Employment Standards TRIBUNAL

An appeal

- by -

One-Two-Express 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: Kenneth Wm. Thornicroft

FILE No.: 2010A/48

DATE OF DECISION: June 23, 2010

DECISION

SUBMISSIONS

Redge Hillman and Yvan Brouillard	on behalf of One-Two-Express Ltd.
Shawn Dowd	on his own behalf
Sukh Kaila	on behalf of the Director of Employment Standards

INTRODUCTION

1. I have before me an appeal filed by One-Two-Express Ltd. (the "Employer") pursuant to section 112(1) of the *Employment Standards Act* (the "*Act*"). The Employer operates a freight and furniture delivery business in Gibson. I understand that Mr. Shawn Dowd ("Dowd") worked for this company as a truck driver from January 23, 2007, until his employment ended on August 29, 2008. On October 8, 2008, Mr. Dowd filed an unpaid wage complaint with the Employment Standards Branch claiming slightly over $22,300 in unpaid wages (primarily overtime pay) and other claims. A delegate of the Director of Employment Standards (the "delegate") conducted an investigation and on March 4, 2010, issued a Determination under ER# 152-729 (the "Determination") and accompanying "Reasons for the Determination" (the "delegate's reasons") ordering the Employer to pay Mr. Dowd $17,094.02 in unpaid wages and section 88 interest. In addition, and also by way of the Determination, the delegate levied four separate $500 monetary penalties (see section 98) against the Employer for having contravened sections 17 (semimonthly pay obligation), 18 (payment of wages on termination) and 21 (unlawful wage deductions) of the *Act* and section 46 of the *Employment Standards Regulation* (failure to produce payroll records). Thus, the total amount payable under the Determination is $19,094.02.

2. I note that the Determination was issued approximately 17 months after the complaint was filed. I do not believe that such a lengthy delay is in keeping with the stated purpose in section 2(d) that *Act* disputes be resolved in a fair and efficient manner. In making this observation, I do not wish to be taken as criticizing the delegate, however, my recent experience has been that some determinations are being issued quite some time after the initial complaint was filed. No one is well served by this sort of systemic delay.

3. I am adjudicating this appeal based on the written submissions of the parties and, in addition to those submissions (filed by the Employer, Mr. Dowd and the delegate), I have also reviewed the section 112(5) record that was before the delegate. The submissions before me include a late submission from the Employer (dated June 2, 2010) and Mr. Dowd's invited response to that submission (dated June 9, 2010). I shall address these latter two documents later on in these reasons for decision.

THE DELEGATE'S REASONS FOR THE DETERMINATION

4. The delegate determined that Mr. Dowd was entitled to $3,000 in unpaid regular wages. This finding was based on an "NSF" cheque that the Employer had issued to Mr. Dowd for the pay period April 26 to May 8, 2008 (Mr. Dowd apparently earned $2,000 during this pay period) and a further $1,000 in unauthorized wage deductions. The delegate awarded Mr. Dowd the sum of $7999.95 in unpaid overtime wages (plus 4% vacation pay on this amount: $320) spanning the period from February 29 to August 29, 2008. The delegate determined that Mr. Dowd was not paid any vacation pay in either 2007 or 2008 and accordingly awarded him $2,633.77 on that account. The delegate found that Mr. Dowd was dismissed without just cause and thus

was entitled to, based on his tenure with the Employer, two weeks' wages as compensation for length of service ($2,080 including 4% vacation pay). Finally, the delegate awarded section 88 interest in the amount of $740.30 for an overall total $17,094.01.

5. As previously noted, the delegate also levied four separate $500 monetary penalties thus bringing the total amount payable under the Determination to $19,094.02.

REASONS FOR APPEAL

6. The Employer asks the Tribunal to cancel the Determination and is basing its attack on all three statutory grounds of appeal, namely, the delegate erred in law, the delegate failed to observe the principles of natural justice in making the determination and new evidence is now available (see *Act*, subsections 112(1)(a), (b) and (c)).

7. The Employer's submission dated April 11, 2010, (appended to its Appeal Form) and its later submission dated May 19, 2010, do not specifically set out the arguments in support of each of the three statutory grounds. However, I have endeavoured to distil the Employer's evidence and argument as it relates to each separate ground from the Employer's submissions.

Alleged Errors of Law

8. So far as I can gather, the Employer's principal attack based on this ground appears to be that the delegate made certain findings of fact, or determined credibility issues, without a proper evidentiary foundation. The Employer says that the delegate relied on "rules that do not apply to the trucking industry" (April 11 submission). With respect to the section 63 award of compensation for length of service, I understand the Employer to be saying that Mr. Dowd quit his employment on February 1, 2008, only to be rehired and then later terminated for cause (see *Act*, section 63(3)(c)) on August 29, 2008 (April 11 submission).

9. The Employer's May 19 submission raises some further matters that could be taken as alleged errors of law. Firstly, the Employer says that the agreed wage rate of $200 per day (a rate that was confirmed by Mr. Dowd and accepted by the delegate for purposes of calculating Mr. Dowd's unpaid wage entitlements) included within it consideration for any overtime pay to which Mr. Dowd would be entitled under the *Act*. Secondly, the delegate failed to account for the fact that Mr. Dowd regularly took at least a 30 to 60 minute meal break during his shifts so that it was not appropriate to award compensation based on a 12-hour working day. Thirdly, the Employer says that Mr. Dowd was eventually paid for the NSF cheque in question. Finally, the Employer says that: "all employees agreed to the attached company policies (including pay deductions for damaged [sic] due to driver negligence)".

Alleged Breaches of the Rules of Natural Justice

10. The Employer's natural justice concerns appear to relate to the following matters. Firstly, the delegate's alleged failure to conduct a proper investigation – the Employer seemingly asserts that findings were made without the Employer being given an opportunity to explain its position. Secondly, the Employer says that that the delegate was biased against it.

Appellant's New Evidence

11. The new evidence appears to be a copy of a cheque that was issued to replace an NSF cheque issued to Mr. Dowd (April 11 submission) and a copy of Mr. Dowd's driving record and some other related documentation

that was referred to in the Employer's late submission filed June 2, 2010. Although the documents relating to Mr. Dowd's driving record (which were not appended to the Employer's June 2 submission) may not have been before the delegate, it is clear that Mr. Dowd's driving record was very much in issue since it was one of the main reasons the Employer advanced in support of its just cause allegation (see Employer's letter to the delegate dated February 2, 2009).

12. With respect to the NSF cheque, the delegate acknowledged, in his May 7, 2010, submission, that Mr. Dowd did receive reimbursement for the NSF cheque in question and asks that the Determination be varied accordingly.

13. As noted above, the Employer's June 2, 2010 submission was filed after the deadline for final submissions. The Employer's June 2 letter was filed presumably in further response to the Tribunal's letter to the parties enclosing a) the section 112(5) record and b) Mr. Dowd's submission dated April 28 and filed May 4, 2010. The Tribunal invited the parties to file their final responses by May 26, 2010 and, indeed, the Employer did file a timely response, dated May 19, 2010, on May 27, 2010. Had the Employer filed its June 2, 2010, submission before May 26, 2010, that submission clearly would have formed part of the record before me and Mr. Dowd would not have been given any further right of reply. As matters now stand, however, the Employer's June 2 submission was late by a few days and Mr. Dowd was given a right to reply to its contents. In the circumstances, I will consider both the Employer's June 2, 2010, letter and Mr. Dowd's June 9, 2010, response to be properly before me.

14. I now turn to the merits of the Employer's appeal.

FINDINGS AND ANALYSIS

15. I am unable to accept the Employer's assertions that the delegate was biased against the Employer or failed to provide the Employer with an opportunity to respond to the evidence and arguments made by Mr. Dowd. The Employer's bias argument appears to be largely, if not exclusively, predicated on the fact that the delegate ultimately found in Mr. Dowd's favour. Bias cannot be presumed from an adverse result and there is nothing in the record before me to suggest, for example, that the delegate was in a conflict of interest due to some prior dealings with Mr. Dowd or due to some other circumstance. Further, I have reviewed the section 112(5) record and it clearly shows that the delegate did make reasonable efforts, consistent with section 77 of the *Act*, to make the Employer aware of the nature of Mr. Dowd's unpaid wage claim. The delegate specifically invited the Employer's response to that claim.

16. As noted above, the Employer's "error of law" grounds are not specifically particularized in its appeal submissions although it is clear that the Employer challenges, for one reason or another, every single component of the unpaid wage claim that as determined in Mr. Dowd's favour. In light of that situation, I propose to deal with each component separately.

17. The delegate originally awarded Mr. Dowd the sum of $2,000 representing a cheque (for the April 26 to May 8, 2008, pay period) that was returned for lack in funds in the Employer's bank account (the so-called "NSF" cheque). As noted above, it is now common ground between all parties that, in fact, the Employer provided a replacement cheque for the full amount of the original cheque, namely, $1,511.53. This latter cheque is dated May 19 and it cleared on June 4, 2008. The delegate originally awarded Mr. Dowd $2,000 on this account apparently representing the gross wages earned during the pay period. However, in his May 7, 2010, submission, the delegate says that the total wages payable to Mr. Dowd under the Determination should only be reduced by the amount of the cheque ($1,511.53). In my view, this is not the proper approach. The payroll records indicate that for the pay period in question Mr. Dowd earned $2,000 from which $488.47 was

deducted and remitted to the federal taxation authorities (representing income taxes, pension plan and employment insurance contributions). Unless there is evidence that these sums were not remitted to the Canada Revenue Agency – and I am not aware of any such evidence – I am of the view that the entire $2,000 regular wage claim should be excised from the Determination since the Employer apparently paid the sum (after accounting for lawful deductions) in full. Although there is no clear evidence before me that the remittances were not made, there is equally no clear evidence that they were. Thus, I think it appropriate to refer this point back to the Director for clarification.

18. I now turn to the overtime pay claim. The delegate awarded Mr. Dowd overtime based on the fact that his agreed daily wage ($200) was based on a 12-hour shift and that under the *Act* overtime is presumptively payable after an employee has worked more than 8 hours in a day (overtime may not be payable in any number of separate circumstances that are set out in the *Act* and the *Employment Standards Regulation*). Further, the delegate determined that on some days Mr. Dowd actually worked longer than a 12-hour shift. However, although the parties both agree that the wage bargain was $200 for a 12-hour day, it does not follow that the agreed *per hour* wage was simply $200 divided by 12 hours ($16.67 per hour). The delegate proceeded as if this were, in fact, the parties' agreement but there is nothing in the evidence to suggest that was their arrangement. The Employer says that the $200 per day figure included an accounting for overtime pay. The minimum wage under the *Act* is $8 per hour and thus the $200 per day rate would fully comply with both a regular wage and an overtime wage based on the $8 per hour regular rate. Indeed, the $200 per day is equivalent to an hourly rate (including statutory overtime) of about $14.30 per hour assuming a 12-hour workday. The delegate simply did not make any finding about the actual hourly rate to be paid and in the absence of such a finding one cannot say whether the $200 per day figure includes or does not account for any overtime that would be worked in a typical 12-hour day. The Employer's evidence is that the per diem figure was based on a regular hourly rate of $14 (and that it included an allowance for any overtime otherwise payable) and, so far as I can tell, Mr. Dowd's submissions do not challenge the Employer on this point (that is not to say, however, that Mr. Dowd necessarily accepts the Employer's point). In the absence of any finding by the delegate on this issue (namely, the agreed base per hour wage), I am referring this matter back to the Director for further investigation.

19. The Employer further says that, in any event, Mr. Dowd was not entitled to section 40 overtime since this section "do[es] not apply to the trucking industry". Although I am not exactly sure of the point that the Employer is raising, I believe it concerns section 37.3 of the *Employment Standards Regulation* that does, indeed, exempt "long haul" and "short haul" truckers from section 40 of the *Act* (the basic overtime provision) in favour of an alternative overtime pay formula. The delegate purported to award overtime pay under section 40 of the *Act*. I do note that Mr. Dowd, in his complaint, described his job as a "short haul driver". I am unable to determine, based on the information before me, whether the delegate considered this issue – it appears he did not – or even if section 37.5 applies to this employment relationship (although there is some evidence in the record before me to suggest that it might well apply). However, since I cannot conclusively say that section 37.5 does not apply, I am also referring that issue back to the Director to be investigated.

20. Mr. Dowd's vacation pay entitlement depends, at least in part, on the final determination of his unpaid wage claim. Accordingly, I am also referring this matter back to the Director.

21. The Employer challenges the delegate's award of $1,000 on account of unpaid wage deductions on the basis that there was a written agreement in place whereby all employees agreed that repair costs due to vehicle damage caused by their negligence would be deducted from their pay. I have before me an unsigned list of certain rules and procedures that includes the following:

> Any damage due to driver negligence will be the responsibility of the driver and will be deducted off the driver's paycheque. Repairs will be done in the most cost effective manner, keeping safety in mind.

22. This provision might have afforded the Employer some sort of argument if it were lawful but it stands in clear contravention of section 21 of the *Act* and thus is void pursuant to section 4 of the *Act*. The Employer's challenge to that aspect of the Determination dealing with unauthorized wage deductions is wholly without merit. If the Employer wishes to pursue Mr. Dowd for a damages relating to vehicle repair costs it must do so in the civil courts by way of an independent action. The Employer was not entitled to act in its own interest by unilaterally deducting from Mr. Dowd's wages an amount it believed it was entitled to claim against him as reimbursement for vehicle repair costs or other charges. The Determination is confirmed as it relates to the $1,000 unauthorized wage deductions.

23. Finally, I turn to the claim for compensation for the length of service. The Employer says it had just cause for dismissal based on, among other things, Mr. Dowd's poor driving record and driving habits. These latter matters were fully particularized in the Employer's letter to the delegate dated February 2, 2009, and included references to traffic tickets, damage claims, motor vehicle accidents as well as numerous customer complaints. Certainly, these sorts of allegations levied against a truck driver could give rise to just cause for dismissal. The delegate, however, seemingly dismissed these allegations because the Employer "has not supported these claims with supplementary information such as written warnings or other evidence that speaks to the incidents outlined by the employer" (delegate's reasons, page R7).

24. It must be remembered that this complaint was the subject of an *investigation* rather than an oral complaint hearing. In such circumstances, I do not think it appropriate for the delegate to simply say that the Employer did not present a sufficient evidentiary case. If the Director decides that a complaint will be *investigated* by a delegate, that decision imposes at least some onus on that delegate to engage in what might be termed a "fact-finding" mission. I do not think it appropriate for a delegate to purport to conduct an investigation but treat one or both of the parties as if the process were a quasi-trial where the delegate simply receives the evidence tendered by the parties. The only communication that I can find in the record before me from the delegate to the Employer dated after February 2, 2009, is the delegate's May 29, 2009, letter – a letter that the Employer says it did not receive. The delegate's May 29 letter does not speak to the just cause issue in any fashion nor does it invite further documentation on the point – such as corroborating driving records. It now seems clear that at least some relevant evidence was available to be submitted to the delegate if he had only asked for it. Without commenting on the veracity of the Employer's just cause allegations, I will note that if proven they certainly could justify a summary dismissal for cause. Finally, if Mr. Dowd did, in fact, quit his employment and was rehired a short time later, this could affect his section 63 entitlement since the latter is based on a period of continuous service. Since these matters were never investigated in any detailed way, I am also referring the matter of Mr. Dowd's section 63 entitlement, if any, back to the Director to be investigated.

25. In summary, I am satisfied that the Employer was correctly held liable for reimbursement of $1,000 representing unauthorized deductions from Mr. Dowd's pay. In all other respects, however, I find that the Determination cannot stand as issued and, accordingly, I am referring back to the Director for further investigation and adjudication all other aspects of Mr. Dowd's claim including the claim flowing from the "NSF" cheque, his overtime claim, his vacation pay claim and his claim for compensation for length of service. In light of the highly contentious nature of these various claims (each party has made quite serious allegations of misconduct against the other), it may be that the most appropriate way to proceed is for the parties to bring their evidence and argument before a new delegate who will preside at an oral hearing, however, I will leave those process issues to the discretion of the Director of Employment Standards.

ORDER

26. Pursuant to section 115 of the *Act*, I am confirming the Determination only insofar as it relates to the $1,000 unauthorized wage deduction. I am referring all other aspects of the Determination back to the Director to be heard and adjudicated.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal