Employment Standards TRIBUNAL

An appeal

- by -

Brink Forest Products Ltd.
("Brink")

- 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.: 2001/104

DATE OF HEARING: June 26, 2001

DATE OF DECISION: July 30, 2001

DECISION

APPEARANCES:

on behalf of Brink Forest Products Ltd.	Grant A. Zimmerman, Esq. Patrick Olivier John Brink
on behalf of the individual	In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Brink Forest Products Ltd. ("Brink") of a Determination that was issued on January 12, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Brink had contravened Part 4, Section 40 and Part 5, Sections 44, 45, 46 and 47 of the *Act* in respect of the employment of Michael Van Sluytman ("Van Sluytman") and ordered Brink to cease contravening and to comply with the *Act* and to pay an amount of $24,853.02.

Brink says the Determination is wrong in two respects, first, in its conclusion that Van Sluytman was not a "manager" as that term is defined in the *Employment Standards Regulation* (the *"Regulation"*), and, even accepting Van Sluytman was not a "manager" under the *Act*, Brink says the calculation of the amounts owing to Van Sluytman is wrong.

Brink also contends that they erred in the payment to Van Sluytman of a 1999 bonus and in calculating annual vacation pay at the rate of 6% instead of 4% and those errors should have been reflected in any amount found to be owing to Van Sluytman.

ISSUES

The issues are whether Brink has demonstrated that Van Sluytman should be considered a manager for the purposes of the *Act* and, if he is not, whether Brink has shown there is an error in the calculation of the amounts owed to Van Sluytman. A third issue is whether the Director erred by not reducing the amount owed to Van Sluytman by the bonus and annual vacation pay "overpayment".

THE FACTS

Brink is an integrated lumber re-manufacturing facility in Prince George, British Columbia. It produces a range of structural, industrial and value-added wood products for local and international markets. Van Sluytman worked for Brink from approximately May, 1993 to March 10, 2000, with a brief hiatus from employment in 1995. The Determination noted that at the time

of termination he was employed as a millwright/supervisor. Brink takes some issue with that designation and says he was hired as the Finger-Joint Foreman and was employed as such at the time of his termination. He supervised up to 12 people in the finger-joint operation.

The central factual issue in this appeal is whether Van Sluytman's duties and responsibilities were sufficient to bring him within the definition of "manager" found in the *Regulations*. The Determination concluded Van Sluytman was not a manager and in doing so, included the following comments and analysis:

> . . . information [from Brink] was necessary to establish more clearly what the employment duties of Van Sluytman were. Even though the request was made of the Employer by the Delegate on numerous occasions, a more detailed accounting of those duties was not provided during the investigation, nor was a job description. Beyond conversations with Kal Rai, the Comptroller, wherein he stated that the Complainant could not fire or hire but could discipline and call in employees as required and approve vacations and leaves, the only information provided by the Employer is contained in the July 14, 2000 letter (*supra*). Mr. Rai also indicated that the position was advertised the same as it had been before. The advertisement in the local newspaper of the vacancy was clipped and is attached as attachment #4. According to the Complainant, at the time of his termination, his title was that of Millwright/Supervisor. When the Employer advertised the position, it was also for a Millwright/Supervisor.
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> At the request of the Delegate, the Complainant did provide an [sic] detailed break down accounting for his duties for an average/normal workday (copy attached as #2), though he did not have a job description as such. He was also able to provide his pay statements, which were used by the Delegate to confirm the amount of wages, he had received during the period in question.
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> The statements from the two parties are not in agreement. It is the Employer's position that the Complainant spent only 20 - 25% of his time performing or overseeing preventative maintenance on the equipment, and that the majority of his time was spent overseeing the operations, including supervising. It is the Complainant's evidence that he would spend approximately 80% of his normal workday as a hands-on operator relieving others during their breaks, or doing necessary maintenance (daily and/or weekly). On average, 20% or less of his workday would be devoted to the supervisory role. The time spent supervising and directing employees during his average workday was much less even than the time spent actually doing the work while others were on their breaks. This would suggest that his primary employment duties did not consist of the supervision and direction of other employees.

> To support their position that Van Sluytman was a manager, Kal Rai, on behalf of the Employer, provided copies of *Applications for Annual Vacation.* On most of the copies submitted Van Sluytman signed his approval of the requested vacation as either foreman or supervisor, and in most cases "Ray" signed on behalf of management, demonstrating that Van Sluytman did not have the authority to grant leaves on his own. The Employer also provided 2 copies of *Discipline Reports.* Van Sluytman appears not to have had sole discretion to administer discipline as two signatures were required. Both sets of documents further support the position that Van Sluytman was not a manager (copies attached as attachment #5).
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> As to the issue of management team meetings of production heads - the Employer is inferring that the fact that Van Sluytman attended the business' weekly management meetings further supports their position that he is a manager. There is no evidence to show that during these meetings Van Sluytman made any decisions that would support their position, merely that as the Millwright/Supervisor of the Finger-Jointer part of the operation he attended the meetings. In *Royal Victoria Security (1996) Ltd.,* B.C. EST #D186/98 (Orr), the Tribunal held that the characterization of a position as management is not indicative of management status.
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> As the Employer did not provide a description of Van Sluytman's daily duties beyond the general statements contained in the July 14 letter, I have accepted, based on the balance of probabilities, that the evidence provided by Van Sluytman more accurately reflects his work duties. This shows that he was indeed responsible for the Finger- Jointer operation, to such a degree that he spent most of his day operating machinery for the staff while they were on breaks, not supervising them. These are duties that one would reasonably expect a foreman or lead hand to perform, but are not connected to the supervision or direction of employees.

In the appeal hearing, Brink called three witnesses: Mr. John Brink, the owner and President of Brink; Mr. Patrick Olivier, the Executive Assistant to the President and Mr. Kuldip Rai, Brink's Controller.

Mr. Brink gave evidence about the business, structure and corporate philosophy of Brink. He stated that Van Sluytman was first hired by Brink in 1993. He testified that Van Sluytman left Brink in January, 1995, returning in July, 1995 to work as a "contractor". Later evidence established that from July, 1995 to about September or October, 1995, Van Sluytman participated, through his company, in building parts for and assembling the finger-joint operation as it presently exists. The finger-joint operation was in full production by late September or early October, 1996 and Van Sluytman, working ostensibly as a "contractor" through his company, assumed the duties and responsibility for the operation of the Finger-Jointer at that

time. In February , 1996, Van Sluytman's status with Brink was changed from "contractor" to employee.

Mr. Olivier commenced his employment with Brink in November, 1999. He provided his opinion about the role and the responsibilities Van Sluytman had with Brink. He attempted to introduce a job description for Van Sluytman that he had prepared after Van Sluytman had left Brink and had never been shown or discussed with Van Sluytman or provided during the investigation. I did not allow the document to be introduced. As Mr. Olivier's employment with Brink overlapped with Van Sluytman's employment by only four months, it was understandable that much of his evidence was impressionistic and anecdotal. He expressed his view of Van Sluytman's role with Brink as being to "drive production" in the finger-joint operation and felt Van Sluytman would have to apply "management techniques" in performing that role. He said he was "on the floor" two or three times a day, but there was nothing in his evidence that indicated he had made any observations about what Van Sluytman did on a daily basis. Mostly, his presence on the floor was related to quality control of production generally. In fact, in direct response to a question from Mr. Zimmerman about what Van Sluytman was actually doing, Mr. Olivier replied that he didn't know what he was doing, only what he should have been doing. That response was also related to a document prepared and provided during the investigation by Van Sluytman. The document purported to describe a typical day's work schedule for Van Sluytman. It listed the following matters:

DAILY WORK SCHEDULE

TIME	JOB
6:30	Arrived to work
6:30-7:00	Line up lugs and make sure all machine is working properly for 7:00 A.M. shift.
7:00-7:30	I make sure that every one is at work, and if anyone is missing, I report To Jim Rosevea or Ray Demily, for them to phone in replacement. I check finger in the joints and adjust, check lumber lengths and glue.
7:30-8:30	Clean shaper heads and get them ready for grinding
8:30-9:10	Cover for coffee breaks, runs make-up machine, check finger joiner, runs shaper machine, run forklift, spear-man pill lumber .
9:10-9:30	Check shaper finger size and set-up, planer size and joiner, fix if necessary ...
9:30-10:00	Talk to operators about the quality of wood, and see if machines is Working properly.
10:00-10:30	Have coffee and finish grinding heads.

10:30-11:00	I operate make-up machine, and spear man operate shaper machine.
11:00-11:30	I operate forklift, spear operator pill lumber, the maker-up and shaper operator return to their job.
11:30-12:00	I work the grading belts and pill block, while the spear-operator has Lunch.
12:00-1:00	Check size, lengths, and conveyor going to the shipper, ripper and saw Machine.
1:00-1:10	I operate the make-up machine and send him for coffee.
1:15-1:25	I operate shaper machine and send him for coffee.
1:15-1:40	I operate the forklift and spear-operator pill lumber, the rest of crew goes For coffee break
1:40-2:00	I grind knives while having lunch.
2:00-2:10	Spear operator goes for coffee, and I take over his job.
2:10-2:45	I operate various machine for bathroom breaks.
2:45-3:30	I pill blocks on lumber sorting belts.
3:30-4:30	I checks all machine for maintenance.
4:30-?	I change shaper heads and do maintenance.

Twice a week I change machine size to another size, which takes 1.5 to 2 hours.

Most maintenance work done on Saturday and some Sunday.

Mr. Olivier provided information on the company structure and also identified eight persons, including Van Sluytman, who comprised the "management team", which in effect identified the eight persons who attended the weekly production meetings.

Van Sluytman confirmed what he had stated during the investigation. He said he was responsible for the operation of the finger-joint operation and in that regard, asserted he spent much of his time performing actual and preventive maintenance on the equipment in the finger-joint operation. He said that since he assumed responsibility for the finger-joint operation, he had reported to a series of managers. At the time of his termination of employment, he reported to Ray Demily and Jim Rosevea. He acknowledged having supervisory responsibilities, but denied having a significant degree of independent authority in respect of that responsibility. There was extensive cross-examination from Mr. Zimmerman on that point.

Mr. Rai gave evidence concerning a perceived error in the wage calculation made by the Director relating to statutory holidays. He testified that Brink paid Van Sluytman for each statutory holiday, but that was not recognized in the Determination. He suggested the Director

misinterpreted the payroll information provided by Brink, presuming the reference to the number of hours recorded against each statutory holiday entry indicated time worked by Van Sluytman, when in fact 8 hours was automatically recorded in the payroll record for each statutory holiday and if no more than 8 hours was recorded on the payroll record for the statutory holiday, that indicated no work was performed by Van Sluytman on that day. If any work was performed on the statutory holiday, it was shown in the payroll record as an addition to the 8 hours automatically recorded. For example, if Van Sluytman did not work on a statutory holiday, the payroll record would show 8 hours; if Van Sluytman worked 4 hours on a statutory holiday, the record would show 12 hours. Van Sluytman said he was pretty sure he had been paid for all the statutory holidays and did not dispute the evidence provided by Mr. Rai.

During the investigation, Brink advised the Director that Van Sluytman was paid annual vacation at the rate of 6%. That was in fact the rate at which Van Sluytman was being paid annual vacation pay entitlement. In 1999, Brink paid Van Sluytman a bonus of $1000.00. This bonus was based on years of employment. Brink said that because Van Sluytman had left their employ in January, 1995 and not returned until February, 1996, he should only have been entitled to 4% annual vacation pay and to a $500.00 bonus.

ARGUMENT AND ANALYSIS

Manager is defined in the *Regulation*:

> *"**manager**" means*
>
> *(a) a person whose primary duties consist of supervising and directing other employees, or*
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> *(b) a person employed in an executive capacity.*

There is no issue in this appeal whether Van Sluytman was employed in an executive capacity. It is accepted that he was not. The issue is whether he should have been considered *"a person whose primary duties consist of supervising and directing other employees"*. Mr. Zimmerman, on behalf of Brink, accepts that the following excerpt from *429485 B.C. Limited operating Amelia Street Bistro*, BC EST #D479/97 as identifying the considerations applicable in determining whether an employee should be considered a manager for the purposes of the *Act*:

> 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) 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 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 emp1oyer or understood by some third party.
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> We also accept that in determining whether a person is a manager the remedia1 nature of the *Act* and the purposes of the *Act* are proper considerations. 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 manager 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.
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> Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make fmal decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves or 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.
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> Also, when considering the reason for the employment of a person, it would be relevant that the person was hired to perform, and was continuing to perform, a job that would not normally be thought of as related to supervising and directing other employees.

I am not persuaded that there was any error in the conclusion that Van Sluytman was not a manager for the purposes of the *Act*. Brink did not show Van Sluytman exercised the power of independent action, autonomy and discretion necessary of a manager under the *Act*. In almost every circumstance identified and argued by Brink as being demonstrative of Van Sluytman's managerial status, the evidence failed to establish Van Sluytman made final decisions relating to supervising or directing employees. Final decisions relating to discipline were, by application of Brink policy, not made by first line supervision such as Van Sluytman. A three day suspension

imposed by Van Sluytman on one employee was dictated by Brink's progressive disciplinary policy. Even in the context of having effective recommendation, there was evidence that when Van Sluytman recommended the termination of one employee, that recommendation was ignored. Van Sluytman said final scheduling decisions were made by Ray Demily. There was no evidence contradicting that statement. Even though Van Sluytman signed annual vacation applications, final approval for the vacation periods requested in those applications went through Ray Demily. While Van Sluytman did "base line" training of new employees, he had no independent authority to decide who to train. Those decisions would be made at production meetings and he had some input, but final say belonged to Mr. Brink. He made observations about the employees who were being trained and reported those back to Ray Demily, Mohinder Basi, the head of Quality Control or others if directed to do so. He could not transfer an employee from one department or shift to another. He did have responsibility for organizing production of the finger-joint operation on his shift, but much of how that was organized was determined by production quotas that were set by Mr. Brink. He had established a new schedule within the finger-joint operation that involved an alteration in the established work process and allowed continuous operation of the Finger-Jointer during the shift. He discussed the schedule with Ray Demily, who authorized him to try it out. There was no evidence that Van Sluytman had the authority to initiate that change on his own.

Nor am I persuaded that the weekly production meetings assist in determining Van Sluytman's status for the purposes of the *Act*. There is no disagreement among the parties that Van Sluytman was responsible for the operation of the finger-joint operation and that responsibility extended to ensuring production quotas were met and that established productions standards were applied. Based on the material provided, it appears the weekly production meetings addressed mainly quality control and production issues. The Determination made the following statement about those meetings:

> There is no evidence to show that during these meetings Van Sluytman made any decisions that would support [Brink's] position, merely that as the Millwright/Supervisor of the Finger-Jointer part of the operation he attended meetings.

I agree with that statement.

This aspect of the appeal is dismissed.

I am satisfied, however, that the calculation in the Determination of wage entitlement on statutory holidays was incorrect. The Director misinterpreted the payroll information provided by Brink as described above by Mr. Rai. The Determination is referred back to the Director to correct the error and vary the statutory holiday calculation accordingly.

On the issue of the "overpayment" of the bonus and the annual vacation pay, the Director noted that Brink gave no indication a mistake in Van Sluytman's annual vacation entitlement or bonus payment had been made. I am inclined to dismiss this ground of appeal on that basis and only

address it because the Director also used 6% annual vacation entitlement in calculating the amount of wages owed to Van Sluytman.

In response generally to the argument the Tribunal should consider adjusting wages owing by deducting amounts paid under "mistake" from amounts otherwise found to be owing and payable as wages under the *Act*, I refer to subsection 21(1) of the *Act*. That provision prohibits an employer from withholding, deducting or requiring payment of all or part of an employee's wages for any purpose. To the extent the amounts paid by Brink to Van Sluytman under "mistake" were wages, Brink is asking the Tribunal to do what an employer is specifically prohibited from doing under the *Act*. I do not believe the Tribunal has that authority.

Even if that authority existed, there was no evidence indicating any mistake was made by Brink when it decided to base Van Sluytman's annual vacation pay entitlement and bonus on his initial employment date. I agree with the position taken in the reply submission of the Director, to the effect that there is nothing in the *Act* preventing an employer from providing a benefit greater that the minimum requirements of the *Act.* As the Director stated in her submission: "The Director will enforce any greater benefit".

To the extent any of the above amounts are not wages under the *Act*, and that seems a probable conclusion in respect of the bonus, there can be no set-off of non-wage amounts against wages owed under the *Act*, even if were inclined to do so.

That aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 12, 2001 be confirmed except as it relates to statutory holidays. That matter is referred back to the Director to vary the amount owed to Van Sluytman as a result of the contraventions of the *Act* by Brink.

David B. Stevenson
Adjudicator
Employment Standards Tribunal