Employment Standards TRIBUNAL

An appeal

- by -

Super Star Trucking Ltd.
("SST")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2015A/77

DATE OF DECISION: September 11, 2015

DECISION

SUBMISSIONS

Randeep Sarai	counsel for Super Star Trucking Ltd.
Nachhattar Singh Gill	on his own behalf
Melanie Zabel	on behalf of the Director of Employment Standards

INTRODUCTION

1. On April 30, 2015, a delegate of the Director of Employment Standards (the "delegate") issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") under section 79 of the *Employment Standards Act* (the "*Act*") ordering the present appellant, Super Star Trucking Ltd. ("SST"), to pay its former employee, Nachhattar Singh Gill ("Mr. Gill"), the total sum of $11,940.75 on account of unpaid wages (principally recovery of wages unlawfully deducted, but also including overtime pay, statutory holiday pay and vacation pay) and section 88 interest. I note that Mr. Gill's first name is recorded as "Nachhattar" in his complaint and in the Determination; however, in an affidavit submitted in these proceedings he stated his first name was "Nachhatar".

2. In addition, and also by way of the Determination, the delegate also levied six separate $500 monetary penalties against SST based on the latter's contravention of sections 17 (payment of wages at least semi-monthly), 21 (unlawful wage deductions), 28 (failure to keep proper payroll records), 45 (statutory holiday pay) and 58 (vacation pay) of the *Act* and section 37.3 of the *Employment Standards Regulation* (overtime pay for short and long haul truckers). Thus, the total amount payable by SST under the Determination is $14,940.75.

3. SST now appeals the Determination on all three statutory grounds, namely, that the delegate erred in law or otherwise failed to observe the principles of natural justice in making the Determination and on the ground that it has "new evidence" that was not available when the Determination was issued (see subsections 112(1)(a), (b) and (c) of the *Act*).

4. I am adjudicating this appeal based on the written submissions filed by the parties and in this regard, I have submissions from legal counsel for SST, from Mr. Gill and from the delegate. SST's appeal submission includes a 3-page memorandum prepared by its legal counsel that is appended to the Appeal Form along with several separate attachments. Mr. Gill submitted a 1-page affidavit although, for the most part, it does not address the issues raised by SST's appeal. In addition to the parties' written submissions, I have also reviewed the Determination and the delegate's reasons as well as the subsection 112(5) record that was before the delegate when she issued the Determination.

THE DETERMINATION

5. On July 8, 2014, Mr. Gill, a truck driver, filed an unpaid wage complaint claiming about $14,300 in unpaid wages as against SST. Approximately 92% of the Mr. Gill's claim was for regular wages with the balance being a claim for overtime pay. Mr. Gill's complaint was the subject of a complaint hearing before the delegate on January 8, 2015, and some 3 ½ months later, on April 30, 2015, the delegate issued the Determination and her accompanying reasons. Both SST and Mr. Gill appeared at the complaint hearing. The delegate's reasons indicate (page R2): "Mr. Gill, who speaks Punjabi, provided the following testimony

with the assistance of his translator, daughter Randeep Gill." While nothing turns on this fact in this appeal, in my view, there may well be a natural justice concern when a translator – who must be scrupulously neutral – is a relative of one of the parties. At the very least, all adverse parties should be fully informed and the hearing should only proceed with the informed consent of all other parties.

6. Mr. Gill's testimony at the complaint hearing was that he was employed as a short haul trucker with SST from June 5, 2013, until April 10, 2014, and that although he was hired at an agreed hourly rate of $18, he was in fact paid on a "per trip" rate. His work consisted of delivering loads to, and picking up loads from, Vancouver area ports. His evidence was that he worked about 12 to 13 hours each day and while he did not work on statutory holidays (since the ports were closed), he did not receive an average day's pay for those holidays. He claimed he was not paid any vacation pay and that, following a strike, he was never called back to work and so he found new employment.

7. SST's position at the complaint hearing was that Mr. Gill was paid for all hours worked in accordance with his employment contract (on a "per move basis") and that he voluntarily quit. SST's evidence was that both vacation pay and statutory holiday pay was embedded in the "per move" rate. SST also argued that Mr. Gill's testimony as to his actual working hours was inflated and that even if he was supposed to be paid $18 per hour, his earnings reflected at least that hourly wage.

8. Mr. Gill received an "advance" on his wages of $1,500 on the last day of each month and then "[o]n the fifteenth of the following month, [SST] paid him for the trips he made in the previous month, less the advance" (delegate's reasons, page R2). SST conceded that it did not have any time records relating to Mr. Gill's hours of work (delegate's reasons, page R5). SST also conceded at the complaint hearing that it "did not get written authorization from Mr. Gill to deduct the wage advance of $1,500 paid on the last day of the month from the subsequent midmonth cheque" (delegate's reasons, page R6).

9. The delegate determined that Mr. Gill as a short haul container truck driver and, as such, was governed by section 37.3 of the *Employment Standards Regulation* (the "*Regulation*"). Regarding Mr. Gill's rate of pay, the delegate rejected Mr. Gill's position and held that he, at least impliedly, accepted work based on a "per move", rather than an hourly, wage rate (delegate's reasons, page R7).

10. With respect to the matter of vacation pay, the delegate noted that SST's evidence at the hearing was inconsistent with its own records (namely, the wage statements it provided to Mr. Gill) and further held (at page R7):

> I am not satisfied that [SST] embedded vacation pay into Mr. Gill's trip rate, but even if it did, the wage statements and daily earnings reports provided no clarity to determine what, if any, vacation pay was embedded. In any case, section 4 of the Act does not allow the minimum requirements of the Act to be waived, even if there was agreement between the parties to embed vacation pay into the regular wage rate. The Act does not permit the embedding of vacation pay or statutory holiday pay into an all-encompassing wage rate.

11. The delegate rejected SST's evidence as to Mr. Gill's working hours as "at best, speculation" (delegate's reasons, page R8) and ultimately concluded that Mr. Gill's "vehicle inspection report logs" provided the best evidence of his actual working hours. As described by Mr. Gill, these logs "reflected his daily pre-trip and post-trip inspections and, essentially, were a clock-in clock-out record of his hours worked each day" (delegate's reasons, page R3). Relying on these logs, the delegate concluded (page R8):

> While not perfect, Mr. Gill's report logs do, for the most part, show times of pre-trip and post-trip inspections of his truck. I find it reasonable to conclude that the times of pre-trip and post-trip

> inspections reflect the start and end times of his work days, as a pre-trip inspection logically commences before the truck is driven, and the post-trip inspection logically commences when the driving is finished for the day. Mr. Gill did not submit report logs for the month of December 2013. While Mr. Gill stated he worked 12 to 13 hours each day, his report logs reflect work days spanning three hours at the least to 11.5 hours at the most. Eight logs for the following dates do not show the time of a post-trip inspection: [dates omitted]. For dates where there is no evidence of actual hours worked, I find it reasonable to conclude that Mr. Gill worked nine hours. Therefore, I find that Mr. Gill worked nine hours per day for each day worked in December, and nine hours on the eight occasions where he did no record a post-trip inspection time in his report logs.

12. The delegate also noted, at page R9, that SST's "monthly earnings records" for Mr. Gill showing his daily earnings for each month "are highly congruent with the days shown as worked in Mr. Gill's report logs".

13. Having established Mr. Gill's actual working hours, the delegate then turned her mind to whether the wages actually paid to him reflected at least the regulatory minimum wage of $10.25 per hour. The delegate ultimately determined that Mr. Gill had, in fact, been paid at least the minimum wage for all hours worked within the section 80 wage recovery period (delegate's reasons, page R9). However, the delegate concluded that since Mr. Gill often worked more than 9 hours per day during the 6-month wage recovery period, he was entitled to overtime pay under section 37.3 of the *Regulation* (page R9):

> Section 37.3 of the Regulation states that an employer must pay a short haul truck driver at least 1.5 times their regular wage for all hours worked in excess of nine hours in a day and 45 hours in a week. Based on his report logs, Mr. Gill worked daily overtime. [SST] paid Mr. Gill straight time for all hours worked. I find Mr. Gill is entitled to overtime at the rate of a half time adjustment for all hours worked excess [*sic*] of nine hours per day during the six month capture period.

14. The delegate calculated Mr. Gill's overtime entitlement at $522.61.

15. The delegate determined that Mr. Gill was entitled to statutory holiday pay, based on an average day's pay, for five separate statutory holidays totalling $737.34 and to vacation pay in the amount of $1,115.00. In each case, the delegate held that SST was not entitled to, and in fact did not, embed statutory holiday pay and vacation pay within the base wage rate.

16. The delegate determined that Mr. Gill voluntarily quit his employment and, accordingly, was not entitled to any compensation for length of service (see subsection 63(3)(c) of the *Act*).

17. Finally, the delegate determined that SST contravened section 21 of the *Act* by unlawfully deducting $9,200 from his wages. This latter amount reflected six separate $1,500 "wage advances", paid to him on the last day of the prior month, that were deducted from his mid-month paycheque the following month (these deductions spanned the period from the middle of October 2013 up to and including the middle of March 2014) as well as a further $200 that was deducted for an item described as "cash – fix car" on Mr. Gill's March 2014 wage statement.

18. As noted at the outset of these reasons, the delegate also levied six separate $500 monetary penalties against SST thus bringing the total amount of the Determination to $14,940.75.

REASONS FOR APPEAL

19. As noted above, SST appeals the Determination relying on all three statutory grounds. Insofar as the "error of law" ground is concerned, SST says that the delegate correctly determined that Mr. Gill was paid on a "per

load" or "per trip" basis but erred in finding that the contractual rate was $50 per "full" trip (that is, to deliver to, and pick up a container from, a Vancouver area port) and $25 for a "half" trip (that is, to either deliver or pick up a container from a Vancouver area port). Counsel for SST, referring to Mr. Gill's signed employment contract, says that the applicable trip or load rates were $40 and $20 for a full and half trip, respectively.

20. With respect to the delegate's determination that Mr. Gill was entitled to both statutory holiday pay and vacation pay, SST asserts, as it did before the delegate, "[SST] paid $50 per full and $25 per half to include at least a 4% vacation pay and to include Statutory pay [*sic*] as no work was done on Statutory Holidays" and that "the vacation pay was always shown separately on Mr. Gill's pay stubs [and] the Statutory pay [*sic*] should have been shown separately but was not". SST says that the delegate erred in rejecting its position that Mr. Gill had already been paid on account of vacation pay and statutory holiday pay. SST also asserts that the delegate erred in determining Mr. Gill's working hours and in calculating his overtime pay entitlement.

21. With respect to the section 21 wage deductions, it should be recalled that there are two separate components to this award: first, the $1,500 monthly wage advances deducted the following month (totalling $9,000) and, second, the $200 deduction for car repairs. SST's position regarding the former is as follows:

> The Director both erred [*sic*] in considering the $1,500 "advances" were deductions for future earnings and penalized the employer for an amount equal to what has already been paid. Both finding [*sic*] were errors in law and fact and go against the principals [*sic*] of justice.
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> …The employer, and in fact virtually the entire container hauling industry, pays their employees based on the amount of loads they haul each and every month. That can only be done after the employee submits their Daily trip sheets to the employer for the month and once the employer reconciles the amount, the employee [*sic*] pays the amount on the 15th of the next month. Though this may appear to be in contravention of section 17, that an employee is not paid within eight days of their pay period, the employer is unable to pay the employee until the employee submits his daily trip sheets, which are only given at the end of the month.
>
> In order to assist the employees and prevent contravention of section 17, the employer Super Star, had agreed to pay $1,500 net pay right at the end of the month for that month and any balance on the 15th of the next month. So the Director erred by stating that the $1,500 was an "advance" for next month's wages, when in fact they were an "un-reconciled" payment for the month that they were paid in.
>
> Furthermore, to order the employer to pay an amount that has already been paid to the employee, and this is not in dispute, is against the principals [*sic*] of justice, as it is double dipping for the employee and a grossly inappropriate penalty against an employer who was actually paying within the employment guidelines.

22. SST also says that the delegate erred insofar as the March 2014 $200 "vehicle repair" deduction was concerned:

> The employee had neither requested it nor did Mr. Gill ever refute that $200 was paid by [SST] so that he could fix his car. That amount was deducted from his payroll that month…It would be therefore against the principals [*sic*] of justice that an employer who assisted an employee on the employee's request, would be penalized equally for that amount, simply for the fact that he did not get the employees [*sic*] signatures.

23. Finally, SST "asks that the administrative penalties should be voided for the above issues if they are found to be successful on this appeal".

FINDINGS AND ANALYSIS

24. As noted above, SST appeals the Determination on all three statutory grounds. Principally, SST relies on the "error of law" ground (subsection 112(1)(a) of the *Act*) but it also asserts that the delegate failed to observe the principles of natural justice and that it now has material evidence previously not available (subsections 112(1) (b) and (c) of the *Act*).

25. In my view, the "natural justice" and "new evidence" grounds are wholly unmeritorious and can be summarily rejected. Counsel says that certain of the delegate's alleged "errors of law" also constitute breaches of the principles of natural justice (for example, her finding with respect statutory holiday pay and section 21 deductions). These arguments are more appropriately addressed as alleged errors of law. There is nothing in SST's materials that raise a conventional "natural justice" argument such as a denial of the right to be heard or an assertion that the delegate was, or reasonably appeared to be, biased. With respect to the "new evidence" ground, SST submitted some new documents and other evidence, none of which was "unavailable" at the time of the complaint hearing. This evidence, which could have been placed before the delegate, does not meet the test for admissibility set out in *Davies et al.*, BC EST # D171/03.

26. I will address each of SST's alleged errors of law in the same order, and using the subheadings, as they appear in its counsel's memorandum.

Rate of Pay

27. In his original complaint, Mr. Gill claimed that his wage rate was $18 per hour. The delegate rejected Mr. Gill's position and determined that he "accepted his remuneration as a trip rate and it is unnecessary to consider any discussions about rates of pay that may have occurred before he began his employment" (page R7). The parties' written employment agreement provided for "trip rates" of, *inter alia*, $40 for "Load from all customers to Ports" and $20 for "Load from Port to Company Yard" and the contract also stated "all rates are inclusive of vacation pay". SST's evidence at the hearing – from Mr. Harinder Chohan, its sole director and officer – was that Mr. Gill was "paid $50 for each 'full move'; that is, to deliver and pick up a container" and "$25 for each 'half move'; that is, to either deliver or pick up a container" (page R4). Mr. Chohan also testified that $10 of the $50 rate, and $5 of the $25 rate, was attributable to vacation pay. It should be noted that based on this evidence, Mr. Gill was receiving vacation pay at a 25% rate ($10/$40; $5/$20) to be contrasted with the statutory 4% rate that would otherwise apply.

28. However, on Mr. Gill's wage statements, his pay (calculated based on the $50/$25 trip rates) was decomposed into an amount reflecting "Regular" wages and a further 4% for "Vacation Paid". For example, on the 12/31/2013 wage statement (for the pay period ending December 31, 2013), the "Gross Pay" for the month is shown as $2,900.00 and this amount is broken down into $2,788.46 "Regular" and $111.54 "Vacation Pay". The wage statement also shows withholdings/remittances for employment insurance, the Canada Pension Plan and income taxes and also includes a net pay calculation after deducting EI, CPP and taxes as well as a further "advances paid" deduction of $1,500. All of the other wage statements in the record follow the same format.

29. Counsel for SST says that the delegate erred in law in failing to account for the vacation pay actually paid to Mr. Gill (as shown on the wage statements) and that, in addition, although the parties' employment contract and the wage statements are silent with respect to statutory holiday pay, "that the excess rate on the load fees were in lieu of Statutory Holiday Pay". Counsel submits "the Statutory pay [*sic*] should have been shown separately [on the wage statements] but was not". This submission falls well short of an assertion that there

was an express agreement between the parties that that a portion of the "trip rates" was on account of statutory holiday pay. There is absolutely nothing in the record to support this latter proposition.

30. The delegate ultimately held, in the face of this conflicting evidence, that "Mr. Gill's rate of pay, exclusive of vacation pay and statutory holiday pay, was $50.00 per trip for a full move, and $25.00 per trip for a half move" (page R7). In essence, SST's current challenge with respect to the rate of pay is a challenge to the delegate's finding of fact on this issue. While I might not have reached the same factual conclusion had I been the original decision-maker hearing all of the *viva voce* and documentary evidence, the delegate turned her mind to the conflicting evidence before her and came to a conclusion that is not wholly unreasonable. I cannot say that she made a "palpable and overriding error" in determining the wage rate (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 10). Further, even if it could be said that SST intended to embed Mr. Gill's vacation pay into the gross wage rate, SST did not comply with the criteria set out in the *National Signcorp* line of authorities in order to lawfully achieve this objective (see *Brandt Tractor Ltd. v. Claypool*, 2015 BCSC 759).

Hours of Work

31. SST asserts that the delegate erred in making her findings of fact concerning the number of hours Mr. Gill actually worked within the 6-month wage recovery period (October 11, 2013 to April 10, 2014). In challenging this aspect of the Determination, SST relies, in part, on "log books for the month of December" that SST has now "pulled out". However, this evidence could have been provided to the delegate and is not admissible in these proceedings (see *Davies et al.*, *supra*). As was the case with the "wage rate" issue, there was conflicting evidence before the delegate regarding Mr. Gill's working hours. "Mr. Gill claimed to have worked 12 to 13 hours per day" (delegate's reasons, page R7) whereas SST, perhaps not surprisingly, claimed that Mr. Gill's evidence on this score was "inflated". SST's position – although it was largely built on speculation rather than hard data – was that while Mr. Gill's hours varied from day to day "he could not have worked any more than eight hours a day" and that he "worked fewer than eight hours per day on many days"; however, SST "did not have a record of the number of hours Mr. Gill worked each day" (delegate's reasons, page R5).

32. In the face of this conflicting evidence, the delegate looked to the most reliable evidence before her, namely, the report logs, and endeavoured to determine the most probable conclusion. Indeed, her ultimate finding that Mr. Gill typically worked a 9-hour day was closer to the position advanced by SST than to that advanced by Mr. Gill. In my view, the delegate's finding of fact as to the number of hours actually worked cannot be said to constitute a palpable and overriding error.

Overtime Pay, Statutory Holiday Pay & Vacation Pay

33. SST's argument with respect to overtime pay is predicated on the assertion that the delegate erred with respect to her findings regarding the wage rate and the number of hours worked. Since I have dismissed SST's arguments with respect to the former issues, it follows that SST's argument with respect to Mr. Gill's overtime pay entitlement must similarly be dismissed. Insofar as statutory holiday pay is concerned, the uncontroverted evidence before the delegate was that Mr. Gill did not work on any of the five statutory holidays in question and there was absolutely no evidence before the delegate that he was ever paid an average day's pay for each of those holidays. SST says that statutory holiday pay was "embedded" in the trip rate but as previously noted, this assertion is wholly unsupported by any corroborating evidence. I have already addressed the matter of vacation pay, above, and see no palpable or overriding error in the delegate's finding of fact on this particular issue.

Unauthorized Wage Deductions

34. There are two components to this aspect of the Determination – the six $1,500 so-called "wage advances" and the $200 car repair item. I shall address each in turn commencing with the latter.

35. SST says that it loaned Mr. Gill the sum of $200 (cash) so that he could repair his personal vehicle. I note that Mr. Gill, in his affidavit, does not deny this assertion. SST says that when it deducted the $200 sum from his paycheque later that same month, it was simply recovering a debt owed. Subsection 22(4) of the *Act* states: "An employer may honour an employee's *written assignment of wages* to meet a credit obligation" (my *italics*). However, SST "did not provide evidence that it obtained Mr. Gill's written permission to directly or indirectly deduct $200.00 from his March 2014 earnings" (delegate's reasons, page R11). It may be that SST can recover this amount by way of a civil action in the B.C. Provincial Court (Small Claims Court), but it has no statutory right to recover this amount under the *Act* and the deduction, since it was not authorized by a written assignment from Mr. Gill, was unlawful under subsection 21(1) of the *Act*. SST could have simply obtained Mr. Gill's written consent to the deduction in which case there would not have been any issue about the matter but, either through ignorance or neglect, it failed to do so. This situation is yet another example of why employers must take care to understand, and comply with, their obligations under the *Act*. The delegate did not error in law when she ruled that Mr. Gill was entitled to recover this unlawful deduction.

36. However, the "wage advances", in my view, stand on a completely different legal footing. It should be recalled that the delegate determined that Mr. Gill did not have any entitlement to any additional "regular" wages although he was entitled to additional overtime pay ($522.61), statutory holiday pay ($737.34) and vacation pay ($1,115.00). The delegate's vacation pay calculation was based on 4% of the regular wages ($26,615) actually paid plus overtime pay and statutory holiday pay. Mr. Gill, after accounting for the additional amounts awarded to him on account of overtime pay, statutory holiday pay and vacation pay has been made fully whole in terms of his entitlements under the *Act*.

37. The six $1,500 wage deductions were not in fact a deduction from wages otherwise payable but, rather, were an accounting item designed to reflect the wages that had previously been paid relative to Mr. Gill's total wage entitlement for the pay period in question. Clearly, SST's payroll system ran afoul of the *Act* and it was properly penalized for having breached sections 17 and 21 of the *Act*. Equally clearly, Mr. Gill did not consent to the form of payroll system that SST implemented. While I completely reject SST's legal counsel's suggestion that SST was unable to implement a compliant payroll system – in my view, it could have easily done so – I am unable to see why Mr. Gill should now recover a $9,000 windfall simply because SST did not implement a payroll system that fully complied with the *Act*. The effect of the Determination, as it presently stands, is to order SST to pay an additional $9,000 to Mr. Gill even though, after accounting for the overtime pay, statutory holiday pay and vacation pay Mr. Gill will now receive, Mr. Gill has been fully paid for all of his work.

38. The delegate's position appears to be that since Mr. Gill did not consent in writing "for these advances to be deducted" and because there was no "contractual agreement for advances [to be recovered]", Mr. Gill is entitled to a $9,000 windfall. The delegate does not assert that that Mr. Gill actually earned the $9,000 in question and, as previously noted, save for overtime pay, statutory holiday pay and vacation pay, Mr. Gill was paid for all hours worked. In my view, allowing Mr. Gill to retain this $9,000 constitutes an unjust enrichment. However, I do not rest my decision in this matter on that equitable doctrine; rather, in my view, there is nothing in the *Act* that would allow Mr. Gill to recover the $9,000 in question in these circumstances.

39. Penalizing SST for not having in place a compliant payroll system is one thing; ordering it to pay monies to Mr. Gill that he never earned, and is not entitled to under the *Act*, is quite another. Subsection 2(b) of the *Act*

states: "The purposes of this Act are as follows…(b) to promote the fair treatment of employees and employers". I am unable to see how the delegate's order requiring SST to pay Mr. Gill the sum of $9,000 – a sum he never earned under his contract and is not otherwise entitled to under the *Act* (unlike, for example, the award of statutory holiday pay) – constitutes fair treatment. In my view, the delegate erred in law in making this award and, accordingly, this aspect of the Determination must be cancelled.

ORDER

40. Pursuant to subsection 115(1)(a) of the *Act*, the Determination dated April 30, 2015, is varied by cancelling the $9,000 award made in favour of Mr. Gill under section 21 of the *Act*. Subject to the appropriate adjustments on account of section 88 interest, the Determination is confirmed in all other respects.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal