

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 N_{OS.}: 1999/364 and 365

DATE OF **D**ECISION: August 11, 1999

DECISION

OVERVIEW

This decision involves appeals under pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), the first by Douglas Bensley operating as Smoother Movers (the employer) (Bensley”) and the other by Smoother Movers Limited, associated pursuant to Section 95 of the *Act* (“Smoother Movers Limited”) of two Determinations both of 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, Murray White (“White”), 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 \$128.51. 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 \$128.51.

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. The calculation of the amount owing is wrong because it failed to include a payment of \$96.00 made to White in January, 1998;
2. White was a manager and as such was not entitled to statutory holiday pay; and
3. The Director was wrong to name Smoother Movers Limited as an associated corporation with Bensley.

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 White is a manager for the purposes of the *Act*, whether the Director was wrong to treat the Bensley and Smoother Movers Limited as associated corporations for the purposes of the *Act* and whether Bensley and/or Smoother Movers Limited have shown the Director erred in calculating the amount owed by not taking account of the \$96.00 payment in January, 1998. The burden of showing that the Determination is wrong either in fact or in law, is on Bensley and/or Smoother Movers Limited.

FACTS

The following facts are relevant to the appeals:

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

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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, Colin Jackson, had substantially similar duties and responsibilities.¹

2. White used the title of manager.
3. The Determinations reached the following conclusion on the facts:

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 Director took account of the \$96.00 paid to White in January, 1998 and credited payment of that amount to Bensley and/or Smoother Movers Limited in unpaid wage calculation.
5. The associated corporation designation was based on a recitation of evidence provided 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. In these appeals, Bensley and/or Smoother Movers Limited says that Smoother Movers Limited owns no trucks.

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

ANALYSIS

I will deal with the appeal regarding the calculation of the amount owed first. Simply put, Bensley and/or Smoother Movers Limited has not shown that the Director failed to take into account the \$96.00 paid to White in January, 1998. The Director says that amount was credited to Bensley and/or Smoother Movers Limited when the calculation was made. Bensley and/or Smoother Movers Limited has shown that the amount was paid but has failed to show that amount was not included in the calculation. This aspect of the appeal is dismissed.

On the issue of whether the Director was wrong to conclude White 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 note 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 identifies a person with the power to hire or fire employees as a manager under the *Act*. In *Director of Employment Standards (Re 429485 (B.C.) Ltd. operating Amelia Street Bistro)* the Tribunal identified the considerations that would be used, in the context of paragraph (a), “*supervising and directing other employees*”, 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 and/or Smoother Movers Limited says, in respect of this aspect of the appeal:

1. The reasons this Determination is wrong are as follows: . . .
- b.) This determination is also wrong because Murray White was the manager and managers are not entitled to statutory holiday pay according to the Employment Standards Act.
- c.) Also, the complainant Murray White testified at the hearing of an appeal by Smoother Movers Limited that he, in his capacity as a manager, hired employees.
- d.) Also evidence was presented at that hearing of Mr. White’s signing documents written by him in which he designates himself with the title of manager.

Under the reasons for making the appeal, Bensley and/or Smoother Movers Limited says:

- a.) Because Murray White was a 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 White 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 White 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 has 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 dismissed.

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 showing that precondition has been met is required . 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 (the employer) is confirmed in the amount of \$128.51, plus interest on that amount pursuant to Section 88 of the *Act*. The Determination issued against Smoother Movers Limited, associated pursuant to Section 95 of the *Act* is canceled.

David Stevenson
Adjudicator
Employment Standards Tribunal