Employment Standards TRIBUNAL

An appeal

- by -

Daniel E. King
("King")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2005A/14

DATE OF DECISION: March 30, 2005

DECISION

SUBMISSIONS

Daniel King	on his own behalf
David Hingston	on behalf of Apple Valley Express Inc.
Theresa Robertson	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Daniel E. King ("King") of a Determination that was issued on January 18, 2005 by a delegate of the Director of Employment Standards (the "Director").

The Determination related to a complaint that had been filed by King alleging Apple Valley Express Inc. ("Apple Valley") had contravened the *Act*. King claimed he was owed regular wages, annual vacation and statutory holiday pay and length of service compensation. King also claimed to be entitled to recover vehicle expenses that he incurred on behalf of Apple Valley during his employment.

During the complaint process, King withdrew the claim for length of service compensation and for some of the vehicle expenses. The claims for annual vacation and statutory holiday pay were settled between the parties. The Director addressed the claim made by King for regular wages and recovery of gas expenses through an oral hearing, which was held on December 1, 2004.

The Director concluded the *Act* had not been contravened and no additional wages were owed by Apple Valley to King.

King says the Director failed to comply with the principles of natural justice in making the Determination on his overtime claim. The focus of the appeal is the decision of the Director to deny King's claim for recovery of gas expenses.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this case is whether the Director committed a reviewable error by denying his claim for recovery of gas expenses.

THE FACTS

Apple Valley is a local and regional pick-up and delivery service company operating from Kelowna, BC. King was employed by Apple Valley as a messenger/delivery person from September 26, 2003 until February 27, 2004. When King was hired, he was told by Apple Valley that he was considered an

independent contractor, that he would use his own vehicle for work and be responsible for all expenses related to the operation of his vehicle and that he would be paid on a "per package" basis. He was told the previous driver had earned approximately $120.00 a day.

The Determination indicated that King became dissatisfied with what he was earning and sought an increase. When he and Apple Valley were unable to reach agreement on an increase, King was dismissed with two weeks' written notice of the termination of his employment with Apple Valley.

One of the issues that arose during the complaint process was whether King was an employee for the purposes of the *Act*. The Director found that King was an employee of Apple Valley under the *Act*. There is no appeal of that finding.

Another issue considered by the Director was whether King was owed regular wages by Apple valley. King claimed he should have been paid $120.00 a day by Apple Valley. The Director found there had been no promise or guarantee made to King by Apple Valley that he would earn $120.00 a day. King understood from the outset of his employment that he was to be paid on a "per package" basis. There is no appeal of the Determination of the claim for regular wages.

On the issue of recovery of gas expenses, the Director denied the claim because the amount of the claim could not be determined. The Determination contains the following analysis on this issue:

> The key issue is whether the cost of the fuel can be determined and thus be recoverable as wages under the *Act*. Mr. King submitted a number of gas receipts that he later agreed were not for fuel for his work vehicle. Further, he was not able to provide any reasonable explanation as to how it could be determined that the balance of the receipts were definitely for his work vehicle. Although he agreed that he used the vehicle to drive to and from work and for personal use, he did not keep a log of the distances travelled to and from work, during work and for other personal use. In short, there is simply no way to determine which receipts are for his work vehicle and what portion of the vehicle was personal.

During the complaint process, Apple Valley argued, and the Director accepted, that King agreed to the "per package" pay rate on the understanding that he would have to cover his own vehicle expenses, including his gas expenses. While noting the prohibition against agreements to waive the minimum standards of the *Act*, the Director concluded that:

> . . . .since Mr. King received at least $3000.00 more than the minimum wage for all hours worked and since I can not quantify the cost of the fuel used by Mr. King to perform his duties, I cannot make a determination as to the amount recoverable by Mr. King as wages nor make a finding that the *Act* has been contravened in this regard.

There is no clear indication in the Determination or in the record of what other "expenses", in addition to the gas, would be included within the "per package" pay rate. There is some reference in the record to auto expenses, maintenance costs, workers compensation and a home office.

While not entirely clear from the Determination, it appears the Director accepted that the cost of gas was a cost of doing business for Apple Valley. The following is included in the Determination under point VI, Findings and Analysis:

> In making his claim for gas expenses, Mr. King, referred to Section 21(2) of the *Act* which states that an employer "must not require an employee to pay any part of the employer's business costs

> except as permitted by the regulation". Since Apple Valley is in the delivery business gas for vehicles would be a cost of doing business.

ARGUMENT AND ANALYSIS

King has the burden, as the appellant, of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *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:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

As indicated above, the appeal questions the correctness of the Director's decision to deny King's claim to recover gas expenses. The ground of appeal chosen by King is that the Director failed to observe principles of natural justice in making the Determination. In reviewing the appeal, I am reminded of the words of the reconsideration panel in *J.C. Creations Ltd.*, BC EST #RD317/03 (Reconsideration of BC EST #D132/03), that:

> Lay parties do not always know what "natural justice" means, or whether or how it differs from "error of law". Indeed, the complexity of administrative law is such that there is no sharp distinction. The grounds for reviewable error in administrative law are not neatly divisible into watertight compartments.

A common sense and plain language orientation to an appeal - one which addresses the substance of the appeal - has been endorsed by the Tribunal. It is clear from the appeal that King cannot accept how the Director could apparently agree that the gas expenses were a cost of doing business to Apple Valley, find that King was required to pay that cost but conclude Apple Valley had not contravened the *Act* and that King was not owed wages.

It is also clear that King does not accept the amount of the gas expenses cannot be determined. King says the gas expenses could have been calculated from his evidence, which he says Apple Valley agreed with, that he travelled an average of 185 kilometres every day for work. Based on that evidence, taken together with cost of fuel during his period of employment and the fuel economy of the vehicle he was driving, King says the amount he was owed as wages for fuel cost could have been determined.

In reply, Apple Valley denies there was any agreement about the number of kilometres King travelled in a day, saying Mr. Hingston, who attended and gave evidence on behalf of Apple Valley, agreed only that it was possible a delivery driver could do that many kilometres in a day but that the evidence indicated King often did much less than that.

In the reply submission of the Director, the following statement is made:

> . . . I agree that Mr. King testified that he averaged 185 km per day and that the employer agreed this was probably what a courier would average. These statement were not helpful in making a decision since neither Mr. King nor the employer kept records/logs of the distances travelled so had no basis on which to make the statements. Further, Mr. King did not know the distance between his home and Apple Valley, nor was he able to say what other amounts of travel was not work related. In other words, the statements were based on speculation.

In reply, the Director also reiterates the point that King was paid in excess of $3000.00 more than the minimum wage for all hours worked, an amount which exceeded the amount of his gas expense claim.

I have considerable difficulty with the above point on at least three grounds. First, King's minimum wage entitlement (to the extent it has any application to this case) cannot be calculated from total earnings during his employment. The *Act* requires that minimum wage be paid on each hour worked. The record shows there were days King earned less than minimum wage for the hours he worked even if no expenses for that day were taken into account. The *Act* is not a "fluid" document that can be tailored to the peculiarities of the business or the employer/employee relationship. The *Act* sets minimum requirements for all employers and employees in the province, unless they are specifically or constitutionally excluded. If the Director was going to utilize minimum wage entitlement, the Director was required to do so in a manner that was consistent with the requirements of the *Act*.

Second, the point made by the Director presumes the only "expense" incurred by King was the gas expense. That presumption does not appear to be entirely consistent with the material on record and is clearly not consistent with what are commonly accepted as vehicle expenses, which typically include variable costs, such as fuel, oil, tire wear, which increase with vehicle use, and fixed costs, such as insurance and depreciation, which are not considered affected by how much a vehicle is driven. Apparently, the understanding between Apple Valley and King was that King would be paid a per package rate and would pay his own expenses. There was no attempt by the Director either to identify what "expenses" were covered by this understanding or determine the total approximate cost of these "expenses" to King. Accordingly, (and even if such an analysis were otherwise acceptable) there is no factual basis for the Director's finding that because King received "at least $3000 more than minimum wage", he in effect received reimbursement for the "expenses" he was required to pay. Additionally, the reasoning of the Director makes it impossible to enforce the minimum wage provisions as there can be certainty as to what the actual wage rate was.

Third, Section 21 of the *Act* prohibits an employer from *directly or indirectly* withholding, deducting or requiring payment of all or part of an employees wages for any purpose and, more relevant to this case, prohibits an employer from requiring an employee to pay any part of the employer's business costs. Clearly Apple Valley could not have deducted or directly set-off the alleged value of these "expenses" from King's wages. The reasoning of the Director, however, by accepting those expenses, which were never identified or valued at the commencement of, or during, the term of King's employment and were not capable of being quantified during the complaint process, can be set off against what he was paid is allowing and endorsing indirectly what Apple Valley could never do directly.

The complaint process was sufficiently deficient that King was denied a fair hearing.

The Director found that Apple Valley required King to pay vehicle expenses related to operating its business. Any reasonable examination of the evidence provided to the Director should have led to the

conclusion that Apple Valley had contravened Section 21 of the *Act*. I do not accept the argument made in the reply submission from Apple Valley that subsection 21(2) did not apply in the circumstances because "expenses" were factored into the "per package" rate. In any event, Apple Valley has not appealed the Determination.

It was inappropriate for the Director to have simply looked at the gas receipts and thrown the claim out in its entirety on the apparent inability of the Director to decide what amount of the fuel cost shown on the receipts related to working for Apple Valley. In my view, the Director, having undertaken an investigation of the complaint and having made findings indicating Apple Valley had contravened the *Act*, was required to decide the amount of wages owing even though that amount could not be decided with mathematical certainty (see *Haack v. Martin*, [1927] S.C.R. 413).

The Tribunal has acknowledged that the task of calculating the amount which may be owed to a complainant once a contravention has been determined can be a difficult task because of a paucity of information, but the Tribunal has also indicated it is a task to which the Director must direct a sufficient effort. This case, to paraphrase the words of Aikins J. in *J. Russell Clancy v. Robert A. Shewan et al*. (unreported, Vancouver Registry #1020/67, at pp. 38-41), was not a situation in which it was impossible to assess the wages owing, but only a situation in which the task presented some difficulty.

A central question which should have been considered by the Director was how many kilometres King travelled in a day working for Apple Valley. There is nothing in the Determination indicating the Director considered that question. The Director had some evidence suggesting a courier could average 185 kilometres a day. While this evidence appears to be in dispute, an examination of the waybills would likely have assisted in resolving that dispute and establishing with some degree of certainty the distances travelled by King each day. There is no indication this information was requested by the Director or provided by Apple Valley.

The Determination also noted the following evidence provided by King:

> The dispatch arrangement was that he [King] would call in to Apple Valley in the morning to be dispatched or, if something were urgent, Apple Valley would call him. Then, during the day, he carried a pager or radio supplied by Apple Valley so that he could be contacted for other deliveries and he would go home after doing his last delivery. He said that once he was dispatched, he remained in his vehicle for the rest of the day, awaiting further dispatches.

There is no indication this information was challenged or rejected.

Additionally, the Director might have been assisted in deciding fuel costs, and vehicle expenses generally, by reference to what King claimed on his income tax statements as vehicle operating costs during his employment with Apple Valley.

In result, the matter is referred back to the Director.

ORDER

Pursuant to Section 115 of the *Act*, this matter is referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal