

An appeal

- by -

Slesse Plumbing Ltd.
("Slesse")

- 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: David B. Stevenson

FILE No.: 2002/241

DATE OF DECISION: August 15, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Slesse Plumbing Ltd. (“Slesse”) of a Determination that was issued on April 10, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Slesse had contravened Part 4, Section 40 of the *Act* in respect of the employment of Kirk Lanz (“Lanz”) and ordered Slesse to cease contravening and to comply with the *Act* and to pay an amount of 5,884.43.

Slesse says the Determination was wrong in its conclusion that Lanz was not a manager.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal is whether the Director was wrong in concluding Lanz was not a manager for the purposes of the *Act*.

FACTS

The Determination set out the following background:

Slesse Plumbing Ltd. is a plumbing company, which is under the jurisdiction of the *Act*. Kirk Lanz worked from April 30, 1996 to July 30, 2001 as a plumber. His rate of pay increased as follows: April 30, 1996 to July 4, 1996 - \$22.00/hr, July 5, 1996 to March 23, 2000 - \$23.00/hr, March 24, 2000 to July 30, 2001 - \$25.00/hr.

It is fair to say the matter of whether Lanz was a ‘manager’ for the purposes of the *Act* was the key issue during the investigation. The findings of fact on that issue were as follows:

Mr. Lanz was hired as a plumber and performed the work of a journeyman plumber during his employment. His last period of employment was for 5 years. In addition to plumber’s work he performed some management duties, however the time spent on these duties changed over the last couple years. Slesse Plumbing’s letter dated March 9, 2002 states: “the construction industry had been in a recession and although he had less employees (2-4) to supervise than when we were in a construction boom, (up to 10) his duties remained the same.”

The number of hours is not in dispute. In the letter dated December 7, 2001 from Slesse Plumbing, they state: “Kirk requested extra hours of work, but as we discussed the company could not afford to pay overtime. We agreed to bank his overtime hours to be taken when times were slower or to be taken in time off.

The Director found no evidence indicating Lanz' primary responsibilities consisted of supervising and directing other employees or that he was employed in an executive capacity with Slesse. The Determination stated:

On the contrary, considering the small number of other employees working with Mr. Lanz, it does not seem reasonable that he would be spending the majority of his time directing and supervising other employees. Mr Lanz was hired as a plumber and it is not uncommon for a journeyman plumber to be involved in apprentice training, however the primary responsibility and the majority of his time would be spent completing the duties of a plumber.

ARGUMENT AND ANALYSIS

The burden is on Slesse, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. Specifically, the burden on Slesse in this case is to show the Director wrongly concluded Lanz was not a manager for the purposes of the *Act*. I am not persuaded that burden has been met.

The definition of 'manager' is found in the *Employment Standards Regulation* (the "*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.*

There is nothing in the material supporting a conclusion that Lanz was employed by Slesse in an executive capacity. As the Tribunal has stated in several decisions, the concept of a person employed in an executive capacity connotes a person with real and recognizable authority relating to the conduct of the business. In *Smedley*, BC EST #D552/97, the Tribunal dealt with the issue of executive capacity under the *Regulation* and noted:

The term "executive capacity" is not specifically defined in the *Regulation*. The Oxford Dictionary defines an "executive" as:

- n. a person or group that has administrative or managerial powers in a business or commercial organization, or with authority to put the laws or agreements etc. of a government into effect.-- -adj. having the powers to execute plans or to put laws or agreements etc. into effect.

Black's Law Dictionary defines "executive capacity" as "Duties in such capacity relate to active participation in control, supervision and management of business."

The legislation makes a distinction between a person who is engaged in the supervision and direction of employees and a person employed in an "executive capacity". Either may be a manager and, as such, excluded from the overtime provisions in the legislation. In my view, it follows that the latter need not supervise and direct employees. I agree with my colleagues in *Amalia Street Bistro*, above, that the remedial nature of the Act and the purposes of the Act are proper considerations. As stated by the panel in *Amalia Street*, the degree to which power and authority typical is present and exercised by an

employee are necessary considerations to reaching a conclusion about the “total characterization” of the primary employment duties of the employee. In my view, it is not the intent of the definition of “manager” in the legislation to include first line supervisors and foremen who do not frequently exhibit the power and authority typical of a manager. Such authority, which is a question of degree, typically includes the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business. The authority must be shown to be exercised by the employee said to be a manager. In order to be employed in an executive capacity, the person must have “duties in such capacity relate to active participation in control, supervision and management of business”. This typically includes the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business.

Even accepting that Lanz independently made job site decisions necessary for the efficient and proper conduct of work on the job site, that responsibility is significantly different from “the power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business” that is contemplated as being exercised by persons employed in an executive capacity. It is interesting that Slesse, in what appears to be their initial response to the Director, refers to Lanz as “on-site manager/foreman”, stating that Lanz, occupying such a position, would receive \$3.00 an hour more than a plumber. I do not doubt that Lanz had an important position, but there is no indication that position involved him participating in management decisions affecting the conduct of the business. Slesse contends that Lanz was compensated as a manager, receiving \$3.00 an hour more than a plumber, and if he was not a manager there should have been an adjustment allowed. Slesse says the investigating officer erred by not taking into account an overpayment of wages. There are two points in response to that position: first, as the Director’s reply notes, neither the title of the position nor the rate of pay determines whether a person is a manager for the purposes of the *Act*, it is determined on the actual duties performed; and second, the *Act* does not allow the kind of set-off suggested by Slesse, see Section 21.

Also bearing on the central issue is the factual conclusion, which is not seriously challenged in the appeal, that Lanz’ primary employment responsibility (for at least the last few years of his employment with Slesse), and which consumed the majority of his time worked, was work as a journeyman plumber. As the Determination correctly noted, it is the ‘total characterization’ of the individual’s employment duties’ that will ultimately determine whether the individual should be considered a manager for the purposes of the *Act*. It would be an extraordinary circumstance for a person whose primary duties comprised working at the tools of a trade to be found to be a manager for the purposes of the *Act* and I can find no such circumstances present in this appeal.

As a final comment, Slesse contends the investigating officer was prejudiced against them. There is no evidence in the appeal, nor in the material on file, that Slesse was denied information necessary to properly respond or that Slesse was not given full opportunity to respond to the claim made by Lanz and I can give this aspect of the appeal no effect. Slesse says Lanz has filed no response to the appeal. That is correct, however, it is not necessary for him to respond. As I noted earlier, the burden in this appeal is on Slesse to show an error, it is not on Lanz to re-establish the validity of his claim.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 10, 2002 be confirmed in the amount of \$5,884.43, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal