

An appeal

- by -

All Right Trucking – 99 Ltd.
(“ART”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/4

DATE OF DECISION: February 19, 2016

DECISION

SUBMISSIONS

Brad N. Cocke

counsel for All Right Trucking – 99 Ltd.

INTRODUCTION

1. On August 1, 2014, Baljinder S. Sidhu (“Mr. Sidhu”) filed an unpaid wage complaint against All Right Trucking – 99 Ltd. (“ART”) pursuant to section 74 of the *Employment Standards Act* (the “*Act*”). Mr. Sidhu, a truck driver, claimed approximately \$21,500 in unpaid wages against ART, a firm in the hauling and excavation business. The complaint was the subject of an oral hearing (conducted by teleconference) on March 19 and April 15, 2015, before a delegate of the Director of Employment Standards (the “delegate”). On November 25, 2015, the delegate issued the Determination now under appeal together with her “Reasons for the Determination” (the “delegate’s reasons”).
2. By way of the Determination, the delegate ordered ART to pay Mr. Sidhu the total sum of \$13,969.07 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied six separate \$500 monetary penalties against ART (see section 98 of the *Act*) based on its contraventions of sections 17 (failure to pay wages at least semimonthly), 18 (failure to pay wages on termination of employment), 45 (failure to pay statutory holiday pay), 46 (failure to pay premium pay for working on a statutory holiday) and 63 (failure to pay compensation for length of service) of the *Act* and section 37.3 (overtime pay for short haul truck drivers) of the *Employment Standards Regulation* (the “*Regulation*”). Thus, the total amount payable under the Determination is \$16,969.07.
3. The unpaid wage award made in Mr. Sidhu’s favour includes regular wages (\$2,717.00), overtime pay (\$7,284.75 calculated in accordance with section 37.3 of the *Regulation*), statutory holiday pay (\$920.61), vacation pay (\$516.09) and two weeks’ wages as compensation for length of service (\$1,980.00) together with section 88 interest (\$550.62).
4. On January 4, 2016, ART appealed the Determination to the Tribunal under subsection 112(1)(b) of the *Act* – the delegate failed to observe the principles of natural justice in making the Determination. ART’s appeal materials include its Appeal Form and an attached submission from its legal counsel. Counsel says that the delegate breached the principles of natural justice in that her decision, particularly with respect to the delegate’s calculations regarding Mr. Sidhu’s unpaid wage entitlements, is not transparent and that her calculations are not readily ascertainable or verifiable from her reasons: “...the [d]elegate failed to provide the basis for the calculations she made, the result of which, [sic] is that the Employer has no way of determining whether the [d]elegate erred in her calculations and/or applied the wrong section of the Act or Regulation.” Counsel further argues: “... this is particularly problematic where, as here, the [d]elegate has expressly stated that there were errors in [Mr. Sidhu’s] calculations on the trip inspection reports”.
5. ART’s counsel, relying on *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and the Tribunal’s decision in *Applied Plastic Technology Inc.*, BC EST # D060/02, says that the delegate’s reasons for decision are legally inadequate and thus asks the Tribunal to refer this matter back to the Director with directions that the Director “provide reasons for the basis of its [sic] calculations of overtime, statutory holiday pay, and regular wages owing”.

6. ART also sought, pursuant to section 113 of the *Act*, a Tribunal order suspending the effect of the Determination pending the adjudication of the appeal. However, in light of the Director's undertaking not to undertake any collection proceedings until the Tribunal finally adjudicates this appeal, the Tribunal's Appeals Manager advised ART's legal counsel, by letter dated January 6, 2016, that the Tribunal would not be issuing a suspension order.
7. At this juncture, I am considering whether this appeal should be summarily dismissed and in assessing this question I have considered ART's submissions, the Determination, the delegate's reasons and the subsection 112(5) record that was before the delegate when she issued the Determination.
8. If this appeal is not summarily dismissed, the respondent parties will be notified and will be provided an opportunity to make submissions regarding the merits of the appeal; ART will be given a final right of reply and then I will issue my reasons for decision.

THE DETERMINATION

9. As previously noted, Mr. Sidhu's complaint was adjudicated following an oral complaint hearing conducted by teleconference on March 19 and April 15, 2015. The delegate issued her reasons over seven months later, on November 25, 2015. There is nothing in the record before me, or in the delegate's reasons, explaining why there was such a significant delay in rendering a decision following the conclusion of the hearing. This is not a complicated case. I do not consider this delay to be in keeping with the subsection 2(d) purpose of the *Act* which states that disputes should be resolved in a fair and efficient manner.
10. In any event, both ART and Mr. Sidhu appeared at the hearing. The delegate addressed three issues in her reasons: i) Did Mr. Sidhu have a valid claim for unpaid regular/overtime wages?; ii) Was he owed statutory holiday pay?; and iii) Was he entitled to compensation for length of service?
11. The delegate's task was complicated by conflicting records and the fact that ART failed to fully comply with its record-keeping obligations under the *Act* although, curiously, the delegate did not levy a separate monetary penalty regarding this section 28 contravention. Mr. Sidhu's position was that although he was paid for 160 hours each month, he actually worked a greater number of hours. Mr. Sidhu, on a daily basis, completed "Driver's Vehicle Inspection Reports" (also known as "log books") and provided these logs to ART about every 15 days.
12. As indicated in the delegate's reasons (page R5), ART submitted records showing that Mr. Sidhu worked, and was paid for, 160 hours each month save for February 2014 when he was apparently paid for 173 hours. Mr. Sidhu was paid only once per month (in contravention of section 17 of the *Act*), and ART's records showed that Mr. Sidhu was not paid any statutory holiday pay. ART's record for April 2014 was apparently, on its face, inaccurate – the delegate stated that it showed a total of 160 paid hours worked when in fact its payroll record indicated Mr. Sidhu worked 22 days at 8 hours each day (176 hours).
13. The delegate rejected certain payroll summary records submitted by ART on the basis that they appeared to have been concocted *ex post* for purposes of the supporting ART's position at the hearing (see delegate's reasons, pages R8 – R9). The delegate held that the log books represented "the best available evidence for me to determine what hours [Mr. Sidhu] worked" particularly since they appeared to have been kept on a contemporaneous basis, were regularly submitted to ART, were legally required to be maintained, and were subject to inspection by Commercial Vehicle Safety Enforcement officers.

14. ART's key challenge to the Determination appears to flow from the following portions of the delegate's reasons (page R10):

I examined each daily inspection report and the summary of hours for each month that [Mr. Sidhu] created. From this information, I calculated the hours that [Mr. Sidhu] worked. In situations where [Mr. Sidhu] had calculated the incorrect hours due to a mathematical error or other error, I calculated the correct number of hours contained on the inspection reports from the time entered for the pre-trip to the time entered for the post trip [sic] inspection.

There were two days that [Mr. Sidhu] had not recorded an end time on the inspection report. I determined that he worked eight hours as I had no evidence to show if he had worked over eight hours on those days. The Employer's summary indicated that Mr. Sidhu had worked on those particular days and was paid for eight hours.

[Mr. Sidhu] provided a summary of hours for each month. The monthly summary for January 2014 did not contain hours worked for January 5, 2014. There was an inspection report that contained an entry that appeared to be January 5, 2014, however, that is a Sunday. I did not receive evidence from [Mr. Sidhu] that he [sic, worked?] on Sundays. The Employer testified they did not work on Sundays. There are no other Sundays in either [Mr. Sidhu's] summaries or inspection reports. I cannot conclude if the report was dated incorrectly or was a duplicate of another date, therefore, I did not add any hours regarding that inspection report.

Based on my findings regarding the daily hours worked by [Mr. Sidhu] I have determined wages are owed for work performed including overtime wages as the records indicate he worked more than 8 hours in a day.

15. While the delegate, in the above excerpts, summarized her findings, she did not, in either her reasons or in an appended schedule, detail the days that Mr. Sidhu worked and the hours actually worked on those days.
16. There was no dispute between the parties that Mr. Sidhu's wage rate was \$22 per hour. Further, the effect of the delegate's finding that Mr. Sidhu was a "short haul truck driver" as defined in section 1 of the *Regulation* – similarly not contested in this appeal – is that his overtime pay would be calculated under subsection 37.3(3) of the *Regulation* as follows:
- (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
 - (a) 1 1/2 times the employee's regular wage for the hours worked in excess of 9 hours in a day, and
 - (b) 1 1/2 times the employee's regular wage for the hours worked in excess of 45 hours in a week.
17. The delegate awarded Mr. Sidhu \$2,717.00 on account of unpaid regular wages (123.5 hours x \$22 per hour). The overtime award, \$7,284.75, represents 220.75 overtime hours at \$33 per hour. However, there is nothing in the delegate's reasons detailing the particular days (or weeks) when Mr. Sidhu worked "overtime" hours or the precise amount of such daily or weekly overtime hours.
18. As recounted in the delegate's reasons (page R11), Mr. Sidhu qualified for payment for three statutory holidays during the wage recovery period. Although ART maintained that Mr. Sidhu did not work on any statutory holidays, the delegate determined that he did work on the February 2014 "Family Day" holiday based on clear and convincing evidence including an inspection report for that day and the truck's odometer readings. The employer's payroll records, as noted above, indicate that ART never paid any statutory holiday pay to Mr. Sidhu. The delegate awarded Mr. Sidhu premium pay for the one statutory holiday he worked plus

an average day's pay for each of the three qualifying statutory holidays within the 6-month wage recovery period (approximately \$185 per day although the actual amount varied for each day). I note that ART does not contest Mr. Sidhu's *entitlement* to statutory holiday pay (to be contrasted with the actual amount of that entitlement).

19. With respect to the matter of compensation for length of service, "The Employers [*sic*] do not refute that they terminated [Mr. Sidhu's] employment" (delegate's reasons, page R11) and did not provide any evidence showing that they provided him with the requisite written notice that would have discharged its financial obligation to pay such compensation. Although ART alleged that it had just cause for dismissing Mr. Sidhu (which similarly would have discharged its presumptive financial obligation to pay compensation for length of service), the delegate rejected ART's just cause argument and ART does not challenge the delegate's decision in this regard.

FINDINGS AND ANALYSIS

20. ART does not contest the \$22 per hour wage rate upon which the unpaid wage award was predicated. ART does not contest Mr. Sidhu's entitlement to be paid statutory holiday relating to the three statutory holidays that fell within the 6-month wage recovery period (one of which Mr. Sidhu worked). Finally, ART does not contest the delegate's finding that Mr. Sidhu was entitled to two weeks' wages as compensation for length of service.
21. ART does submit that the delegate's reasons are legally deficient because one cannot discern how the final unpaid wage amounts were actually determined. For example, each of the three "statutory holiday pay" awards was in a separate amount (\$188.57, \$186.75 and \$182.29), but there is nothing in the delegate's "Wage Calculation Summary" appended to her reasons, or in the text of her reasons, that shows how each of these amounts reflects an "average day's pay" as required by section 45 of the *Act*. Further, although the delegate says that she calculated Mr. Sidhu's entitlement principally based on the log books, she also noted that in some cases there were "errors" that had to be corrected but nowhere in her reasons, or in the Wage Calculation Summary, does she set out the specific errors or list the actual daily/weekly hours worked. Although the delegate does indicate that the 2-weeks' wages award for compensation for length of service was based on a weekly wage of \$990, as derived from the log books, since the data from which this weekly wage was calculated is not set out in the delegate's reasons or in the Wage Calculation Summary, one cannot say whether the section 63 award is, or is not, correct.
22. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, the Supreme Court of Canada stated (para. 16): "Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion". However, the court also stressed that the reasons must "demonstrate 'justification, transparency and intelligibility'". In a later decision, *Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405, the high court emphasized that "the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable" (at para. 3).
23. In my view, the delegate's decision, while for the most part thorough and comprehensive, does fall down in detailing how the various unpaid wage awards were calculated. In my view, the reasons in this regard are simply not transparent or intelligible. The delegate summarized the outcome of her underlying calculations without providing the actual calculations and relevant details. For example, on what days was overtime pay earned? Was any weekly overtime pay earned and, if so, for what particular weeks? In a case such as this,

where there were admitted errors in the records upon which the calculations were based, and in the absence of any detail as to the actual days worked and the number of hours worked each day, it is simply not possible to verify whether the delegate's calculations are accurate. In effect, the delegate's reasons leave ART (and Mr. Sidhu) simply having to trust that her calculations are accurate since they cannot be independently verified by the details provided in her reasons.

24. In my view, the most efficient way to address this deficiency in the delegate's reasons is to refer this matter back to the Director for the purpose of preparing a report setting out the actual unpaid wage calculations in detail. I presume the delegate has already prepared such a report, at least in some fashion (perhaps a spreadsheet?), as it would have been a prerequisite to issuing the Determination. After the report has been filed with the Tribunal, ART and Mr. Sidhu will be given an opportunity to respond and, with all this further material in hand, I will then issue a final decision.

ORDER

25. Pursuant to subsection 114(2)(a) of the *Act*, this matter is referred back to the Director for the purposes of preparing a report detailing Mr. Sidhu's unpaid wage entitlement (\$13,969.07). The report shall be delivered to the Tribunal within 30 days after the issuance of these reasons. The Tribunal will then provide the report to ART and Mr. Sidhu for their response.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal