

An appeal

- by -

Inter-Urban Delivery Service Ltd.
("Inter-Urban")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2003A/323

DATE OF DECISION: March 3, 2004

DECISION

SUBMISSIONS

Dan McDonald, Vice-President

for Inter-Urban Delivery Service Ltd.

Greg Brown, E.S.O.

for the Director of Employment Standards

INTRODUCTON

This matter comes before me as a result of a “referral back” order [see section 115(1)(b) of the *Act*] made by my colleague, Adjudicator Collingwood (B.C.E.S.T. Decision No. D325/03 issued December 10th, 2003; E.S.T. File No. 2003A/197).

The Determination

The proceedings before the Tribunal commenced when Inter-Urban Delivery Service Ltd. (“Inter-Urban”) filed an appeal, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), from a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 28th, 2003 (the “Determination”).

By way of the Determination (which was issued after an investigation conducted by the delegate), Inter-Urban was ordered to pay its former employee, Hardip Cheema (“Cheema”) the sum of \$8,597.26 on account of unpaid overtime, minimum daily pay, vacation pay, statutory holiday pay, recovery of Inter-Urban’s business costs that were paid by Cheema (W.C.B. premiums) and section 88 interest.

The Appeal

Inter-Urban appealed the Determination alleging that the delegate erred in law, failed to observe the principles of natural justice and that it had new and relevant evidence that was not before the delegate. More particularly, Inter-Urban argued, among other things, that its business fell under federal, not provincial jurisdiction; that Cheema was an independent contractor not an employee; and that, in any event, Cheema’s complaint was filed outside the statutory limitation period governing the filing of complaints.

The appeal came on for hearing before Adjudicator Collingwood on October 21st, 2003; as noted above, the Adjudicator’s reasons for decision were issued on December 10th, 2003. Both Inter-Urban and Cheema attended the appeal hearing; the Director was not represented at the hearing. I might add that if the Director had attended the appeal hearing, the Adjudicator might well have not found it necessary to make a referral back order which, in turn, has (perhaps needlessly) delayed the final adjudication of this appeal.

The Adjudicator concluded that “all but three” of the issues raised on appeal by Inter-Urban had “no merit whatsoever”. The Adjudicator concluded that Inter-Urban’s assertions that the delegate did not allow it to submit all of its evidence or that it had any new and relevant evidence were “utter nonsense”. The Adjudicator characterized the delegate’s investigation as fair and thorough. The Adjudicator was fully satisfied that both Cheema’s wage rate and unpaid wage claim were correctly calculated.

The three issues that, in the Adjudicator's view, had some merit were the timeliness of the complaint, the jurisdictional issue (federal or provincial?) and the question of Cheema's status (employee or independent contractor?)

The "Referral Back" Order

Adjudicator Collingwood concluded that since Cheema was terminated sometime during January 2002, the complaint--having been filed on May 15th, 2002--was filed within the 6-month time limit set out in section 74(3) of the *Act*. However, the Adjudicator noted that the delegate failed to disclose the entire record [contrary to section 112(5) of the *Act*] and that two issues were not adequately addressed in the Determination, namely, the jurisdictional issue and the matter of Cheema's status. The relevant portions of the Adjudicator's reasons for decision on these latter two points are reproduced below:

The Determination does not explain why it is decided that Mr. Cheema is an employee. Yet I find that this most important of issues was raised at the investigative stage, in a letter dated May 23, 2003, if not before that point. (The letter refers to past discussion of the matter of whether Mr. Cheema worked as [an] independent contractor.) This issue is referred back to the Director with an order to provide reasons.

The Determination does not explain why it is decided that Inter-Urban falls within the jurisdiction of the *Act* and there is no explanation for that. The Director has offered no explanation for that lack of reasons while the Appellant tells me that this issue was also raised at the investigative stage. If it was and, certainly, I have no reason to disbelieve Inter-Urban, then fairness alone demands that the Director provide reasons for that decision as well. If it is that the Director does not have jurisdiction, then the delegate has made an error in law which is fatal to the Determination.

ANALYSIS

By way of response to the Adjudicator's December 10th, 2003 Order, the Director's delegate submitted a report, dated December 29th, 2003, addressing both the "jurisdictional" and the "status" issues. The delegate's report was provided to both Inter-Urban and Cheema for their response (to be filed by January 20th, 2004). Inter-Urban filed a reply, dated January 20th, 2004; Cheema did not file any reply.

Having considered the two submissions before me, as well as the other material on file, I am of the view that the Determination must be confirmed. I shall briefly address the two outstanding issues, namely, the matters of jurisdiction and Cheema's status.

The Jurisdictional Issue

The uncontroverted evidence before me is that while about 1/3 of Inter-Urban's 12 trucks are regularly used to transport goods to Washington state, the bulk (67%) of Inter-Urban's fleet are used to make deliveries exclusively within B.C. I have no evidence before me that Mr. Cheema was regularly involved (or at all) in making deliveries across the provincial border into Washington state. While Inter-Urban asserts that its entire operation falls under federal jurisdiction it has failed, despite being given every reasonable opportunity to do so, to provide any credible *evidence* to support that assertion.

Mr. Cheema's Status

I am fully satisfied that the delegate correctly determined that Mr. Cheema was employed by Inter-Urban. He was not an independent contractor. I note that even Inter-Urban appears to have considered Cheema to have been an employee during some portion of his tenure as evidenced by its issuance of a record of employment (unnecessary if he was a true independent contractor) and Inter-Urban's insistence that employment benefits such as vacation pay and statutory holiday pay were included in his daily compensation.

Cheema mainly drove Inter-Urban's truck and on those occasions when he used his own vehicle, Inter-Urban reimbursed Cheema for his operating costs. Cheema was clearly subject to Inter-Urban's direction and control, he was economically dependent on that firm and was an integral part of Inter-Urban's business operations. Cheema was not an entrepreneur providing services to Inter-Urban--he had no opportunity for profit (beyond the payment of his contracted wages) nor did he face any risk of incurring business losses. In sum, the suggestion that Cheema was a true independent contractor is one that is manifestly untenable.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$8,597.26** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal