Employment Standards TRIBUNAL

An appeal

- by -

Delta Enterprises Ltd.
("Delta" or the "Appellant")

- 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: Ib S. Petersen

FILE No.: 2002/626

DATE OF DECISION: March 4, 2003

DECISION

OVERVIEW

This is an appeal by the Employer, Delta, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on November 28, 2002. The Determination concluded that Mr. Harcharan Gill was owed $27,558.39 by his Employer on account of overtime, vacation pay and statutory holiday pay.

From the Determination, the following background facts may be gleaned. Delta operates a trucking company. Mr. Gill worked as a driver between October 4, 2000 and December 22, 2001.

Following a complaint, the Delegate conducted an investigation. He concluded that the Employer did nor pay Mr. Gill on a semi-monthly basis, overtime wages, vacation pay and statutory holiday pay, as required by the *Act*. On the basis of the evidence before him--including inconsistencies and contradictions in the Employer's evidence--he accepted that Mr. Gill was paid by the hour and that the hourly rate was $15.00. The Delegate did not accept that Mr. Gill was compensated by salary for all or part of the time. He did not, as well, accept that the remuneration included vacation pay. The Employer took the position that because Mr. Gill was a "local driver" he was not entitled to overtime wages until after 60 hours in a week (Section 37.3 of the *Employment Standards Regulation* (the "*Regulation*")) and that, in any event, Mr. Gill did not work more than 40 hours per week. The delegate did not accept that interpretation.

FACTS AND ANALYSIS

The Employer, as mentioned, appeals the determination. As the Appellant, it has the burden to persuade me that the Determination is wrong. In the circumstances, I am not persuaded that it has met the burden and, therefore, for the reasons set out below, the appeal is dismissed.

The Appellant sets forth two grounds of appeal: (1) Mr. Gill was a long haul truck driver under Section 37.3 of the *Regulation* and (2) Mr. Gill was hired to work for Delta at the hourly rate of $10.30.

Section 37.3 of the *Regulation* provides:

> 37.3(1) Sections 35 and 40 to 42 of the Act do not apply to a person employed as a long-distance truck driver.
>
> (2) An Employer who requires o allows a long-distance truck driver to work more than 60 hours a week must pay the employee for the hours in excess of 60 at least double the regular wage.

Section 1 of the *Regulation* defines:

> "Long-distance truck driver" means a person employed to drive a truck normally 160 km or more from their base;

The appeal does not provide much in the way of particulars. Essentially the factual basis for this argument consist of these two statements: Mr. Gill "was hired as a long haul truck driver." He "would normally operate outside a radius of 160 km from his home terminal." The latter simply tracks the statutory language. I do not find much merit to this argument. At the very least one would expect an Appellant trying to persuade an appeal tribunal of the merits of this argument would provide the most basic details and factual information in support. Moreover, as pointed out by the Delegate, the argument is disingenuous from the standpoint that the Employer during the investigation appears to have taken the position that Mr. Gill was a "local driver" and because he was driving less than 160 km, "he can legally work 60 hrs [sic] per week, and we don't have to pay any local driver overtime." This ground of appeal is dismissed.

The second ground of appeal is that Mr. Gill was hired at the hourly rate of $10.30 (supported by a document entitled "Application for Employment"). This ground of appeal ignores the Delegate's detailed analysis of the evidence before him, including the contradictory information and records supplied by the Appellant, that was the basis for his conclusions with respect to Mr. Gill's pay rate. It is simply not, in my view, persuasive from the standpoint of showing that the Delegate erred. Moreover, as pointed out by the Delegate, it is irrelevant if "at no time during the course of his employment [Gill] was ... paid $10.30 per hour." The Employer provided, as pointed out by the Delegate, conflicting information and records, including three different versions of payroll records and pay rates. The employer maintained initially, according to the Delegate response to the appeal, until confronted by pay stubs submitted by Mr. Gill, that Mr. Gill was compensated by way of salary. The Appellant does not meaningfully respond to the delegate's submissions. I dismiss this ground of appeal as well.

The Delegate comments at the end of his submission that "the employer has done nothing more than attempt to doctor payroll records in an attempt to avoid minimum requirements ...." Based on the appeal, this does not seem farfetched.

Briefly put, I am not persuaded that the Delegate erred in his Determination and, in short, therefore, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 28, 2002, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal