

An appeal

- by -

CityLink Bus Lines Ltd.

- 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: John M. Orr

FILE No.: 2004A/32

DATE OF DECISION: May 21, 2004

DECISION

SUBMISSIONS

Greg Brown

Delegate of the Director of Employment Standards

OVERVIEW

This is an appeal by CityLink Bus Lines Ltd. (“CityLink”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Determination dated October 24, 2003 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

A delegate of the Director determined that CityLink operated an intra-provincial bus service and employed Brian Wilson (“Wilson”) from July 23, 2000 to January 23, 2003. The delegate determined that CityLink owed wages to Wilson in the amount of \$5,479.31 and imposed an administrative penalty in the amount of \$2,000.00.

CityLink appealed on the basis that new evidence had become available and that there were errors in law made in calculating vacation and statutory holiday pay. CityLink wished the matter referred back to the Director for re-calculation in light of the new evidence and consideration of certain “averaging principles”.

The Tribunal issued a decision dated January 30, 2004 allowing the introduction of new evidence and referring the matter back to the Director to consider the new evidence and CityLink’s submissions.

The Director’s delegate has now provided a report to the Tribunal and the matter has been assigned for further adjudication.

ANALYSIS

CityLink originally submitted that the company was previously unable to address the issues because the company was subject to an audit by the Canada Customs and Revenue Agency (“CCRA”). CityLink stated that the payroll records had since been released by the CCRA.

CityLink also submitted that the company needed to explain that the bus drivers, including Wilson, were involved in some form of option that involved an “Averaging Principle”. There was not a clear explanation given for this submission but CityLink wanted the opportunity to explain this in more detail to the delegate. It was also submitted that all vacation pay was paid on a monthly basis and that this could be demonstrated by a review of the now available payroll records.

Neither Mr. Wilson nor the Director’s delegate made submissions opposing the consideration of new evidence, despite the delegate’s previous concerns expressed in the Determination about CityLink’s

failure to participate during the investigation. There was, of course, no onus upon these parties to respond to the appeal.

Under the circumstances that the failure of CityLink to provide the records at an earlier time was allegedly caused by the actions of the CCRA and was through no fault of the appellant it appeared reasonable to allow the appellant the opportunity to provide those records to the Director for consideration and to make any relevant submission to the Director based on the issues raised in the appeal.

However, since the matter was referred back to the Director CityLink has failed to provide the records or submissions to the Director.

The Director's delegate states that on February 4, 2004 he tried to telephone CityLink to request the records. The phone numbers given by CityLink were no longer in service. The delegate contacted the lawyer, who had previously represented CityLink, and was informed that the lawyer had no working phone number for CityLink but that CityLink was still receiving mail at their post office box.

The delegate states that on February 10, 2004 a demand for payroll records was sent by certified mail to the only known address for CityLink. CityLink was given until February 27, 2004 to respond. As of the date of the delegates report, March 2, 2004, no records or submissions were received by the delegate from or on behalf of CityLink.

The delegate submits that the appeal should be dismissed and the determination confirmed based on the failure of CityLink to participate in the investigation despite being given an opportunity to do so. I must agree with the delegate at this stage. CityLink appealed for the opportunity to provide new evidence that was not previously available and to make additional submissions. That opportunity was granted by the Tribunal but CityLink has failed to take advantage of the opportunity and continues to fail to participate in the investigation process.

Accordingly, in the absence of the payroll records or further submissions, the Determination dated October 24, 2003 is confirmed.

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated October 24, 2003 is confirmed.

John M. Orr
Member
Employment Standards Tribunal