

An Application for Reconsideration

- by -

J.P. Metal Masters 2000 Inc.
("J.P. Metal")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113, as amended

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2005A/109

DATE OF DECISION: September 8, 2005

DECISION

SUMBISSIONS

Timothy Watkins for J.P. Metal Masters 2000 Inc.
Dennis Foucher on his own behalf

INTRODUCTION

1. This is an application filed by J.P. Metal Masters 2000 Inc. (“J.P. Metal”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of Member David B. Stevenson’s decisions issued on April 19th, 2005 (B.C.E.S.T. Decision No. D057/05) and June 21st, 2005 (B.C.E.S.T. Decision No. D084/05).

PREVIOUS PROCEEDINGS

The Determination

2. On January 19th, 2005 (following a teleconference hearing conducted on January 11th, 2005), a delegate of the Director of Employment Standards (the “Director”) issued a Determination and accompanying “Reasons for the Determination” (“Reasons”) upholding an unpaid wage complaint that had been filed against J.P. Metal by a former employee. The Director’s delegate ordered J.P. Metal to pay Dennis Foucher (“Foucher”) the sum of \$3,829.41 on account of unpaid wages and section 88 interest. The bulk of the unpaid wage award (\$2,325.88) represented overtime pay (section 40), however, Mr. Foucher was also awarded vacation pay (section 58), statutory holiday pay (section 46), and compensation for length of service (section 63). In addition, the Director’s delegate levied three \$500 administrative penalties given J.P. Metal’s separate contraventions of sections 40, 46 and 63 of the *Act*. Thus, the total amount payable under the Determination was \$5,329.41.
3. The principal issue before the Director’s delegate was whether or not Mr. Foucher was a “manager” as defined in section 1 of the *Employment Standards Regulation*. “Managers” are excluded from the hours of work and overtime provisions of the *Act* (Part 4) as well as the statutory holiday provisions of the *Act* (Part 5). These latter exclusions are contained in sections 34(1)(f) and 36, respectively, of the *Regulation*. The delegate determined that Mr. Foucher was not a “manager” and, accordingly, awarded him overtime pay and statutory holiday pay and, in addition, penalized J.P. Metal for having failed to pay Foucher overtime and statutory holiday pay.

The Appeal Proceedings before the Tribunal

4. J.P. Metal appealed the Determination on the ground that Director’s delegate erred in law in determining that Mr. Foucher was not a “manager” and on the further ground that the delegate failed to observe the principles of natural justice in making the Determination. In a decision issued on April 19th, 2005 (B.C.E.S.T. Decision No. D057/05), Member Stevenson confirmed the Determination with the exception

of the award for statutory holiday pay—this latter matter was referred back to the delegate for review and, if required, re-calculation.

5. The delegate subsequently prepared a report dated April 22nd, 2005 in which he concluded he made a minor error with respect to his review of J.P. Metal's payroll records. Thus, the delegate recommended that the original Determination be varied to reflect the fact that \$396 had been paid on account of statutory holiday pay (there still remained an unpaid amount for statutory holiday pay). After making the necessary adjustments for vacation pay and section 88 interests, the net amount payable by J. P. Metal to Mr. Foucher was \$3,414.65 rather than \$3,829.41.
6. The delegate's April 22nd report was forwarded to the parties for their comments which were to be delivered in writing by no later than May 10th, 2005. Mr. Foucher filed a short submission in which he accepted the delegate's revised calculations; J.P. Metal did not file any submission whatsoever regarding the delegate's revised calculations. Accordingly, in a short decision issued on June 21st, 2005 (B.C.E.S.T. Decision No. D084/05), Member Stevenson issued an order varying the Determination to reflect the delegate's revised calculations. Thus, as matters now stand, J.P. Metals has been ordered to pay Mr. Foucher the sum of \$3,414.65 plus any further accrued section 88 interest (accrued after January 19th, 2005) and to pay the Director the sum of \$1,500 reflecting three separate \$500 administrative penalties (two of which relate to J.P. Metal's failure to pay overtime pay and statutory holiday pay).

THE APPLICATION FOR RECONSIDERATION

7. J.P. Metal's legal counsel filed a request for reconsideration on May 11th, 2005 (a date prior to Member Stevenson's decision on the referral back report). The Tribunal held the reconsideration application in abeyance pending the issuance of Member Stevenson's final order regarding the statutory holiday pay calculation.
8. The only issue raised in the reconsideration application is whether the Tribunal erred in confirming the delegate's conclusion that Mr. Foucher was not a "manager" as defined in section 1 of the *Regulation*.
9. Although this reconsideration application is timely, I am not satisfied that it is meritorious. Accordingly, I am dismissing the application and confirming Member Stevenson's final decision regarding the Determination. My reasons for making this latter order are set out below.

ANALYSIS

10. The Tribunal's reconsideration power is not to be used as a second (or, in this case, third) opportunity to simply reargue a position that has been argued (and rejected) in prior proceedings. J.P. Metal must satisfy me that both the delegate and Member Stevenson clearly and obviously erred in finding that Mr. Foucher was not a "manager". This latter question involves determining what is the correct legal test for a "manager" and then applying that test to the proven facts. In my view, both the delegate and Member Stevenson applied the correct legal test and I see no error in their application of the facts to that test.
11. As is detailed in the delegate's Reasons, Mr. Foucher held a "managerial" title, however, the delegate after having considered the evidence before him, concluded that, in fact, Mr. Foucher had little, if any, managerial authority. In particular, the delegate noted that company decisions regarding hiring, firing,

evaluating, directing and disciplining employees were almost exclusively within the purview of two other individuals in the organization. These latter facts are largely uncontested.

12. J.P. Metals is a comparatively small firm that operates as a steel fabrication subcontractor in the construction business. Normally, Mr. Foucher would monitor the work of 3 to 5 employees (and also provide some limited training for them, if needed) who would be working at a particular job site. However, for the most part, the crews worked without much direction other than initially being told what work they needed to complete during their shift. Mr. Foucher was being paid at a rate of \$21 per hour when his employment ended in late September 2005.
13. Although Mr. Foucher had some limited discretion regarding the expenditure or allocation of company resources, his role was more in the nature of a “lead hand” (i.e., a labourer with very limited on-site supervisory responsibilities) than a “site manager” (his actual title). Mr. Foucher did not hire or fire, evaluate, discipline or schedule his work crew, nor did he have any signing authority on the company’s bank accounts. In sum, Mr. Foucher appeared to have very little, if any, independent decision-making authority regarding any substantial matters; the independent authority he did exercise appears to have been quite trivial (e.g., authorizing the use of company tools on site although even on this point, most often, crew members simply used the tools they needed without seeking prior permission from Mr. Foucher).
14. Member Stevenson noted that the *Act* is remedial legislation and should be given large and liberal interpretation (as has been stressed by the Supreme Court of Canada on several occasions). A “manager”, properly so characterized, is not entitled to the statutory benefits of overtime pay and statutory holiday pay unless such entitlements have been separately negotiated and included in their contracts of employment. Accordingly, if a person is to be denied statutory benefits because they are a “manager”, it should be clear and obvious that the individual meets the regulatory definition of “manager”. In my view, this was not even a close case; Mr. Foucher clearly was not a manager.
15. It may well be that Mr. Foucher exercised, to a very limited extent, some of the authority that is generally ascribed to “managers”. However, as Member Stevenson noted in his April 19th reasons (at page 5), job titles are not determinative and one must consider the totality of the individual’s functions and duties. Member Stevenson concluded, as do I, that Mr. Foucher could not be fairly characterized as a “manager” given the overwhelming lack of authority in those areas that are generally considered to be managerial functions. In short, it cannot be said that Mr. Foucher’s “principal responsibilities” were to direct or control other J.P. Metal personnel or its other organizational resources. Mr. Foucher was employed as a skilled labourer and, in addition, he had some ancillary and very minor supervisory duties. However, I agree with both the delegate and Member Stevenson that Mr. Foucher was not a “manager” as that term is defined in the *Regulation*.
16. I wish to make one final comment. In his reconsideration application, legal counsel for J.P. Metals noted that “the parties were not represented by counsel” and that Member Stevenson “failed to address his mind to critical issues relating to the correct burden of proof on the employer”. In my view, whether J.P. Metals was, or was not, represented by legal counsel is, in the context of this case, wholly irrelevant. As for the burden of proof, it was the appellant’s burden to show that the delegate erred in law in rejecting J.P. Metal’s assertion that Mr. Foucher was a “manager”. So far as I can determine, Member Stevenson quite properly placed the burden on the appellant to demonstrate that the delegate erred in law.

ORDER

- ^{17.} The application, made pursuant to section 116 of the *Act*, to vary or cancel the final decision of Member Stevenson is **refused**.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal