Employment Standards TRIBUNAL

An appeal

- by -

Ares Ventures Inc.
("Ares")

- 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.: 2001/681

DATE OF DECISION: January 7, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Ares Ventures Inc. ("Ares") of a Determination that was issued on September 4, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Ares had contravened Part 1, Section 4, Part 4, Sections 35 and 40 and Part 5, Sections 45 and 56 of the *Act* in respect of the employment of three employees, Paul Mireault ("Mireault"), Ken Pearson ("Pearson") and John McArter ("McArter") and ordered Ares to cease contravening and to comply with the *Act* and to pay an amount of $11,138.31.

Ares says the decision was wrong in its conclusion of the hourly rates of pay of the employees and failed to make allowance for coffee/smoke breaks and lunch breaks taken by the employees. Ares also disputes the calculated hours worked. In respect of McArter specifically, Ares says he has exaggerated his actual time worked by claiming a flat rate 2 hours for call-outs on certain days. Ares also disputes that McArter's claim should have included employment with Ares in December, 1999.

ISSUE

The issue in this appeal is whether Ares has demonstrated the Determination was sufficiently wrong in its conclusions of fact, in its interpretation of the facts or in its conclusions and decisions in respect of the complaints by Mireault, Pearson and McArter to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary or cancel the Determination or refer it back to the Director.

FACTS

Ares operates a residential construction business in Kimberley, B.C. Mireault worked for Ares from December, 2000 to April 25, 2001; Pearson worked from November 16, 2000 to March 14, 2001; and McArter worked from December 15, 1999 to May 31, 2001. Each of the individuals complained they had not been paid all wages, annual vacation pay and statutory holiday pay owed.

Ares took the position that there was an arrangement in place that the individuals would work all hours at straight time in exchange for a higher rate of pay. The individuals denied any such arrangement.

The Determination notes the following findings of fact:

1. The payroll records indicated the individuals worked overtime but were not paid overtime rates;

2. The individuals were not paid statutory holidays in accordance with the *Act*;

3. Ares' reason for not paying overtime in accordance with the *Act* was, by operation of Section 4 of the *Act*, of no force or effect; and

4. Except for the vacation pay owing on the overtime and statutory holiday pay, there was no contravention of Part 7 of the *Act*.

The Determination considered the position taken by Ares on the alleged arrangement and rejected it:

> Section 4 makes it clear that an arrangement providing for less than the minimum standards required under the *Act* is not enforceable, regardless of whether or not the complainant was told of the employer's policy and whether or not the agreement was in writing or verbal.
>
> In other words, the employer and employee cannot waive statute law.

ARGUMENT AND ANALYSIS

The burden is on Ares in this appeal to persuade me that the Determination is wrong in law, in fact or in some combination of law and fact (see *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, as a matter of law or as a matter of mixed fact and law, sufficient to justify intervention by the Tribunal under Section 115 of the *Act*.

In the appeal, Ares argues that all of the individuals were labourers and that the normal wage rate for labourers was $9.00 an hour. The wage rate paid to the individuals was a higher rate than what normally would be paid and was designed to account for all hours, including overtime hours, worked by these labourers in order to simplify payroll. Ares also argues the hours of work should be adjusted to reflect the smoke/coffee breaks taken by the individuals, although he does not say how much time should be deducted or provide any other support for the argument.

The Director and two of the individuals have responded to the appeal. The individuals reject the arguments of Ares about their position and wage rate as fabrication. Both note that any breaks were authorized and there was never any question they would not be paid. They reject any suggestion they were simply 'labourers', and both provide some compelling detail respecting their qualifications and their duties and responsibilities while employed with Ares.

The Director says argument of Ares suggests the individuals were being paid a 'blended' rate and this is a new argument, which should not be considered on appeal and which in any event does not withstand either practical or statutory scrutiny. From a practical perspective, the 'blended' rate had the potential, in some circumstances, of increasing wage costs by as much as 30% over the cost of paying an employee according to requirements of the *Act*. The Director says Ares may not challenge the hours used in the calculations, as these were taken directly from their own payroll records and time sheets. In respect of the breaks, the Director says these were already given and paid for and may not now be deducted from wages.

The Director does agree that the calculation of wages owed to McArter did extend back too far. The calculations should have commenced as of June 26, 2000, not December 15, 1999 as there was a break in employment resulting from a layoff greater than a temporary layoff. The Director also agrees that for a period of time, McArter's claim should have been calculated at $12.00 an hour, not $13.00 an hour. The Director has submitted that a variance of the Determination is justified and has indicated the variance should indicate an amount owing of $7,443.32.

In its final reply, Ares says it is not accurate to describe their position as suggesting a 'blended' rate, but says their position is that the individuals accepted the higher rate of pay in lieu of any overtime pay and if the employees wages are going to be retroactively adjusted based on the requirements of the *Act*, then Ares should be able to retroactively have the wages adjusted to reflect that it is not statutorily required to pay for coffee breaks.

The appeal of Ares is dismissed, but the Determination will be varied according to the submission of the Director.

Even if I accepted there was a 'deal' with the individuals to waive the minimum requirements of the *Act*, the Director was entirely correct in the application of Section 4 of the *Act* to such an arrangement. It was not open to Ares to make any arrangement with the employees that would have the effect of waiving a requirement of the *Act*. Ares alleges the individuals were abusing the system and there was bad faith involved. Whether those allegations have any validity and, if so, whether that should compel the Director to have ceased investigating the complaints is a matter for the Director to decide under Section 76 of the *Act*. Such allegations are serious and the consequence is significant. Clear and convincing evidence would be needed to support those allegations and I see nothing in the appeal that would compel a conclusion there was either an abuse of process or bad faith nor provide an evidentiary foundation for the result sought by Ares.

Next, I decline the invitation to make any adjustment to the calculation of hours worked by the individuals to reflect the paid coffee/smoke breaks given to the individuals. There are several reasons for this position, including a conclusion that the breaks were authorized and the inability of Ares to quantify with any degree of accuracy what amount of time these breaks represent. Most compelling, however, is that the adjustment would have the effect of deducting from the individuals wages already paid. An employer is prohibited from 'clawing back' wages paid to an

employee - even wages allegedly paid under a mistake - by subsection 21(1) of the *Act*, which states:

> 21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

The Tribunal will not allow an employer to accomplish indirectly what the *Act* prohibits that employee from accomplishing directly. Ares says the result is unfair. I disagree. There is no unfairness to Ares that could not have been avoided by complying with the requirements of the *Act*.

Otherwise, Ares has not provided any evidence to demonstrate that the hours of work calculated by the Director from the employer's payroll records and time sheets were incorrect. Nor has Ares proven that the individuals were no more than 'labourers', nor, even if that were the case, that the Director was wrong not to have accepted their wage rate should have been the 'normal' labourer's rate of $9.00 an hour.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 4, 2001 be varied to show an amount owing of $7,443.32, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal