

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Keep On Trucking Ltd.
("Keep On")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Mark Thompson
FILE NO.:	783/98
DATE OF HEARING:	February 24, 1999
DATE OF DECISION:	March 22, 1999

DECISION

APPEARANCES

David M. Jenkins: For Keep On Trucking Ltd.
Tony D. Wedzinga For himself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Keep On Trucking Ltd. ("Keep On") against a Determination issued by a delegate of the Director of Employment Standards (the "Director") on November 18, 1998. In the Determination, the delegate found that Mr. Tony Wedzinga ("Wedzinga"), a former employee of Keep On was entitled to annual vacation pay, compensation for length of service and wages at the minimum wage in the amount of \$2,256.07, plus interest from the last day of Wedzinga's employment.

Mr. David M. Jenkins ("Jenkins"), president of Keep On, appealed the Determination on three grounds: that the Determination had failed to offset monies the company owed to Wedzinga by advances paid to him; that Wedzinga had in effect taken nine days of annual vacation which should have been deducted against vacation pay and that Wedzinga had been discharged for cause, thus eliminating any entitlement to compensation for length of service. In addition, Keep On raised the issue of Wedzinga's status as an employee in its appeal.

Wedzinga participated in the hearing by telephone.

ISSUES TO BE DECIDED

The issues to be decided in this case were: whether the advances paid to Wedzinga were properly the subject of the Determination; whether Wedzinga's entitlement to vacation pay should have been reduced by nine days; whether Keep On discharged Wedzinga for cause and whether Wedzinga's status as an employee should be considered in the outcome of the case.

FACTS

Wedzinga worked as a truck driver for Keep On from April 25, 1996 through January 13, 1997. In addition, Wedzinga owned 45 per cent of the shares of Keep On, but was not an officer or director of the company. The appeal concerned four separate issues.

Advances

Jenkins presented evidence of monies paid to Wedzinga between November 11, 1995 though April 27, 1996, approximately every two weeks, in sums of \$200.00 except for March 9 and April 27, 1996, when the sums were \$1,120.00 and \$1,000 respectively, for a total of \$3,043.61. According to Jenkins, the amounts were paid at Wedzinga's request in cash because Wedzinga did not have a bank account. After April 1996, other funds were deposited in Mrs. Wedzinga's bank account. Jenkins acknowledged that only one payment was recorded on Keep On's payroll, on March 9, when the payment was \$748.62, less statutory deductions.

Wedzinga testified that the funds in question were re-payment of earnings lost as a result of a motor vehicle accident, paid to Jenkins shortly after his regular payday. Jenkins decided not to file an insurance claim for the accident, which apparently occurred on February 14, 1996. Wedzinga presented a copy of a letter from his lawyer to the Insurance Corporation of British Columbia seeking a settlement in the amount of \$3418.76 for loss of wages and prescription drugs Wedzinga used as a result of the accident. Wedzinga further stated that the Insurance Corporation accepted his claim and paid him in November 1996 and that Jenkins was attempting to recover money he could have claimed from the Insurance Corporation through Wedzinga.

In his appeal, Jenkins introduced a letter from himself to Wedzinga on January 23, 1997. The letter referred to a number of matters left over from the employment relationship and also requested repayment of the "cash advancements," Jenkins had made to Wedzinga. The explanation was that Wedzinga had agreed to repay the advances after he received a settlement from the Insurance Corporation of B. C.

Wedzinga replied to Jenkins by letter January 23, 1997 stating that "with extreme prejudice" he would comply with the requests Jenkins had made in the first letter. Further, the letter stated:

I have no personal knowledge of any known advancements totaling \$3,043.61 in the period of November 11/95 to Apr. 27/96 to myself. Any and all monies received from you are considered by me to be all or part of wages earned and due. I have no knowledge ever stating to you that I would re-pay any monies from any I.C.B.C. settlement.

Vacation pay

In essence, the appeal on this point is that Wedzinga was paid for nine days on which he did not work, admittedly because the company had no work for him to do. Jenkins referred to problems with railway shipments or other failures out of the control of either Keep On or Wedzinga. Since Wedzinga received his regular pay cheque, Jenkins sought to reduce his vacation entitlement for the nine days in question.

Wedzinga pointed out that he never received any advance notice that he would not be able to work on the days in question, and Keep On did not make any effort to locate other work for him after he reported for duty.

The Determination did not address this issue. It found that Wedzinga had received a total of four days of paid vacation between June 11, 1996 and January 13, 1997, and calculated the amount of vacation pay due accordingly.

Jenkins stated that the calculation of Wedzinga's pay status by the Director's delegate incorrectly showed December 26, 1996 as a statutory holiday. Since Wedzinga was paid for that day, his vacation entitlement should be reduced by one day. Wedzinga did not contradict Jenkins's statement, although no payroll evidence was available.

Just cause for termination

Perhaps the most fundamental difference between the parties in this case was the circumstance of Wedzinga's termination. The Director's delegate summarized the facts leading to Wedzinga's termination. Jenkins called Wedzinga on December 30, 1996 to inform him that he would be laid off effective January 31, 1997. If Wedzinga was willing to accept a 20 per cent pay cut, the layoff would take effect "about April 1, 1997." Wedzinga asked for time to think the offer over, but did not contact Jenkins. On January 12, 1997, Jenkins telephoned Wedzinga to ask him if he accepted the reduction in pay. Wedzinga accepted the pay cut, and Jenkins asked him to state his acceptance in writing. Wedzinga did not provide the written statement. Wedzinga continued to work for Keep On and had an accident on January 12, 1997. In the course of obtaining another truck for Wedzinga to use, Jenkins learned that the company for which Keep On was hauling freight had reduced the hourly rate from \$30 to \$25. At this point, Jenkins decided that he could no longer operate the company without significant losses and called Wedzinga on January 14 to inform him that his employment was terminated. During this conversation, Wedzinga acknowledged that he threatened Jenkins with physical violence. Wedzinga testified that he told Jenkins that if he had a car, he would have come to Jenkins's residence and given him "what for." He denied threatening physical harm. Jenkins testified that Wedzinga said that he should punch his face 100 times and used abusive language.

Parenthetically, the Determination noted that no charges were laid with the police as the result of Wedzinga's conduct. In his appeal, Jenkins argued that he had reported the incident to the RCMP, and he took exception to the inference in the Determination that

charges had not been laid. According to Jenkins, the RCMP did open a file on the case, but that he had requested the police to warn Wedzinga in a telephone call that his conduct was a criminal offense. In the hearing Jenkins suggested that the Tribunal obtain the file. I ruled that the contents of the file constituted hearsay and would not bear on the outcome of the appeal.

Other compensation

In his appeal, Jenkins presented evidence of gasoline credit card bills which Keep On had paid over a period of two years when Wedzinga had obtained the fuel for his private vehicle using the company credit card. Jenkins argued that he had paid these bills to help Wedzinga through difficult financial circumstances, and had not treated them as compensation for payroll or any other purposes. Jenkins claimed an offset of \$1,241 against amounts owed to Wedzinga from the Determination as reimbursement for the gasoline bills.

Wedzinga stated that he was permitted to use the company credit card for his own vehicle in exchange for dropping manifests at Jenkins's home, delivering the truck to the dealer for maintenance and other miscellaneous errands. Occasionally, the credit card was used for purely "personal" purposes. In those cases Wedzinga repaid Jenkins in cash.

Employee status

In the appeal, Keep On raised the issue of Wedzinga's status as an employee, which had not been addressed in the Determination. According to Jenkins, he began Keep On at Wedzinga's request. Jenkins stated that he knew nothing about the trucking business, but opened the business to assist Wedzinga. He gave Wedzinga the authority to buy the truck that appeared to be the company's major capital asset. Wedzinga was owner of 45 per cent of the company shares and took no orders from Jenkins on a day to day basis. Jenkins introduced a letter to Wedzinga from Revenue Canada stating that since Wedzinga owned 45 per cent of Keep On's shares, he was not eligible for coverage under the Employment Insurance system. Jenkins pointed out that this issue was not addressed in the Determination, although he testified that he had raised it on behalf of Keep On during the investigation of Wedzinga's complaint by the Director's delegate.

Income splitting

The Determination mentioned an "income splitting arrangement", presumably involving Wedzinga's wife. The effect of this arrangement in the view of the Director's delegate was to reduce Wedzinga's monthly pay from September 1996 to December 1996. Wedzinga denied that such an arrangement existed. In his reply to Keep On's appeal, he stated that his wife had done office work for Keep On, but the effect of the Determination was to deduct money his wife received from Wedzinga's pay. In the hearing, Wedzinga stated that he did not know if his wife performed any services for Keep On between 1994 and 1997. He denied agreeing to any such arrangement on the grounds that the amount (\$500 per year) was too small to affect his tax status.

ANALYSIS

The Determination found that the amounts paid to Wedzinga did not constitute advances against wages since they did not appear on the payroll records provided by Keep On. The parties' intentions with respect to the "advances" are clouded in irregularities. Both Jenkins and Wedzinga agree that Wedzinga suffered loss of wages due to a motor vehicle accident and that Jenkins decided not to file a claim with the Insurance Corporation. Jenkins then advanced sums of money to Wedzinga in cash over two calendar years. In his defense, Jenkins stated that it was common practice for employers to advance their employee's wages in cash, without statutory deductions, with the understanding that the advances would be reconciled for tax purposes by the end of the year. Jenkins did not present any evidence that such reconciliation took place. Wedzinga's letter of January 23, 1997 is ambiguous at best. While it acknowledges that funds Wedzinga received were wages, it also denies any knowledge of the \$3,043.61.

Therefore, I am unable to conclude that the funds in question were part of Wedzinga's wages and hence covered by the provisions of the *Act*.

Keep On's claim for holiday pay cannot succeed. The company's record of hours worked did not identify the days in question as vacation days. Section 28 of the *Act* requires employers to identify vacation pay as employees receive it. That requirement was not met. Keep On here seeks to reduce Wedzinga's vacation pay by unilaterally declaring nine days to have been vacation long after the fact. In *Re Marathon Systems Solutions Inc. Bcest #D539/97*, the Tribunal held that an employer could not deduct vacation pay from vacation pay owed to a former employee for days not worked during the employment relationship. Although an error involving December 26, 1996 may have occurred, the lack of any payroll records prevents any decision that might vary the Determination.

The Determination found that Keep On had not terminated Wedzinga for just cause. Jenkins argued that Wedzinga's threat constituted just cause for termination. While there was conflicting evidence about what Wedzinga said during the conversation on January 14, both parties agree that Wedzinga made his offensive remarks after Jenkins had informed him of his termination. The simple logic of the events supports this conclusion. By both accounts, Wedzinga was angry with Jenkins, clearly because Jenkins had terminated his employment, leaving Wedzinga in difficult financial circumstances on short notice. The remarks could not have been the cause of termination.

Keep On's request that any funds owed to Wedzinga be reduced by the amount of the gasoline credit card bills cannot succeed. The claim was not raised with the Director's delegate during the investigation of the case, and the Tribunal is reluctant to accept evidence on matters not put to a delegate of the Director before a determination was issued. The Tribunal is an appellate body, and it should not undertake investigations of evidentiary matters. Moreover, the credit card bills do not fall under the definition of wages in the *Act*. Neither the Tribunal nor the Employment Standards Branch has the

authority to collect debts that may exist between an employer and an employee. The credit card payments were not treated as wages while Wedzinga was employed by Keep On, and the employer is not entitled to convert them to wages retroactively.

The *Act* defines an "employee" as:

- a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- c) a person being trained by an employer for the employer's business,
- d) a person on leave from an employer, and
- e) a person who has a right of recall.

The *Act* further defines an "employer" as a person:

- a) who has or had control or direction of an employee, or
- b) who is or was responsible, directly or indirectly, for the employment of an employee.

In this case, the facts clearly support the conclusion that Wedzinga was an employee. He received wages for his work on behalf of Keep On. The company, through Jenkins was responsible for his employment.

Wedzinga did not file an appeal of the Determination with regard to the delegate's calculation of his monthly wage. Instead he raised the issue in his response to Keep On's appeal. The lack of an appeal would be sufficient grounds not to vary the Determination. However, Wedzinga's statement that he did not know whether his wife performed any services for Keep On is simply not credible. His lack of any response to the apparent reduction in his monthly pay to reflect the so called income splitting arrangement also indicates that such an arrangement did exist, for whatever reason.

ORDER

For these reasons, the Determination of November 18, 1998 is confirmed pursuant to Section 116 of the *Act*. Wedzinga is entitled to \$2,256.07, plus interest from January 13, 1997 pursuant to Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal