Employment Standards TRIBUNAL

An appeal

- by -

L. and T. Loading Ltd.
and
Powder King Mountain Resort Inc.
("L. and T." and "Powder 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/680

DATE OF DECISION: February 14, 2001

BRITISH COLUMBIA

DECISION

OVERVIEW

This is an appeal brought by L. and T. Loading ("L. and T.") and Powder King Mountain Resort Inc. ("Powder King") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 11th, 2000 under file number ER No. 53-239 (the "Determination") and in the amount of $20,635.70--*sic:* the sum of the wages and interest set out in the Determination is $20,635.80.

By way of a letter dated January 22nd, 2001 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on the parties' written submissions and that an oral hearing would not be held (see section 107 of the *Act*). In the circumstances of this case, I agree with that decision.

THE DETERMINATION

L. and T. and Powder King were both subcontractors on a road rebuilding project known as the "Highway 97-Honeymoon Creek" project. The Director's delegate determined that L. and T. and Powder King were "associated corporations" as defined in section 95 of the *Act.* Accordingly, the two firms were held jointly and separately (severally) liable for $19,365.61 in unpaid wages and a further $1,270.19 in interest owed to fourteen former employees of one or both of the two firms.

The delegate determined that the employees in question were entitled to overtime pay and other unpaid wages pursuant to the *Act* based on the "fair wage" rates established by *Skills Development and Fair Wage Act* and accompanying regulation (B.C. Reg. 296/94).

Further, by way of the Determination, a $0 penalty was levied against both L. and T. and Powder King pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

Finally, both L. and T. and Powder King were advised, by way of a notice set out at page 9 of the Determination, given their failure to voluntarily comply with the provisions of the *Act* and the *Skills Development and Fair Wage Act,* "you are now disqualified from bidding on Provincially-funded construction projects to which the [*Skills Development and Fair Wage Act*] applies until October 4th, 2001".

THE APPEAL DOCUMENTS

All parties to this appeal were advised, in writing, on October 5th, 2000 to provide written submissions with supporting records and other documents by no later than October 27th, 2000. Although the delegate and two of the former employees filed submissions with the Tribunal, *the appellants did not file any submission in response to the Tribunal's request.* At the outset, and

as a general observation, I wish to note that an appellant's prospects of succeeding on appeal (*i.e.,* by showing that a Determination is incorrect) are markedly diminished when that appellant fails to provide *any* corroborating records or other documentation to support the allegations contained in its appeal form. Indeed, in some circumstances, such a failing might well constitute an abandonment of the appeal.

The material filed by the appellants in this matter consists *only* of the Tribunal's standard-form notice of appeal signed by Richard Doyle (whom I understand to be a director/officer of both L. and T. and Powder King) on behalf of both firms and an attached one-page letter, dated October 4th, 2000 also signed by Richard Doyle--both of which documents were filed, by fax transmission, on October 4th, 2000 approximately 75 minutes before the governing appeal period expired. The notice of appeal does not contain any particulars as to the reasons for appeal; the attached memorandum, entitled "Regarding the Labor Relations Dispute", sets out seven separately numbered assertions with respect to the delegate's investigation and the Determination. I propose to address each of the appellants' assertions in turn.

ANALYSIS

The first first three matters concern the section 95 declaration and can thus be jointly addressed. Although the appellants do not apparently challenge the propriety of the section 95 declaration *per se*--and quite properly so since the evidence before me (see Determination, page 5) overwhelming justifies such an order--Mr. Doyle requests "that one or the other company be assigned as the ONLY employer so that the wages can be properly calculated and the appropriate deductions can be made to Revenue Canada based on that information". Mr. Doyle also queries why he is not entitled to direct that the employees of one or both of the two firms be paid separately by each firm. The short answer to the latter concern is that Mr. Doyle is entitled under the *Act* to allocate the employees' pay as between the two firms provided that is a *bona fide* allocation based on work separately undertaken by the employees for the independent benefit of each of the two firms. In this case, the allocation appears to have been nothing more than an administrative ruse to avoid the application of the overtime provisions of the *Act*--whether intended or not, that was the effect. Further, and with respect to the first-noted concern, once a proper section 95 declaration has been made, all firms subject to the declaration are jointly and severally liable for the unpaid wages of any employee of any one of the firms named in the declaration. Simply put, I have no jurisdiction under the *Act* to designate either L. and T. or Powder King as the "only" employer since *both* are considered, under section 95, to be a *single* employer for purposes of the *Act.*

Fourth, Mr. Doyle says that three of the fourteen employees who were awarded unpaid wages under the Determination have requested "to have their names removed from any investigations pertaining to these allegations...". Although the employees in question were not original complainants, the delegate was entitled, under section 76(3) of the *Act,* to conduct an investigation affecting an employee even in the absence of a specific complaint from that employee. In this case, a wider investigation of the appellants' operations was undertaken following the receipt of written complaints from four employees. This wider investigation--

characterized by the delegate as an "audit"--resulted in a Determination in favour of employees who never formally filed written complaints under the *Act*. The delegate's actions in this regard were entirely appropriate and fully within the delegate's statutory authority, namely, to ensure compliance with the *Act* and, in this case, also the *Skills Development and Fair Wage Act.*

Fifth, Mr. Doyle says that the employees, or at least some of them, "were paid holiday pay...and shouldn't have been" and that, accordingly, the appellants' liability should be adjusted to reflect this alleged overpayment. I can only say that this allegation is wholly unsupported by any evidence and thus must be rejected. On an appeal to this Tribunal, the burden lies with the appellant to show that the Determination is in error. The appellants have manifestly failed to discharge their evidentiary burden on this point.

Mr. Doyle's sixth point relates to the appellants' asserted obligations, entitlements or adjustments (the nature of which are not particularized) under federal income tax legislation. That matter is not relevant to this appeal. Further, this point does not address the one issue that is relevant, namely, the correctness of the Determination. If, as a result of having been ordered to pay certain unpaid wages, the appellants (or, for that matter, the employees) are entitled to some dispensation (or if they have additional liabilities) under federal income tax legislation, that is a matter entirely between the appellants and the federal taxation authorities.

Finally, Mr. Doyle requests an oral hearing; that request was considered and, as previously noted, refused by the Tribunal's Vice-Chair pursuant to section 107 of the *Act.* In the circumstances of this case, I agree with that decision.

It follows that since I have found all seven points raised by Mr. Doyle to be without merit, this appeal must be dismissed.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed in the amount of **$20,635.80** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* as and from September 11th, 2000 (the date the Determination was issued).

In light of my confirmation of the delegate's conclusion that the appellants contravened both the *Act* and the *Skills Development and Fair Wage Act* and accompanying regulation, the $0 penalty assessed by way of the Determination is also confirmed.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal