

An appeal

- by -

CityLink Bus Lines Ltd.

- 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: John M. Orr

FILE No.: 2003A/307

DATE OF DECISION: January 30, 2004

DECISION

SUBMISSIONS

No submissions were received.

OVERVIEW

This is an appeal by CityLink Bus Lines Ltd. (“CityLink”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Determination dated October 24, 2003 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

A delegate of the Director determined that CityLink operated an intra-provincial bus service and employed Brian Wilson (“Wilson”) from July 23, 2000 to January 23, 2003. The delegate determined that CityLink owed wages to Wilson in the amount of \$5,479.31 and imposed an administrative penalty in the amount of \$2,000.00.

CityLink has appealed on the basis that new evidence has become available and that there were errors in law made in calculating vacation and statutory holiday pay. CityLink wishes the matter referred back to the Director for re-calculation in light of the new evidence and consideration of certain “averaging principles”. CityLink requested an oral hearing to present the new evidence.

ISSUE

The primary issue in this case is whether the new evidence should be admitted. Secondly whether there are sufficient grounds to warrant referring this matter back to the Director.

ANALYSIS

CityLink submits that the company was previously unable to address the issues because the company was subject to an audit by the Canada Customs and Revenue Agency (“CCRA”). CityLink says that the payroll records have now been released by the CCRA.

CityLink also submits that the company needs to explain that the bus drivers, including Wilson, were involved in some form of option that involved an “Averaging Principle”. It is also submitted that all vacation pay was paid on a monthly basis and that this can be demonstrated by a review of the now available payroll records.

Neither Mr. Wilson nor the Director’s delegate made submissions opposing the consideration of new evidence, despite the delegate’s previous concerns expressed in the Determination about CityLink’s failure to participate during the investigation. There is, of course, no onus upon these parties to respond to the appeal.

Under the circumstances that the failure of CityLink to provide the records at an earlier time was caused by the actions of the CCRA and was through no fault of the appellant it appears to me to be reasonable to allow the appellant the opportunity to now provide those records to the Director for consideration and to make any relevant submission to the Director based on the issues raised in the appeal. This difficulty has arisen before where a party is dependent on third parties to acquire the needed information and the evidence has subsequently been admitted: *Re: Wilson*, BCEST #D237/01; *Re: Cathay Traditional Chinese Medical Centre Ltd.*, BCEST #D169/01.

This issues raised, if valid, may have significant consequences for the amount of wages owing and the penalties imposed.

Accordingly the appeal is granted and this matter is referred back to the Director to consider the new evidence and CityLink's submissions.

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated October 24, 2003 is referred back to the Director for further investigation.

John M. Orr
Adjudicator
Employment Standards Tribunal