smoother Movers Limited.

> In determining whether the complainant was a manager . . . , I have to consider the amount of time the complainant spent on supervising and directing other employees. This is an important factor but not a determinative one. There is no evidence at all that the complainant was actually supervising and directing other employees in the performance of their duties. I find that the complainant's main responsibility was that of a dispatcher in selecting and scheduling the crews that were to go on a specific job. His other duties were mainly administrative in nature. I could not find any evidence that the complainant had the power of independent action, autonomy and discretion. He did not have the authority to make final decisions relating to supervising and directing employees or to the conduct of the employer's business.

4. The wages found to be owing to Jackson comprised overtime, vacation pay on overtime and statutory holiday pay.

5. The associated corporation designation was based on a recitation of evidence given by Bensley at the Tribunal's hearing on the earlier appeal:

> . . . Bensley testified that he had been in the moving business for approximately 15 years as a proprietorship. He also explained that Smoother Movers Limited operated a web-site on the internet. He was the sole shareholder, officer and director of that company. The limited company did not carry on the moving business but Bensley admitted it owned the vehicles.

6. Bensley and/or Smoother Movers Limited say that Smoother Movers Limited owns no trucks.

ANALYSIS

I will first deal with the appeal by Bensley and/or Smoother Movers Limited regarding the calculation of the amount owed. The Director says Bensley never challenged the calculation made in the June 5, 1998 correspondence. The implication from that position is that I should reject the appeal because Bensley did not provide any information during the investigation indicating the calculation was wrong. Bensley responds that he has challenged the calculation, noting that one of the grounds of appeal leading to BC EST #D094/99 was that $2324.15 had already been paid to Jackson in addition to what was found to be owed in the Determination.

The deficiency in this ground of appeal is that Bensley and/or Smoother Movers Limited bear the burden of demonstrating that some error has been made in calculating the amount owed. The appeal only states that a ground of appeal in the previous decision was that $2324.15 had

already been paid. That ground of appeal was, however, never considered by the Tribunal and whether it has merit has never been dealt with. There is nothing in the appeal or on the face of the record that makes any reference to this amount and in this appeal Bensley and/or Smoother Movers Limited have not submitted any documentation to support their assertion or to show that the amount alleged to have been paid relates in any way to the amount in the Determination. As a result, they have not established any error has occurred and this ground of appeal is rejected.

On the issue of whether the Director was wrong to conclude Jackson was not a manager under the *Act*, I note first that the *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) And *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I specifically refer to the following comment from *Machtinger v. HOJ Industries Ltd., supra*:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

In determining whether a person is a manager, the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. The analysis required under the *Act* for determining whether a person is to be considered a manager for the purposes of the *Act* starts with the language of the *Act*. The definition of manager is found in Section 1 of the *Employment Standards Regulation*, and reads:

> ***"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.*

There is no specific language in that provision that conclusively states that a person with a power to hire or fire employees is a manager for the purposes of the *Act*. In *Director of Employment Standards (Re 429485 (B.C.) Ltd. operating Amelia Street Bistro)* the Tribunal identified, in the context of the language of paragraph (a), "*supervising and directing other employees"*, the considerations that would be used to identify a manager under the *Act*:

> Any conclusion about whether the primary employment duties of a person consists 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 that the person is described by the employer or identified by other employees 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 the perception of some third party. . . .
>
> 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 a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. 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 a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

The Tribunal has also accepted that the terminology *"employed in an executive capacity"* connotes an individual who is employed in a capacity that relates to active participation in the control, supervision and management of the business.

Bensley says, in respect of this ground of appeal:

> 1. The reasons the Determinations are wrong are as follows:
>
> b.) Because Colin Jackson was the manager and managers are not entitled to statutory holiday pay according to the Employment Standards Act. . . .
>
> d.) Also, the complainant Colin Jackson testified at the hearing of an appeal by Smoother Movers Limited the he hired Jim Code, Jack McNeil and others.

Under the reasons for making the appeal, Bensley says:

a.) Because Colin Jackson was the manager of Smoother Movers. The testimony and the evidence at a three day hearing at the Employment Standards Tribunal overwhelmingly concluded his position as manager and his executive capacity.

The above represents the sum and substance of the appeal of the conclusion that Jackson was not a manager for the purposes of the *Act*. There is no factual support, no disagreement with the facts listed in the Determination and no analysis that addresses any of the considerations relevant to whether an individual fits the *Act's* definition of *"manager"*. In short, there is absolutely no basis for the bald assertion that Jackson was a manager or that he was in an executive capacity. The fact that an individual hires employees is only one of a number of factors that have to be considered and it is irrelevant to that consideration that a person is called a "manager". It is the substance of the work performed and the total characterization of the duties of the individual that puts the individual in the capacity of a manager, not the form or title that accompanies the job. The basis for the conclusion of the Director has not been addressed at all in the appeal application.

This ground of appeal is also rejected.

On the third ground of appeal, I agree with Bensley and/or Smoother Movers Limited that the Determination against Smoother Movers Limited must be set aside. I do so primarily on the basis that the Determination does not show any reason to invoke Section 95 at this time. The Determination states:

> The association is based on an admission made by Douglas Bensley at the hearing of an appeal by Smoother Movers Limited against a Determination dated July 16, 1998.

The "admission" referred to in the Determination is found above in paragraph 5 of the facts. The difficulty with the basis upon which the Determination is based is that it fails show that all of the prerequisites to the application of Section 95 were present. In *Invicta Security Systems Corp.*, BC EST #D349/96, the Tribunal identified four preconditions to an application of Section 95:

1. There must be more than one corporation, individual, firm, syndicate or association, or any combination of them;

2. Each of the entities must be carrying on a business, trade or undertaking;

3. There must be common control or direction; and

4. There must be some statutory purpose for treating the entities as on employer.

On the facts outlined in the Determination, the basis for a conclusion that Smoother Movers Limited is carrying a business, trade or undertaking is not readily apparent. In fact, the passage relied on from the earlier Tribunal decision specifically notes that the "limited company did not carry on the moving business". That statement does not necessarily mean there is no business, trade or undertaking at all being carried on by the limited company, but in light of that statement, some further examination and explanation is required, showing that precondition has been met. Additionally, no statutory purpose is apparent on the record and no such purpose is indicated in the Determination.

The Director is not foreclosed from revisiting whether a Determination under Section 95 is necessary to protect or effect some statutory purpose (provided the other preconditions can also be established), but at present all of the preconditions for the associated corporation Determination have not been established and the appeal on that Determination succeeds.

ORDER

Pursuant to Section 115 of the *Act*, the Determination issued against Douglas Bensley operating as Smoother Movers is confirmed in an amount of $2033.79, plus interest accrued on that amount pursuant to Section 88 of the *Act* from the date of the Determination. The Determination issued against Smoother Movers Limited, associated pursuant to Section 95 of the *Act* is canceled.

David Stevenson
Adjudicator
Employment Standards Tribunal