

An appeal

- by -

David te Boekhorst
(the “Complainant”)

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2013A/69

DATE OF DECISION: November 25, 2013

DECISION

SUBMISSIONS

David te Boekhorst

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), David te Boekhorst (the “Complainant”) has filed an appeal of the determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 1, 2013 (the “Determination”).
2. The Determination concluded that the Complainant’s former employer, Beaver Valley Investment Limited carrying on business as Jack Williamson Paving (“JWP”), contravened Part 3, section 18; Part 5, section 45; and Part 7, section 58 of the *Act*, as well as section 37.3 of the *Employment Standards Regulation* (the “*Regulation*”), in respect of the employment of the Complainant, and ordered JWP to pay the Complainant wages and interest in the amount of \$5,160.89.
3. The Determination also levied five (5) administrative penalties of \$500.00 each against JWP for contraventions of sections 17, 18, and 45 of the *Act*, as well as sections 37.3 and 46 of the *Regulation*. The total amount of the Determination is \$7,660.89.
4. The Complainant has appealed the Determination and checked off all three available grounds of appeal under section 112 of the *Act* on the Appeal Form; namely, the Director erred in law, the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made. The Complainant seeks to have the Determination referred back to the Director.
5. The Employment Standards Tribunal (the “Tribunal”), after receiving the Complainant’s appeal on September 10, 2013, requested the Director to provide the section 112(5) “record” that was before the Director at the time the Determination was made. Subsequently, on October 17 2013, the Director provided the “record” to the Tribunal and the Tribunal sent a copy of the same to the Complainant on October 18, 2013, by regular mail. The Complainant was afforded an opportunity to review the “record” and make objections, if any, to the completeness of the “record” by November 1, 2013, but no objections were filed with the Tribunal.
6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on my review of the Reasons for the Determination (the “Reasons”), the written submissions of the Complainant, and the “record” that was before the delegate when the Determination was being made. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, JWP and the Director may be invited to file further submissions. Conversely, if I find that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUES

7. The issues in this appeal are threefold:

- (i) Did the Director err in law in making the Determination?
- (ii) Did the Director breach the principles of natural justice in making the Determination?
- (iii) Is there new evidence available that was not available at the time the Determination was made? And, if so, is this new evidence sufficient to justify the Tribunal to change or vary the Determination under appeal or to refer the matter back to the Director as requested by the Complainant?

THE FACTS

8. JWP operates a trucking company in Salmo, British Columbia, and employed the Complainant as a truck driver from September 8, 2012, to October 22, 2012, at a rate of pay of \$25.00 per hour.
9. On January 3, 2013, the Complainant filed a complaint against JWP with the Employment Standards Branch (the “Branch”) stating that he did not receive all regular wages, overtime wages, statutory holiday pay and vacation pay for work performed between September 8, 2012, and October 22, 2012 (the “Complaint”).
10. On May 9, 2013, the delegate of the Director held a hearing into the Complaint (the “Hearing”). The Complainant attended at the Hearing by telephone and testified on his own behalf. Robert MacDonald (“Mr. MacDonald”), one of two Directors and Officers of JWP, appeared by telephone on JWP’s behalf.
11. The delegate, after reviewing the evidence of both parties, issued the Determination on August 1, 2013. For purposes of this appeal, it is not relevant for me to reiterate all the evidence set out in the Reasons or presented in the “record”, although I have reviewed both the Reasons and the “record” very closely.
12. In the Reasons, it is noteworthy that the delegate preferred the evidence of the Complainant, and particularly the Complainant’s evidence contained in his personal log book, over the evidence of Mr. MacDonald. The delegate noted that section 17 of the *Act* required JWP to pay the Complainant’s wages at least semi-monthly and that all wages earned in a pay period should have been paid within eight (8) days of the end of the pay period, neither of which was done in this case.
13. The delegate also noted that all wages earned during the Complainant’s last full pay period of October 1 to October 15, 2012, should have been paid by JWP no later than October 23, 2012, but was not. JWP’s failure to do so was a contravention of section 17 of the *Act*, and the delegate ordered JWP to pay the Complainant \$3,556.25 in regular wages, and levied an administrative penalty against JWP of \$500.00 for the said contravention.
14. With respect to the matter of overtime, the delegate concluded that the Complainant was driving a truck for JWP within 160 kilometres of JWP’s home terminal in Salmo and, therefore, the Complainant was a short-haul truck driver as defined in section 1 of the *Regulation*. In accordance with section 37.3 of the *Regulation*, the delegate reasoned that an employer must pay a short-haul truck driver one and one-half times their regular wage for all hours worked over nine (9) hours in a day or 45 hours in a week. In this case, the Complainant’s log book showed that the Complainant worked 26.75 overtime hours between September 8, 2012, and October 22, 2013, for which he was not paid, and therefore, the delegate ordered JWP to pay the Complainant an amount of \$1,003.13 on account of overtime, and issued an administrative penalty against JWP for contravention of section 37.3 of the *Regulation* in the amount of \$500.00.
15. With respect to statutory holiday pay, the delegate found that the Complainant was owed an average day’s pay for Thanksgiving Day (October 8, 2012), and ordered JWP to pay the Complainant \$215.63 on account of the

said holiday and levied an administrative penalty of \$500.00 against JWP for contravening section 45 of the *Act*.

16. The delegate also found that JWP contravened section 58 of the *Act* for failing to pay 4% vacation pay on the Complainant's gross wages, and ordered JWP to pay the Complainant a total of \$271.00 in annual vacation pay. The delegate also noted that section 18 of the *Act* requires an employer to pay all wages, including vacation pay, within six (6) days of termination of employment by an employee. In this case, JWP failed to comply with section 18 in respect of vacation pay and all other wages owed to the Complainant and, therefore, the delegate issued a further administrative penalty against JWP for contravention of section 18 in the amount of \$500.00.
17. Finally, the delegate also issued a further administrative penalty of \$500.00 against JWP for its failure to produce Employer Records when requested by the Director, pursuant to section 46 of the *Regulation*.

SUBMISSIONS OF THE COMPLAINANT

18. The Complainant has provided slightly more than five (5) pages of written submissions, with the first two-and-a-half pages being a challenge under the *Charter of Rights and Freedoms* (the "*Charter*") of section 37.3 of the *Regulation*. The gist of the Complainant's submission in this challenge is that the *Regulation* discriminates against truck drivers because truck drivers are not paid overtime rates as set out in section 40 of the *Act* after working eight (8) hours per day, but other semi-skilled, manual labourers are. This unequal treatment of truck drivers, the Complainant argues, is in contravention of his "right to fair and equal opportunity" and violates his "right to security of the person", as well as his "right to pursue happiness" and "right to fair and equal access". In his submissions, the Complainant is asking the Tribunal to "have the Ministry of Labour correct this misapplication of law".
19. The Complainant also contends that the delegate made an error of law for failing to consider an overpayment of \$300.00 when he received a cash advance of \$300.00, which was left in a "used sandwich baggie in the back of [his] pickup truck on or around October 7, 2012", presumably from JWP. It would appear that the Complainant is seeking a variation of the award with respect to regular wages paid to him in the Determination, although his written submissions do not elaborate further on this point except to state that the Tribunal should "correct [this] error in law and fact".
20. I also note that in his submissions, the Complainant asserts that Mr. MacDonald "committed perjury" when he stated that he only paid his truck drivers based on the information contained in rental slips from clients which slips were required to be returned by the drivers to JWP if the latter were to receive payment for the jobs they worked on. In support of his contention that Mr. MacDonald perjured himself, the Complainant submits his personal log book pages from July, 2012 (although I note his Complaint form shows he started employment with JWP on September 8, 2012) and states that in the instances referred to in the said logs, he was paid in cash by JWP or Mr. MacDonald even when there were no client slips submitted by him. In the premise, he submits that Mr. MacDonald committed perjury and "must be investigated".
21. The Complainant then goes on to explain that there are other drivers too who were paid cash by JWP or Mr. MacDonald and no payroll records were kept in those instances by Mr. MacDonald or JWP. He states that he asked the Branch to do a "payroll audit" of JWP in the circumstances but the Branch refused. He is now asking the Tribunal to demand from Mr. MacDonald copies of various documents pertaining to jobs in which JWP was involved and he further requests the Tribunal to perform a "payroll audit of JWP for the past five years" and require Mr. MacDonald or JWP to compensate or reimburse all employees who were not properly paid wages.

22. The Complainant also submits that the delegate committed an “error in fact and law” by not levying a penalty of \$500.00 under the *Regulation* for JWP’s contravention of section 45 of the *Act* for failing to pay holiday pay.
23. The Complainant is also requesting that his “name [be] blocked on all paperwork that can be accessible to the public or any party including any Ministry or agent working on the government’s or Ministry’s behalf”. He contends that “all [his] information is private and confidential until [he] give[s] permission in writing stating otherwise”.
24. Lastly, I note that the Complainant has attached his March 19, 2013, and April 19, 2013, correspondence to the delegate, which is also contained in the “record” that was before the delegate at the time the Determination was made. He has also enclosed: his correspondence with Medical Services Branch; a few log book records for July 2012; an Employment Standards Factsheet relating to truck drivers; a commentary on Part 3 of the *Canada Labour Code* pertaining to motor vehicle operators hours of work regulations from Human Resources Development Canada; his correspondence with the same body, dated May 29, 2006, and a further correspondence with the same body that is undated, but relates to his request for information under the *Access to Information Act*. I have reviewed all these documents, and do not find it necessary to reiterate the contents of these documents under this heading.

ANALYSIS

25. Having reviewed the written submissions of the Complainant and issues and questions he raises in relation to his appeal of the Determination, I will next address these issues and questions under separate headings below.

(i) *Charter Challenge*

26. The Complainant, under the error of law ground of appeal, is challenging the constitutionality of section 37.3 of the *Regulation*. He contends that section 37.3 of the *Regulation* contravenes the *Charter of Rights and Freedoms* as it discriminates against truck drivers like him - short haul drivers - relative to other semi-skilled manual labourers in terms of over-time pay. More particularly, he argues that section 37.3 requires that short haul drivers have to work more than 9 hours (and not the 8 hours that other semi-skilled labourers have to work) before they qualify for overtime pay. The relevant part of section 37.3 is set out below:

Truck drivers

- 37.3 (1) Sections 35, 40 and 42 (2) of the Act do not apply to a person employed as a long haul or short haul truck driver.
- ...
- (3) An employer who requires or allows a short haul truck driver to work more than 9 hours in a day or 45 hours in a week must pay the employee at least
- (a) 1½ times the employee’s regular wage for the hours worked in excess of 9 hours in a day, and
- (b) 1½ times the employee’s regular wage for the hours worked in excess of 45 hours in a week.
27. The Complainant is seeking this Tribunal to refer the matter back to the Director to recalculate his overtime wages based on the more favourable rate applicable for other semi-skilled manual labourers; namely, at 1½ times the employee’s regular wage rate for hours worked in excess of 8 hours in a day.

28. Having said this, for the following reasons, I find that this Tribunal does not have jurisdiction to consider the Complainant's constitutional or *Charter* challenge of section 37.3 of the *Regulation* and, therefore, this aspect of the Complainant's appeal must fail as having no reasonable prospect of succeeding on appeal. More specifically, I note that section 86 of the *Act*, while it does *not* deal with the Tribunal's authority, is instructive on the Director's authority on the subject of *Charter* issues. This section expressly provides that neither the Director, nor any person acting on behalf of the Director, has any jurisdiction to determine constitutional questions:

No jurisdiction to determine constitutional question

- 86.1 Nothing in this Act is to be construed as giving the director or any person acting for or on behalf of the director under this Act jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

29. In the case of the Tribunal's authority, section 103 of the *Act* delineates the sections of the *Administrative Tribunals Act* ("ATA") that apply to this Tribunal. I find particularly noteworthy and of great importance here the inclusion of sections 45 and 46 of the *ATA*:

Application of Administrative Tribunals Act

- 103 Sections 1 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 40, 45, 46, 46.3, 48, 49, 50 (2) to (4), 51 to 53, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the tribunal.

30. The relevant parts of sections 45 and 46 of the *ATA* provide:

Tribunal without jurisdiction over *Canadian Charter of Rights and Freedoms* issues

- 45 (1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.
- (1.1) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

...

Notice to Attorney General if constitutional question raised in application

- 46 If a constitutional question over which the tribunal has jurisdiction is raised in a tribunal proceeding, the party who raises the question must give notice in compliance with section 8 of the *Constitutional Question Act*.

31. Section 45 of the *ATA* unequivocally provides that the Tribunal has no authority over *Charter* issues and, therefore, the Tribunal in this case is effectively prevented from considering the Complainant's *Charter* challenge to section 37.3 of the *Regulation*. I also note that even if the Complainant's challenge to the validity of section 37.3 of the *Regulation* was within the Tribunal's jurisdiction (which it is not), the Complainant has not satisfied the requirement in section 46 of the *ATA* which refers to the requirement imposed by section 8 of British Columbia's *Constitutional Questions Act* ("CQA") on any party challenging the constitutional validity of any law. More particularly, under section 8 of the CQA, the law that is the subject of a constitutional challenge cannot be held invalid or inapplicable, and a remedy cannot be meted out to the party making the challenge unless the latter has served a notice of the challenge or application on the Attorney General of Canada and the Attorney General of British Columbia in compliance with the section. However, as adverted to earlier, I need not rely on section 46 of the *ATA* as section 45 is a full answer to the Complainant's *Charter* challenge.

32. I also note that the Supreme Court of Canada’s decision in *R. v. Conway* is instructive on the issue of the Tribunal’s jurisdiction to consider *Charter* issues. In this case, Abella J. writing the majority decision set out the following simplified two-part test at paras. 81 and 82 for when an administrative tribunal is considered a court of “competent jurisdiction” to consider constitutional questions and order *Charter* remedies:

[81] [T]he first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal’s jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.

[82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal’s statutory mandate, structure and function (*Dunedin*).

33. In this case, although the Tribunal has jurisdiction to consider questions of law (section 110 of the *Act*), the legislature, by way of section 45 of the *ATA*, specifically excludes jurisdiction from the Tribunal over *Charter* issues. In the result, the Tribunal would fail the threshold question in the *Conway* test and, therefore, it is not a court of “competent jurisdiction” to consider *Charter* issues.

(ii) *Overpayment of Wages*

34. The Complainant is arguing that the delegate made an error of law in failing to consider an overpayment of \$300.00 he received in cash, which was left in the back of his pickup truck on or around October 7, 2012, presumably by JWP. I am somewhat confused with this submission of the Complainant as it would appear that the Complainant is seeking the Tribunal to vary the part of the Determination ordering JWP to pay him regular wages, and reduce it by \$300.00. In support of his submissions here, the Complainant asks the Tribunal to “look closely at the paper work” for evidence of this miscalculation. However, I do not find any evidence of miscalculation on the part of the delegate in the “record” or any paperwork adduced in the appeal by the Complainant. I also do not find any evidence or submissions contained in the Reasons or in the “record” to substantiate the Complainant’s contention that an overpayment of \$300.00 in cash was made to him on October 7, 2012. In the circumstances, I find no merit in this challenge or submission of the Complainant.

(iii) *Allegation of Perjury Against Mr. MacDonald and Request for Tribunal to Conduct a Payroll Audit of JWP’s Business*

35. The Complainant has alleged that Mr. MacDonald has committed “perjury” when giving his evidence, and is asking this Tribunal to “investigate” him as well as conduct a payroll audit of JWP’s business “for the past five years”, and to require Mr. MacDonald or JWP to reimburse all employees who were not properly paid wages. While these requests of the Complainant for the Tribunal to intervene may be a direct result of the purported rejection by the Branch of the Complainant’s request to carry out an audit of payroll records of JWP, I note that under 76(2) of the *Act* the Director has absolute discretion to conduct an investigation to ensure compliance with the *Act* and *Regulation*. It is not for the Tribunal, in the circumstances of this appeal, to conduct an audit of JWP’s payroll records relating to other employees or to order the Director or the Branch to audit JWP’s payroll records. In the circumstances, I find the Complainant’s request that the Tribunal perform an audit of JWP’s payroll records inappropriate and lacking presumptive merit on appeal.

36. With respect to the Complainant's allegation that Mr. MacDonald committed perjury in giving evidence at the Hearing and should be "investigated", I note that the delegate in the Reasons preferred the evidence of the Complainant and, particularly, the Complainant's personal log books over the evidence of Mr. MacDonald and made the awards in the Determination based thereon. Having said this, I am not quite clear from the Complainant's submissions here what, if anything, more the Complainant is seeking the Tribunal to do in relation to his allegation of perjury against Mr. MacDonald. If this submission of the Complainant is related to his request for the Tribunal to conduct an audit of JWP's payroll records then I have dealt with it in the previous paragraph. If the Complainant is seeking some independent "investigation" of Mr. MacDonald, that is not something within the jurisdiction of this Tribunal.

(iv) Administrative Penalty for Contravention of Section 45 of the Act

37. The Complainant has alleged that the delegate erred in fact and law by not levying a penalty of \$500.00 under the *Regulation* against JWP for its contravention of section 45 of the *Act* for failing to pay holiday pay. However, my review of the Reasons shows that the delegate indeed levied a \$500.00 penalty for this breach. The administrative penalty for this breach appears to be subsumed under a related breach of section 18 of the *Act*. I note at pages R7 and R8 of the Reasons, the delegate states:

Section 18 of the Act requires an employer to pay all wages, including *vacation pay* [italics added for emphasis], within six days of termination of employment by an employee. In this case, the Complainant ended his employment on October 22, 2012. The Employer was required under section 18 to pay the Complainant all wages he earned in the final pay period, including any *vacation pay* [italics added for emphasis], no later than October 28, 2012. Accordingly, I find the employer contravened section 18 of the Act when it failed to pay the Complainant all final wages within six days of the Complainant's termination of employment, for which an administrative penalty is imposed....

38. In the circumstances, I find this aspect of the appeal without merit and lacking any reasonable prospect of success on appeal.

(v) Request for Privacy and Confidentiality of the Complainant's Identity

39. The Complainant, in his appeal submissions, has also requested that his name be kept private and confidential and not accessible to the public or any party, including any Ministry or agent working on the government's or Ministry's behalf. While I find this request does not relate to a challenge of the Determination, I note that any decision of this Tribunal is eventually published on the Tribunal's website once it is rendered and once on the website it is accessible to the public. I do not find any basis in the submissions of the Complainant to order a deviation from the normal publication of this decision on the Tribunal's website. As for the Complainant's request that his name be kept private and confidential from any Ministry or agent working on the government's or the Ministry's behalf, this Tribunal has no authority in its enabling statute to make any such order.

40. On the whole, I am not persuaded that there is any presumptive merit in the Complainant's appeal, and I find that there is no reasonable prospect that the appeal will succeed.

ORDER

41. Pursuant to section 114(1)(f) of the *Act*, I am dismissing this appeal on the ground that it has no reasonable prospect that it will succeed, and in accordance with subsection 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal