Employment Standards TRIBUNAL

An appeal

- by -

S.L.B. Transport Ltd.
("S.L.B.")

- 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/32

DATE OF DECISION: May 27, 2005

DECISION

SUBMISSIONS

Steve Bereti	on behalf of S.L.B. Transport Ltd.
Graham Jickling	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by S.L.B. Transport Ltd. ("S.L.B.") of a Determination that was issued on January 20, 2005 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that S.L.B. had contravened Part 3, Section 18, Part 4, Section 40, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of Richard Malley ("Malley") and ordered S.L.B. to pay Malley an amount of $1,270.86, an amount which included wages and interest.

The Director also found that S.L.B. had failed to comply with Section 85(1)(f) of the *Act* and Section 46 of the *Employment Standards Regulation* (the *"Regulation"*).

By reason of finding contraventions of the *Act* and *Regulation*, the Director imposed administrative penalties on S.L.B. under Section 29(1) of the *Regulation* in the amount of $1500.00.

The total amount of the Determination was $2,770.86.

S.L.B. says the Director erred in law in assuming jurisdiction over S.L.B. under the *Act* and failed to observe principles of natural justice in making the Determination. S.L.B. also says evidence has become available which was not available when the Determination was made.

S.L.B. has requested an oral hearing on the appeal, claiming they should be allowed to :face [their] accuser" and there is crucial information which is "better handled face to face". 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 appeal is whether S.L.B. has shown there is any error in the Determination that allows or justifies the intervention of the Tribunal under Section 115 of the *Act*.

THE FACTS

The Determination sets out the following background information:

> S.L.B. Transport Ltd. operates a trucking company, which falls within the jurisdiction of the Act. Richard Malley was employed as a truck driver from September 16, 2003 to March 22, 2004 at a

> rate of pay of $16.00 per hour. The complaint was filed within the time period allowed under the Act.
>
> On July 13, 2004 an administrative assistant from our office contacted the employer Mr. Stephen Bereti to discuss the allegations made by the complainant and explained the procedural process, options available to the parties and the legalities that might be applicable. According to the notes on file the employer would not discuss the matter and kept interrupting when she attempted to discuss the issues. The employer stated, "you are just trying to annoy me" "Sue me" and hung up the phone. The employer called back the same day indicating he had spoken with a lawyer and that his lawyer advised him to go to a "hearing".
>
> The procedural process was explained however the employer indicated he did not want to participate in a mediation hearing and that he could not attend a hearing until September.
>
> Accordingly, an "Adjudication" hearing was set for September 16, 2004. Written Hearing notices were mailed to the parties together with a demand for production of all payroll records. The Hearing notice confirmed both parties would be contacted by telephone conference call. These documents were sent by registered mail on July 15, 2004.
>
> In preparation for the hearing, I noticed the employer had not provided the payroll records required by the "Demand For Employer Records" sent by registered mail July 15, 2004. accordingly, on September 15, 2004 I sent a fax to the employer providing disclosure of an additional submission of the complainant. I also noted that the employer had not provided the payroll records and reiterated the request for these records by attaching a copy of the "Demand" with the fax.

The Director conducted a hearing on the complaint by telephone conference. Mr. Stephen Bereti represented S.L.B. at that hearing. At the outset of the hearing he indicated to the Director that he was unable to participate as the company records were at his accountant's office. A discussion ensued between the Director and Mr. Bereti about the amount of notice that had been provided, with the Director indicating some attempt could have been made to secure the records and the hearing would proceed. Mr. Bereti's response was to hang up the phone with the comment that the Director could do what he had to do, he was not paying anything anyway.

Later on the same day, after the hearing was concluded, Mr. Bereti called the Director and advised he was going to hire a lawyer, adding he was sick and would not deal with the matter over the telephone. He said he didn't have his documents and he wanted to proceed in front of his "accuser" with his lawyer present.

In the Determination, the Director considered whether S.L.B. had been provided a reasonable opportunity to respond to the complaint as required by Section 77 of the *Act*.

Malley had provided detailed records of daily hours worked, which the Director accepted as being accurate. Based on those records, the Director found Malley was owed regular wages, including wages for travel time, overtime wages and annual vacation pay. The Director also found Malley had been terminated without cause, notice or pay in lieu of notice and was, accordingly, entitled to length of service compensation. The Director denied a claim for re-imbursement of an overweight ticket that had been paid by Malley.

ARGUMENT AND ANALYSIS

S.L.B. has the burden 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.*

I will first deal with the matter of new evidence which S.L.B. has relied on as one of the grounds of appeal. The "new evidence" goes to the conclusion by the Director that Malley was entitled to length of service compensation and that wages were owed. The submission on these matters states:

> Mr. Malley has done highway trips for us before, proven by our payroll records. He was aware when he was hired that he was expected to perform both city and highway work. We have also found the certification records for the truck. The truck was government certified a week previous to Mr. Malley refusing to work. He asserts he didn't want to drive an unsafe vehicle, but the truck was not unsafe after passing government safety requirements, nor did Mr. Malley bother actually checking the truck, he just objected going to work and used that as his excuse. Mr. Malley was often unreliable, he wouldn't call in for work, nor could you find him because there was work, and his absences were lengthy. With this type of unreliability, showing a history of not wanting to work, there was no reason to keep trying to employ him, and this is just an approach to get money that isn't owed to him. Our payroll records will show that he was paid everything that was owed to him, and as far as being unfairly dismissed, how far does an employer have to go to try and get someone to work who doesn't want to.

The appeal submission also indicates, in the context of S.L.B.'s contention that an oral hearing is necessary, that the payroll records contain a lot of other "crucial information" and that there are two drivers who could be called to testify. Apart from the question of whether the "new evidence" ground of appeal has been met, the following point should be noted. The appeal on this ground (and generally for that matter) represents far more than just seeking to provide additional evidence on a key point in the Determination. It represents an attempt to provide all of the information and make all of the arguments that should have been provided and made to the Director before the Tribunal, seeking to have the Tribunal reach a different conclusion. The Determination cites and provides commentary from the Tribunal's decision in *Tri-West Tractor Ltd.*, BC EST #D268/96 in the context of examining the opportunities provided to S.L.B. to participate in the complaint process and the effect of its failure to do so. On this first point, it is relevant to note the final sentence of the excerpt from that decision found in the Determination:

> The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

That comment is applicable to this appeal. The failure of S.L.B. to participate militates against this appeal.

In any event, the Tribunal has taken a relatively strict view of the ground of appeal based on evidence coming available that was not available at the time the Determination was made, indicating in several decisions that it is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. An appellant seeking to rely on this ground of appeal must, at least, show the evidence was not reasonably available and could not have been provided during the complaint process. The operative words in the *Act* are: *"that was not available at the time the determination was made"*. It is apparent that S.L.B. has raised this ground of appeal for the sole purpose of submitting evidence and argument that could have, and should have, been provided during the complaint process but was not because he refused to participate in the complaint process.

In the circumstances, I find this ground of appeal has not been made out and I do not accept the evidence which S.L.B. seeks to provide with the appeal.

S.L.B. has also grounded this appeal on the assertion that the Director failed to observe principles of natural justice in making the Determination. The submission on this ground of appeal relies on what S.L.B. says were the reasons for its inability to get its payroll records from the accountant. It is not entirely clear from the appeal whether this ground of appeal goes to the penalty that was imposed for S.L.B.'s failure to comply with Section 85(1)(f) of the *Act* and Section 46 of the *Employment Standards Regulation* (the *"Regulation"*) or to the Determination generally. I will address both possibilities.

Section 85(1)(f) empowers the Director to require a person to produce for inspection any records that may be relevant to an investigation by the Director under Part 10 of the *Act*. A demand for employer records was made by the Director to S.L.B. on July 15, 2004. A copy of the Demand is included in the record. I am satisfied the records being demanded were relevant to the Director's investigation of the complaint filed by Malley and were clearly described. I am satisfied the Demand was properly served on S.L.B. The demand required production of the described documents on or before August 31, 2004. Section 46 of the *Regulation* required S.L.B. to comply with the Demand. S.L.B. failed to comply with the Demand. There is no indication in the record of any attempt being made by S.L.B. to communicate to the Director any difficulty in obtaining the records. S.L.B. had two months to comply with the Demand. While Mr. Bereti told the Director after the complaint hearing that he had health issues, there is no indication he was physically or medically incapable of dealing with this matter for the entire two month period from the issuance of the Demand to the date of the complaint hearing. The Director was not required, by principles of natural justice, or for any other reason, to accede to the demand by Mr. Bereti in the phone conversation after the complaint hearing to give him more time to produce the records and to re-schedule the complaint hearing with all parties present so he could "face his accuser".

On the facts, a contravention of the *Regulation* was clearly established. Section 29 of the *Regulation* sets out a mandatory penalty scheme, which in the circumstances required the Director to impose an administrative penalty of $500.00 on S.L.B. for the contravention found in the Determination.

Turning to a consideration of whether the Director failed generally to observe principles of natural justice in making the Determination, I am unable to find any such failure on the part of the Director. Much of what S.L.B. complains about is of its own making. S.L.B. chose not to participate in an attempt by the Director to mediate a settlement of Malley's complaint, choosing instead to proceed directly to a

complaint hearing, and refused to respond to the Demand for Employer Records. S.L.B. had notice from July 14, 2004 that a complaint hearing would be conducted by telephone and gave no indication before the hearing that such a process was unacceptable. Mr. Bereti, representing S.L.B., refused to participate in the complaint hearing, claiming the company's payroll records, which he had two months to secure, were at his accountant's office.

The complaint made by Malley was not complicated or unique. Malley claimed he was owed regular and overtime wages, including wages for travel time. He was specific in his complaint about the days and hours he worked. This information was provided to S.L.B. It would have been a simple matter to compare that claim against the company's records and respond. Malley also claimed he had been terminated without cause and without written notice or pay in lieu of notice. Once again, if S.L.B. considered there was just cause, it was a simple enough matter to respond, providing the reasons for termination, or provide information indicating written notice, or compensation in lieu, was given. Malley claimed reimbursement for an overweight ticket. There was no apparent dispute about the facts of that matter, only whether its payment could be recovered as wages. The Director was able to address this aspect of Malley's claim without any input at all from S.L.B.

This ground of appeal is also dismissed.

Finally, S.L.B. says the Director erred in law. The submission of S.L.B. on this ground of appeal is brief:

> . . . in our very first conversation I made it known that we take loads out of the country, and operate in prorate. We are a federal company and as we understand it, governed by federal standards. Our prorate # is BC0294500.

The issue here is one of the constitutional jurisdiction of the Director over the complaint. It is clear that to determine the constitutional jurisdictional issues, certain kinds of "constitutional facts" are required. In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking (see *Arrow Transfer Co. Ltd.* [1974] 1 Can. L.R.B.R. 29).

The record confirms that in a July 13, 2004 discussion with a Branch representative S.L.B. claimed to have evidence that it was under federal jurisdiction. The notation also indicates S.L.B. failed to provide this evidence as promised. Apart from reference to "taking loads out of the country" and "operating in prorate", no evidence relating to the jurisdictional question has been provided by S.L.B., either to the Director or to the Tribunal. Those assertions are not helpful on the jurisdictional question. There is a complete absence of material constitutional facts in this case.

As noted by the Supreme Court of Canada in *Northern Telecom Ltd. v. Communication Workers of Canada*, [1980] S.C.R. 115:

> One thing is clear from the earlier discussion of the applicable constitutional principles. In determining whether a particular subsidiary operation forms an integral part of the federal undertaking, the judgment is, as was said in Arrow Transfer, a "functional, practical one about the factual character of the ongoing undertaking". Or, in the words of Mr. Justice Beetz in Montcalm, to ascertain the nature of the operation, "one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors" and the assessment of those "normal or habitual activities" calls for a fairly complete set of factual findings.

The absence of any constitutional facts is wholly attributable to S.L.B. The burden in an appeal is on the appellant to show an error in the Determination. They have failed to meet that burden. As well, the following comment from the Supreme Court in *Northern Telecom Ltd.* applies and I adopt it in the context of this aspect of the appeal:

> I am inclined toward the view that, in the absence of the vital constitutional facts, this Court would be ill-advised to essay to resolve the constitutional issue which lurks in the question upon which leave to appeal has been granted. One must keep in mind that it is not merely the private interests of the two parties before the Court that are involved in a constitutional case. By definition, the interests of two levels of government are also engaged. In this case, the appellant did not apply to the Court, pursuant to Rule 17 of the Supreme Court Rules, for the purpose of having a constitutional question stated. If the appellant had intended to raise a question as to the constitutional applicability of the Canada Labour Code, then the obligation was upon the appellant to assure that the constitutional issue was properly raised. As no constitutional question was stated nor notice served upon the respective Attorneys General, the Court lacks the traditional procedural safeguards that would normally attend such a case and the benefit of interventions by the governments concerned.

This ground of appeal is dismissed.

In sum, the appeal is denied.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated January 20, 2005, be confirmed in the amount of $2.770.86, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal