

An appeal

- by -

Lester Johnston operating LJ Trucking  
(“Johnston”)

- 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:** Michelle Alman

**FILE No.:** 2000/719

**DATE OF DECISION:** January 18, 2001

## DECISION

### OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Lester Johnston, operating LJ Trucking ("Johnston"), from a Determination issued September 25, 2000 by a delegate of the Director of Employment Standards ("the Director"). The Determination concluded that Johnston contravened sections 16, 17 and 18 of the Act by failing to pay his employee, Bryan Jameson ("Jameson"), the proper wages owed to Jameson during and after the end of Jameson's employment. The Determination also concluded that Johnston contravened section 28 of the Act by failing to maintain and provide the Director's delegate with required payroll records for Jameson. The Determination ordered Johnston to cease contravening the Act and pay a total of \$3,083.43 (\$2,850.00 in wages, plus 4% vacation pay of \$114.00, plus \$119.43 in interest owed as of September 25, 2000) to Jameson.

As an attachment to the Determination, a second delegate of the Director, pursuant to section 98 of the Act and section 29 of the *Regulation*, issued a \$0.00 Penalty against Johnston for his violations of the Act and for his repeated failures to provide any oral information or documents in reply to a Demand for Employer Records.

Johnston appeals from the Determination and the accompanying \$0.00 penalty, alleging that Jameson was paid all wages owing to him, and was, in fact, overpaid.

### PRELIMINARY ISSUES

There is an effort made by Johnston in his submissions concerning the September 25, 2000 Determination and associated Penalty to appeal from an earlier-issued \$500.00 Penalty Determination. Apparently, Johnston never submitted any appeal documents concerning that separate Penalty Determination. On December 20, 2000 the Tribunal's Vice-Chair advised Johnston that his failure to provide a copy of that Penalty Determination and his reasons for appealing it meant that the matter could not be appealed. This is in accordance with both the provisions of section 112(2) of the Act and with the Tribunal's rules. I will not, therefore, be addressing Johnston's disagreement with the earlier-issued Penalty Determination.

A much more significant preliminary issue arises in this case as to the admissibility of new evidence on appeal. Prior to issuing the Determination, the Director's delegate contacted Johnston by telephone on June 21, 2000 to request information about Jameson's complaint. As noted in the Determination and in the Director's appeal submissions, Johnston refused to provide any information and told the Director's delegate, "Do whatever you have to do," or words to that effect. The Director's delegate then sent Johnston a Demand for Employer Records by registered mail on June 23, 2000 to obtain payroll records to confirm the dates

and hours of Jameson's work, and what wages he had been paid. Johnston declined to pick up the registered letter containing the Demand.

On July 31, 2000, the Director's delegate prepared a Penalty Determination, apparently for \$500.00, against Johnston for his failure to comply with the Demand for Employer Records, and sent it by registered mail. Again, Johnston declined to pick up that registered letter. (He did apparently receive that Penalty Determination at some point, as evidenced by his efforts to appeal from it noted above.)

The September 25, 2000 Determination states that Johnston "refused to provide any information or to participate in any manner in the investigation." The last day to pay the amount of the Determination or file an appeal from the Determination was October 18, 2000. On October 17, 2000 Johnston for the first time sent the Director's delegate some documentation allegedly showing that Jameson had been fully paid for all work done during his employment with LJ Trucking. Johnston formally filed his appeal of the September 25, 2000 Determination with the Tribunal on October 18, 2000 and included the documents sent to the Director's delegate on October 17, 2000. Those documents include: copies of cheques made payable to Jameson, Calvin Jameson's (Jameson's brother or father), and an inn; some load delivery slips signed by Jameson, Calvin Jameson, and another driver alleged to have shared trips with Jameson; a copy of a guest registration form indicating monthly rental of a room for LJ Trucking; and a report of wage calculations and payments allegedly made to Jameson, Calvin Jameson, and the other driver based on the included load delivery slips.

In his initial appeal submissions of October 18, 2000 Johnston does not give any reason whatsoever for his failure to supply to the Director's delegate during the investigation stage of the proceedings the relevant documents included with his appeal. This point is emphasized in the Director's October 23, 2000 submissions. In his further appeal submissions of November 21, 2000, Johnston apologizes for "being abrupt with the officer that phoned regarding this matter," and goes on to state that he "did not see the importance of the claim at the time." Johnston states further that he requested information from the Director's delegate as to how Jameson calculated that he was owed any additional wages.

The Tribunal has previously ruled that new evidence is not to be admitted on an appeal from a Determination if that evidence "should have and could have been given to the delegate in the investigative process." *Tri-West Tractor Ltd.*, BC EST #3268/96; see also *Kaiser Stables Ltd.*, BC EST #D058/97. That principle must, however, "be balanced against the right of the parties to have their rights determined in an administratively fair manner." *Specialty Motor Cars (1970) Ltd.*, BC EST #D570/98. The Tribunal also said in *Specialty Motor Cars, supra*,

There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and...an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not

initially disclosed and any prejudice to parties resulting from such nondisclosure.

I am not persuaded in this case that the newly supplied evidence should be considered in this appeal. I say this for a number of reasons. First, in his submissions Johnston fails to give any reasons, other than that he "did not see the importance of the claim at the time," to explain why the cheques, load delivery slips, guest registration form and wage calculation and payment report were not produced to the Director's delegate prior to the issuance of the Determination. These items were clearly relevant and would have provided the Director's delegate with information against which he could have tested Jameson's calculations for his unpaid wage claim. Jameson and Calvin Jameson both contend in their submissions that Johnston in his appeal still did not supply all of the load slips related to Jameson's work. This might explain why Johnston did not supply the requested records at the investigation stage: Johnston's self-interest would have been served by earlier cooperation, unless he believed that he might be found to owe Jameson a greater amount than Jameson claimed if all relevant records were supplied to the Director's delegate.

Reviewing the newly supplied evidence and Johnston's submissions, I also note that Johnston makes contradictory statements as to the agreed rate of pay for Jameson. In his October 18, 2000 submissions Johnston indicates first that Jameson worked for him for an agreed wage rate calculated as a percentage of the net weights noted on Jameson's load slips. In his note to the Director's delegate dated October 17, 2000 Johnston indicates that the agreement was that Jameson would receive "25% including holiday pay." The attached wage calculation and payment report indicates, however, that Jameson's wages were calculated based on halving the value of the loads' net weight amounts, then multiplying the result by 24% and adding 4% for holiday pay. This comes closer to Jameson contention that he agreed to work for 28% of gross weight value and Johnston's payment of room fees during long hauls. In my view, Johnston's contradictions concerning the agreed rate of pay makes his newly supplied evidence of questionable worth.

The evidence is also of questionable relevance because it attempts to support Johnston's claim for impermissible wage offsets. Without presenting any evidence of a written authorization or permissible assignment of wages for room cost deductions from Jameson's pay, Johnston claims a February 7, 2000 cheque for \$625.95 made out to the Caesar's Inn as a payment of wages to Jameson. Johnston also supplies a February 13, 2000 guest registration form for a \$600.00 *monthly* room rental charge *made out to LJ Trucking and signed by Johnston* as proof that he was entitled to claim an additional \$600.00 for motel costs as a deduction from wages owed to Jameson. These practices are clearly contradictory to section 21 of the *Act*, which states in relevant parts:

**21. Deductions--(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.

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

Both the cheque payable to the Caesar's Inn and the guest registration card indicating the company's monthly rental of a room for \$600.00 appear to be based on an arrangement made directly with Johnston's business rather than with Jameson. These are, therefore, business costs. There is nothing in the *Regulation* permitting an employer to offset wages for these types of business costs, and there is no evidence of any written permissible wage assignment from Jameson for the room expenses. The evidence sought to be introduced on appeal in support of these deductions from wages is, therefore, of no assistance to Johnston's appeal.

Sections 2(b) and 2(d) of the *Act* state:

**2. Purposes of the Act--**The purposes of this Act are as follows:

(b) to promote fair treatment of employees and employers;

...

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act...

In John Ladd's Imported Motor Car Co. operating John Ladd B.M.W.M., BC EST #D313/96, the Tribunal cited a Supreme Court of Canada case, *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, as standing for the proposition that "the objective of providing a speedy and efficient mechanism for investigating and resolving disputes was at least as important as substantive protections. Here, Johnston offered no meaningful reason for his failure to participate in the investigation stage of Jameson's complaint. Jameson is entitled to fair treatment, and to the most efficient procedures for resolving the dispute over his wage claim. Johnston's refusal to provide evidence at an earlier stage, taken together with the above-noted problems with the newly provided evidence and the continuing failure of the newly produced records to specify the hours and days Jameson worked, lead me to conclude that the newly produced evidence should not be considered in this appeal.

## ISSUE

The only remaining issue raised in the appeal is whether Jameson was an employee or an independent contractor.

## THE FACTS AND ANALYSIS

LJ Trucking is a hauling business operated by Johnston out of Williams Lake. Johnston agrees that Jameson worked for him driving loads for LJ Trucking from January 19, 2000 to February 28, 2000. In his initial appeal submissions dated October 18, 2000, and in his October 17, 2000 note to the Director's delegate, Johnston does not raise the issue of Johnston's being an independent contractor instead of an employee. Indeed, in his October 18, 2000 submissions Johnston says that Jameson "was to be paid Semi-monthly [sic] but required a few advances..." Johnston raises the issue of Jameson being a contractor only in his November 21, 2000 submissions when he states: "We do not know where Jameson gets his figures he was paid as a contractor, he stating he has a GST & WCB number which he did not supply us, so there were no remittances to Canada Customs & Revenue Agency. [sic]" Johnston replies on December 8, 2000 to Jameson's submissions, saying: "Bryan states he would wait for a proper two-week pay period, Our records show he was usually paid before the pay day we can support this by the fax we sent to you in September with the load slips & cancelled cheques. [sic]"

Jameson states in his November 17, 2000 submission that he reached a verbal agreement with Johnston for his employment. Jameson does not mention being a contractor, and refers to Johnston's paying the room fees for another of his drivers. Jameson complains, "I would wait at his house for a proper two-week pay only to have not show-up.[sic]" In his undated submissions faxed to the Tribunal on December 14, 2000 Jameson denies that he has "any compensation number," and says, "I would like L.J. Trucking to produce his other truck driver's pay slips which would show that L.J. Trucking pays for all rooms, fines for overloads, income tax, plus compensation for holiday pay, etc."

Section 17(1) of the *Act* requires payment of wages owed to an employee at least semi-monthly. There is an inherent contradiction in Johnston's references on October 18, 2000 and December 8, 2000 to his payments to Jameson in advance of semi-monthly pay dates, and his contention that Johnston was a contractor. The *Act's* provisions do not apply to employment of an independent contractor, so if Jameson had been an independent contractor, Johnston would not have needed to make semi-monthly payments to Jameson unless they had specifically agreed to such payments. Aside from the single comment in his November 21, 2000 submissions, Johnston offers no evidence in support of the vague contention that Jameson was a contractor.

On appeals to the Tribunal, the appellant bears the burden of proving on a balance of probabilities that there are errors in the appealed-from Determination: see, for example, *John Ladd's Imported Motor Car Company, supra*. I find that Johnston has not met his burden of proving that Jameson was an independent contractor. Because there is no evidence in this regard, there is nothing to analyze in light of the common law tests for whether someone is an employee of an independent contractor. Johnston's appeal is dismissed.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination and associated Penalty issued September 25, 2000 are confirmed, with additional interest to be calculated pursuant to section 88 of the *Act*.

**MICHELLE ALMAN**

**Michelle Alman  
Adjudicator  
Employment Standards Tribunal**