Employment Standards TRIBUNAL

An appeal

- by -

Kimberly Transport Ltd.
(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 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2009A/156

DATE OF DECISION: February 17, 2010

DECISION

SUBMISSIONS

Tom Johnson	on behalf of Kimberly Transport Ltd.
Rory Schultheis	on his own behalf
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought on behalf of Kimberly Transport Ltd. (the "Employer") challenging a determination of a delegate (the "Delegate") of the Director of Employment Standards dated October 22, 2009, (the "Determination") in respect of a claim for overtime brought by a Rory Schultheis ("Schultheis").

2. The Delegate conducted a hearing of Mr. Schultheis' complaint on October 5, 2009. She then determined that the Employer had contravened section 37.3 of the *Employment Standards Regulation* (the "*Regulation*") because it had failed to pay overtime wages to Mr. Schultheis in the amount of $2,897.50. Adding the annual vacation pay and interest to this sum that was mandated by the *Employment Standards Act* (the "*Act*"), the Delegate determined that the Employer owed Mr. Schultheis $3,041.39. The Delegate also imposed an administrative penalty of $500.00, to be paid by the Employer pursuant to section 29(1) of the *Regulation*. The total found to be owed by the Employer was, therefore, $3,541.39.

3. I have before me the Determination and the Delegate's Reasons for the Determination, the Appeal Form and submission delivered by the Employer, the record that appears to have been before the Delegate when she made the Determination, a submission from the Delegate, a submission from Mr. Schultheis, and a reply submission from the Employer.

4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. My review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

5. The Employer employed Mr. Schultheis as a short haul truck driver from September 17, 2008, to May 27, 2009. He received payments of $19.00 for each hour he worked.

6. The wage statements referable to Mr. Schultheis break down the $19.00 per hour he received into two components. Under the heading "Total Hours" the statements set out that Mr. Schultheis' hourly rate of pay would be $12.67. Directly underneath, the statements indicate that Mr. Schultheis would also be paid a "Bonus – Safety" of $6.33 per hour worked.

7. During the period referred to in Mr. Schultheis' complaint, he worked 305 overtime hours and was paid $19.00 for each of those hours. Mr. Schultheis claims that his rate of $19.00 per hour was the rate he was

entitled to be paid for regular hours of work, and that he should have received the premium rate provided for in the *Regulation* for the overtime hours he had worked.

8. The relevant parts of section 37.3 of the *Regulation* say this:

> 37.3(3) An employer who requires or allows a short haul truck driver to work more than 9 hours in a day or 45 hours in a week must pay the employee at least
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> (a) 1 ½ times the employee's regular wage for the hours worked in excess of 9 hours in a day, and
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> (b) 1 ½ times the employee's regular wage for the hours worked in excess of 45 hours in a week.

9. At the hearing conducted by the Delegate, Mr. Schultheis testified that he and the Employer's principal, Tom Johnson ("Johnson"), verbally agreed that he would be paid $19.00 for his work. When Mr. Schultheis received his first paycheque he noticed that the wage rate was broken down into the $12.67 and $6.33 components noted above. He said he spoke with Mr. Johnson about this immediately thereafter, and confirmed with him once again that his rate of pay was $19.00 per hour. He said Mr. Johnson told him that the breakdown into the two components was for "tax purposes" and it was "just the way I write it up."

10. Mr. Schultheis also testified that he at no time agreed to an hourly rate of pay of $12.67. He speculated that the Employer's practice of issuing wage statements containing a rate for regular hours, and a different rate by way of safety bonus, was a ruse concocted for the purpose of avoiding the requirements to pay overtime set out in the *Act* and *Regulation*. Mr. Schultheis supported this contention by referring to the fact that he had always received the safety bonus component of his wages notwithstanding he had been involved in four separate accidents while driving for the Employer, the last one resulting in the termination of his employment.

11. Mr. Johnson appeared at the hearing on behalf of the Employer. He said that when he had hired Mr. Schultheis, he had agreed to pay him "up to $19.00 per hour." He also stated that Mr. Schultheis' hourly rate of pay was $12.67 and that the additional $6.33 for safety bonus was not a part of Mr. Schultheis' wages for the purposes of calculating the amount he should be paid for overtime work. He pointed out that this was clearly set out on the wage statements Mr. Schultheis had received.

12. Mr. Johnson acknowledged that while the Employer had several written policies which it circulated to its employees, there was no formal or written document which defined what the safety bonus was, or the parameters for determining when it would be paid or withheld. Mr. Johnson also conceded that Mr. Schultheis was paid the safety bonus throughout the period of his employment, regardless of his spotty safety record, because, he said, he had a "soft heart."

13. The task before the Delegate was to determine whether Mr. Schultheis' wage rate was $12.67 or $19.00 per hour. If it was the former, the Employer's obligation to pay wages had been satisfied. If it was the latter, the Employer owed Mr. Schultheis overtime wages.

14. The Delegate determined that the substance of the contractual arrangement between the Employer and Mr. Schultheis was that Mr. Schultheis would be paid at a rate of $19.00 per hour, not $12.67, and so Mr. Schultheis was owed overtime wages. There were several reasons why the Delegate reached this conclusion. The Employer had prepared no written policy statements or guidelines regarding the safety bonus, and Mr. Johnson alone decided whether, and if so on what basis, the bonus would be awarded or withheld. The Employer gave no explanation as to why the bonus was paid to Mr. Schultheis for the regular hours he

worked, but never in respect of his overtime hours. The fact that the Employer did not withhold payment of the safety bonus to Mr. Schultheis notwithstanding he became involved in several accidents also persuaded the Delegate that the bonus was not, in reality, tied to Mr. Schultheis' record for safety, but that it was simply an idiosyncratic practice of the Employer for recording regular wages.

15. The Delegate found Mr. Schultheis to be a credible witness. His recollection of discussions and events was detailed and convincing. The Delegate observed that Mr. Johnson's testimony was vague and lacked specificity. Mr. Johnson relied primarily on the wording of the wage statements, and the specific reference to a separate safety bonus as a component within the $19.00 per hour paid to Mr. Schultheis. The Delegate decided that the wage statements were equivocal, that they did not convey with certainty a message that Mr. Schultheis was to be paid at a rate of $12.67 per hour, and that there was no direct evidence supporting an inference that he had ever specifically agreed to be paid at that rate for his regular hours of work.

ISSUE

16. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

17. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

18. Section 115(1) of the *Act* should also be noted. It says this:

> 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
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> (a) confirm, vary or cancel the determination under appeal, or
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> (b) refer the matter back to the director.

19. The Employer wishes the Determination to be cancelled. It relies on each of the grounds of appeal set out in section 112(1). I will deal with these grounds in reverse order.

New Evidence

20. The Tribunal's right to allow an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. The jurisdiction to permit new evidence on appeal is not intended as an invitation to a disappointed appellant to seek out further information to bolster a case that failed at first instance if that evidence could have been presented to the delegate before the determination was issued (see *MSI Delivery Services Ltd.*, BC EST # D051/06).

21. The Employer seeks to introduce evidence of the pay stub of another employee which, it says, will serve to demonstrate that a safety bonus was withheld. The inference the Employer wishes the Tribunal to draw from this evidence is that the safety bonus noted on Mr. Schultheis' wage statement was not a sham.

22. I am not persuaded that this evidence satisfies the criteria established under section 112(1)(c). In my view, evidence of what the Employer might have done in the case of another employee in perhaps different circumstances is of very limited, if any, value in deciding what the nature of the employment relationship was between the Employer and Mr. Schultheis. The Delegate was correct to focus on what the Employer did regarding Mr. Schultheis' record for safety, and it was clear that the Employer withheld no bonuses from him despite the fact that he had been involved in several accidents. The inference the Delegate was entitled to draw from that evidence was that in Mr. Schultheis' case, the safety bonus aspect of his wage was not truly related to his driving habits, but was instead a component of his regular hourly wage.

23. I have also decided that the Employer has failed to show that the evidence of the Employer's treatment of another employee regarding a safety bonus which the Employer now seeks to present was not available at the time the Determination was made. The Employer states that it involved considerable work to examine its driver records at another location to identify an occasion where a safety bonus had been withheld, and then it had to make a request of its accountant to retrieve a copy of the relevant wage statement. The Employer says this took more time than anticipated, with the result that the Employer did not, it seems, have the information in hand at the time of the hearing. If so, the Employer should at least have requested an adjournment, or advised the Delegate that there was other evidence which the Employer was seeking out which might assist the Delegate in resolving the issues before her. This the Employer did not do. In my view, it is now too late for the Employer to attempt to rehabilitate a failed case with evidence it might, with greater diligence, have presented to the Delegate before the Determination was made.

24. A further item of evidence the Employer seeks to adduce on appeal takes the form of an explanation why it did not withhold Mr. Schultheis' safety bonus after his accidents. The Employer says that Mr. Schultheis did not report the accidents. Instead, the damage was noted by the Employer's mechanic. The Employer states that it would have been problematic for it to have withheld the safety bonus in such circumstances, either because Mr. Schultheis would have said he did not cause the damage, or he had not noticed it. As this evidence appears to have probative value, it is a mystery to me why the Employer did not tender it at the hearing, or at least make the Delegate aware of it prior to the issuing of the Determination. There is no suggestion in its reference to it in its submission that the evidence was unknown to the Employer at that time. I note, in addition, that it appears to contradict the evidence given by Mr. Johnson at the hearing to the effect that the reason he did not withhold Mr. Schultheis' safety bonus was because he had a "soft heart." I decline to conclude, therefore, that the Employer's reference to this evidence is sufficient to warrant a cancellation of the Determination due to the operation of section 112(1)(c).

25. The Employer makes reference in its submission to the fact that its review of Mr. Schultheis' payroll records has revealed to it that he did not have his coffee breaks "deducted" from his paycheque. The Employer asks that this matter be "revisited." I decline to do so. Mr. Schultheis' entitlement to wages was the sole issue raised in his complaint. If the Employer believes that it paid Mr. Schultheis for periods of time when he was not working it should have raised the matter with the Delegate, at least at the hearing, and certainly before the Determination was made. It cannot in the circumstances of this case ask that the Tribunal consider the issue for the first time on appeal.

26. The Employer also alludes to the fact that it has instituted a new policy ensuring that employees sign agreements before commencing work. I infer that the purpose of this initiative is to clarify, in future cases, the rates of pay for work performed, in order to avoid the difficulties which have arisen for the Employer as a

result of Mr. Schultheis' complaint. If so, the Employer is to be commended for attempting to make its employment arrangements more clear. However, the development of a new policy for new hires can be of no assistance in deciding the outcome of this appeal.

Natural Justice

27. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was in some respect unfair. Examples of cases where natural justice concerns may arise include situations where a party like the Employer has not received notice of a complaint, or has been deprived of a reasonable opportunity to respond to it. In other situations, a decision may be impeached if a party can show bias on the part of the decision-maker, whether actual, or reasonably apprehended.

28. There is nothing to which the Employer has referred in its submissions which leads me to conclude that the Delegate failed to observe these principles. The substance of the Employer's attack on this ground appears to be that the Delegate declined to accept the Employer's position that the wage statements were conclusive proof demonstrating that Mr. Schultheis' rate of pay was $12.67 per hour for his regular hours, and that the safety bonus should not be construed as a component of his wages for the purpose of calculating his rate of pay for overtime. That sort of challenge seeks to undermine the validity of the Delegate's conclusions in substance; it does not raise a doubt concerning the fairness of the procedure the Delegate adopted. The Employer was fully aware of the substance of the complaint and had ample opportunity to present a case to refute the allegations contained within it. There is no suggestion of bias.

29. On this ground, too, the Employer's appeal must fail.

Error of Law

30. As I see it, the thrust of the Employer's argument is that the Delegate chose, incorrectly, to rely on the evidence of Mr. Schultheis concerning his discussions with Mr. Johnson relating to his hourly wage, when she should have based her Determination on the plain language of the wage statements.

31. The Employer disputes Mr. Schultheis' version of what he was told by Mr. Johnson concerning his rate of pay. It submits that Mr. Schultheis understood that his regular wage was $12.67 per hour, which is why he did not file a complaint regarding an overtime premium until after his employment was terminated.

32. The Employer's submissions misconstrue, to a degree, the jurisdiction of the Tribunal when it decides appeals on the ground that a delegate has erred in law. What the Employer is asking the Tribunal to do is substitute the Employer's view of the facts for the factual conclusions drawn by the Delegate. The Tribunal's power to correct errors of law under section 112(1)(a) does not permit it to interfere with a delegate's findings of fact, absent a finding of palpable and overriding error. This means it must be established that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, an appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex, supra; Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

33. Here, it cannot be said that the factual conclusions of the Delegate were irrational, perverse, or inexplicable. The language employed in the wage statements produced by the Employer for Mr. Schultheis was not so

plain as to lead inexorably to the conclusion that Mr. Schultheis was to be paid $12.67 for his regular hours of work and the $6.33 incorporated as a safety bonus was not to be construed as part of his regular wages. The fact that the Employer withheld no part of Mr. Schultheis' safety bonus when he became involved in accidents and no safety bonus was paid to him when he was paid for overtime work were both elements of the surrounding circumstances which could lead the Delegate, acting rationally, to conclude that the ambiguity in the wage statements should be resolved in favour of an interpretation that Mr. Schultheis' employment contract entitled him to be paid $19.00 per hour for his regular hours of work.

34. The Delegate's conclusions relating to the conversations Mr. Schultheis had with Mr. Johnson regarding his wage statements support that interpretation. Mr. Johnson's testimony at the hearing provided no details of what he might have said to Mr. Schultheis concerning the meaning of the safety bonus. This is what the Delegate was alluding to when she noted that Mr. Johnson's evidence was vague. Rather than dwell on verbal discussions, which Mr. Johnson conceded he might not recall accurately, he preferred to rely on the language of the wage statements to support the position of the Employer. Mr. Schultheis' evidence of his discussions with Mr. Johnson was, on the other hand, clear and specific. It is trite to say that the weight to be given to particular evidence rests with the trier of fact, in this instance the Delegate (see *Housen v. Nikolaisen* [2002] 2 SCR 235 at paragraph 72). The Delegate was entitled to prefer Mr. Schultheis' recollection of the relevant events. His evidence of what Mr. Johnson said to him about the notations on his wage statements reveals that the Employer did not clearly communicate to him that the safety bonus was not to be construed as a component of his wages for the purposes of calculating the overtime premium to which he might become entitled.

35. The fact that Mr. Schultheis did not file a complaint with the Director alleging a failure to pay the proper overtime premium until after his employment was terminated is of no moment. There are several possible explanations for this, all of which are inconsistent with his having been in agreement with the Employer's position regarding the amount of his regular hourly wage. It is enough, given the nature of the evidence before me, that Mr. Schultheis filed his complaint within the time permitted in the *Act*. I do not believe I need to speculate concerning his motives for doing so, or why he may have decided to wait for a period of time before exercising his rights.

ORDER

36. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal