

An appeal

- by -

CityLink Bus Lines Ltd.
("CityLink" or the "Employer")

- 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: Paul E. Love

FILE No.: 2002/537

DATE OF DECISION: January 15, 2003

DECISION

OVERVIEW

This is an appeal by an employer, from a Determination dated October 3, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Employee worked for one day as a bus driver. The Employer promised to pay the Employee for that one day, and pay the sum of \$10.00 to cover the employee’s gas to drive from Surrey to Abbotsford. The Employer did not participate in the investigation, but chose to advance a full explanation that Mr. Rai was not an employee to the Tribunal as part of his appeal submission. I dismissed the appeal on the basis of the principle in *Tri-West Tractors Ltd., BCEST #D268/96*. A party must tender its explanation to the Delegate during the investigation. Further, the particular explanation advanced did not afford the Employer a defence, as the Employer appears to have indirectly required the Employee to work, or work as part of a training process prior to the appointment of the employee to the position. On the Employer’s version of the facts, Mr. Rai was an employee, as set out in section 1 of the *Act*. I therefore confirmed the Determination.

ISSUE:

Did the Delegate err in finding that Mr. Rai was an employee in the circumstances of this case?

FACTS

I decided this case after considering the written submission of the Employer, Employee and the Delegate. The Delegate found that Mr. Rai worked for one day with CityLink Bus Lines Ltd., an intra-provincial bus line. The Delegate found that Mr. Rai was to be paid \$12.00 per hour. The Delegate determined that the Employer had promised to pay the sum of \$10.00 to Mr. Rai and wages for the day. Mr. Rai lived in Surrey. The shift was to start in Abbotsford. After performing the job duties for one day, Mr. Rai decided it was too far to commute for work.

The Delegate found as a fact that Mr. Rai was not paid for six hours of labour. The Delegate also determined that while the Act does not require the payment of an employee’s commuting costs to work, the Employment Standards Branch will “enforce terms and conditions of employment which exceed the minimum requirements of the Act.”

The Delegate noted in the Determination that the Employer did not respond to a letter outlining the complaint, or to a letter dated August 28, 2002 indicating the Delegate’s preliminary findings based on the available evidence. Further, the Employer was contacted by telephone, and claimed that the complainant never worked for him. The Employer has not contradicted the Delegate’s version of events related to the investigation. I, therefore find, that the Employer failed to participate in the investigation.

Employer's Argument:

The Employer filed an appeal alleging that there was an error in the facts, an error in interpreting the law, and a different explanation of the facts. The full text of the Employer's reasons for this appeal are as follows:

The complainant Nirbhai Rai was one of several applicants for a driver's job.

He was given the opportunity to ride on a bus with the company driver H. Vanderroean to determine for himself what the work entails. Before the actual hiring process begins. This process is complex and did never occur in Mr. Nirbhai's case. I have contacted the law firm Gowlings and will be represented at a hearing at a date you may determine.

The Employer asks the Tribunal to cancel the Determination.

Employee's Arguments:

The Employee submits that he worked for the Employer as a driver on May 1, 2002, and is entitled to wages for the one day of work.

Delegate's Argument

The Delegate submits that the Employer did not advance this explanation during the course of the investigation, the Employer only stated that Mr. Rai "never worked for him".

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

In my view this is a case which falls to be determined on the principles of *Triwest Tractors Ltd.*, *BCEST #D 268/96*. The explanation advanced by the Employer on appeal, is one which could have been advanced to the Delegate. A party is not permitted to "lie in the weeds", and advance its case to the Tribunal on appeal, when the facts should have been advanced to the Delegate investigating the case. The process before the Tribunal is in the nature of an appeal, where the appellant must demonstrate error in order to succeed. In my view, the Delegate cannot be said to have "erred" in a fact finding process, where the Employer failed to participate in that process.

While I do dispose of this case on the principle noted above, I note that the argument raised by the Employer is not well founded. On the Employer's version of the facts, it appears that the Employer required, Mr. Rai as part of the selection process, to ride along and therefore "train" without pay, before appointment to a position. As set out in section 1 of the *Act*, a person being trained for the employer's business is also an employee for the purposes of the *Act*, and entitled to the protection of the *Act*. Further an employee is also a person who the employer permits indirectly to perform work.

For all the above reasons, I dismiss the Employer's appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated October 3, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal