Employment Standards TRIBUNAL

An appeal

- by -

Urban Sawing & Grooving Company Ltd.
("Urban")

- 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: David B. Stevenson

FILE No.: 2005A/80

DATE OF DECISION: July 27, 2005

DECISION

SUBMISSIONS

A. Paul Devine	on behalf of Urban Sawing & Grooving Ltd.
Lynn Egan	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Urban Sawing & Grooving Company Ltd. ("Urban") of a Determination that was issued on April 1, 2005 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Urban had contravened Part 7, Section 58, Part 8, Section 63 and Part 10, Section 83 of the *Act* in respect of the employment of Jerry Sentes ("Sentes") and ordered Urban to pay Sentes an amount of $11,113.30, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on J.P. under Section 29(1) of the *Employment Standards Regulation* (the *"Regulation"*) in the amount of $2000.00.

3. In this appeal, Urban claims the Director erred in law in finding Sentes was entitled to length of service compensation under Section 63 of the *Act* because Sentes was employed on one or more construction sites by an employer whose principal business is construction. Alternatively, Urban says the Director erred in law in finding Sentes was constructively dismissed. Urban also says the Director failed to observe principles of natural justice in making the Determination.

IS AN ORAL APPEAL HEARING REQUIRED?

4. By way of a letter dated June 20, 2005, the parties were advised by the Tribunal's Vice-Chair that this appeal would be decided on the written submissions received from the parties.

5. In its appeal submission, Urban had asked for an oral hearing, "if the findings of fact referred to in this submission are insufficient to dispose of this appeal in the appellant's favour". Whether the Tribunal considers the appeal has merit or not, we are not required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* ("*ATA*") including section 36 which states: ". . . the tribunal may hold any combination of written, electronic and oral hearings" (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). In my view, an oral hearing is not necessary to decide this appeal. Findings of fact have already been made by the Director in the complaint hearing. I shall address the effect of the attempt by the appellant to challenge or supplement those findings of fact by seeking to introduce additional evidence in this appeal later in this decision.

6. I have before me the section 112(5) record as well as written submissions from the Urban and the Director. No argument has been made concerning the sufficiency of the record. It is the responsibility of Urban to ensure the sufficiency of the appeal.

ISSUE

7. The issues in this appeal are whether any error in law has been made by the Director and whether the Director failed to observe principles of natural justice in making the Determination.

THE FACTS

8. The facts are not particularly complicated.

9. The Determination states that Urban operates a concrete sawing and grooving business, providing this service to customers such as the City of Vancouver and Terasen Gas. Sentes was employed by Urban as a cutter/lead hand on and off for more than 19 years. His last period of continuous employment was from April 3, 2000 to August 16, 2004.

10. Sentes filed a complaint under the *Act* alleging Urban had contravened the *Act* by failing to pay overtime wages and by taking an unauthorized deduction from his wages in the amount of $678.64. The Director received and reviewed the complaint and decided to investigate.

11. There was an effort by the Director to mediate a resolution of the Complaint that was partly successful. The Director decided to conduct a complaint hearing. The complaint hearing was attended by Sentes, on his own behalf, and by Steven and Marie Velecky, who are both directors and officers of Urban, on behalf of Urban.

12. The Determination indicates that at the beginning of the hearing, Sentes advised the Director the claim for the unauthorized deduction had been resolved in mediation, but that he wanted a claim for length of service compensation to be added to his complaint. He also claimed his employment was terminated because he had sent a Request for Payment Form (Self-Help Kit) to the employer. There was some discussion among the parties about Sentes' request and the hearing proceeded. The Determination notes that Mr. and Mrs. Velecky were offered an opportunity to adjourn and have the hearing reconvened at a later date, but both said an adjournment would not be necessary and they would deal with the issue at the hearing.

13. The hearing addressed six issues. They are set out in the Determination. The facts and evidence on each of the issues are set out, as is the analysis on each of those issues. The Director made findings of fact and reached conclusions based on those findings of fact.

14. The Determination does not indicate there was any evidence submitted or argument made by Urban that Sentes was not entitled to length of service compensation under the *Act* because Urban was an employer whose principal business is construction and Sentes was employed at one or more construction sites.

15. Mr. Velecky has filed an affidavit with the appeal in which he makes assertions of fact in support of the contention that Urban is an employer whose principle business is construction and that Sentes was employed by Urban at one or more construction sites and in support of the position that Sentes was not "constructively dismissed" from his employment by Urban. It should be noted that the position of Urban at the complaint hearing - a position which was not accepted by the Director - was that Sentes had voluntarily quit, or resigned, his employment.

ARGUMENT AND ANALYSIS

16. The grounds upon which an appeal may be made are found in subsection 112(1) of the *Act*, which says:

> *112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law;*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

17. The *Act* does not list error of fact as a ground of appeal. The appeal must be confined to those grounds listed above.

18. The Tribunal has consistently stated that an appeal to is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process, hoping the Tribunal will reach a different conclusion. An appeal is an error correction process with the burden of showing the error being on the appellant. The Tribunal does not normally hear new arguments on appeal and has taken a relatively strict view of the "new evidence" ground of appeal. This approach is grounded in the statutory objectives of efficiency and finality.

19. As indicated above, Urban has framed this appeal as error of law and failure to observe principles of natural justice. I shall address the arguments raised under each of those grounds, even though I take a somewhat different perspective of the nature of the appeals. Specifically, there is a substantial aspect of Urban seeking to introduce "new evidence" into this appeal that has to be examined in light of the grounds of appeal found in subsection 112(1), which does not include an appeal on alleged errors of fact, and the discretion of the Tribunal hear new arguments and receive new evidence.

Preliminary Matter

20. In its reply to the submission filed by the Director, Urban has raised a question of the status of the Director in the appeal. Urban invokes the Supreme Court of Canada decision, *Northwest Utilities Ltd. v. The City of Edmonton*, (1978) 89 D.L.R. (3d) 161 in which the Court said that on judicial review an administrative tribunal had status for certain purposes but was not allowed not defend the correctness of its decision on the merits. However, the rule restricting the right of a tribunal to make submissions before the court is a rule of the Court rather than a rule of law: see the decision of Osler, J. in *Consolidated Bathhurst Packaging Ltd. v. I.W.A.* (1985), 20 D.L.R. (4^{th}) 84.

21. The Tribunal controls its own process under Section 107 of the *Act* and may adopt a different approach than taken by the Courts on judicial review.

22. The Director has a compelling interest in the administration of the *Act* that justifies being given status and standing as a party of right in any appeal. While there are circumstances where it is appropriate to impose limitations on the role of the Director in an appeal, those circumstances, and the limitations imposed, are best addressed by the Tribunal on a case by case basis. As a general statement, there are sound practical and policy reasons for not unduly limiting the role of the Director in an appeal. This general statement

recognizes that the role of the Director *vis.* the Tribunal is not identical to that of an administrative tribunal to a Court on judicial review. The Director's function is not exclusively adjudicative, but is substantially investigative. Nor is the Tribunal's role under the *Act* like that of a court on judicial review. A key distinction is present in this case, where Urban seeks to have the Tribunal receive and review evidence that was not presented to the Director in the complaint process. The Tribunal may substitute findings of fact where new evidence makes it clear the factual findings in the Determination were wrong.

23. In this appeal, Urban seeks to change findings of fact made by the Director in the Determination, has attacked the fairness of the complaint process and has raised a question of the proper interpretation and administration of Section 65 of the *Act*. The Director has a statutory responsibility to administer the *Act*, including the responsibility to make findings of fact and to ensure the fairness of the complaint process. It is the Director's exercise of that statutory responsibility that is under appeal and justifies hearing the response on those matters. Also, and as noted above, the Director has an interest in the proper administration of the *Act*. That interest justifies hearing the Director on whether subsection 65(1)(f) disentitled Sentes from length of service compensation.

New Evidence and Argument

24. Although Urban has not grounded their appeal in subsection 112(1)(c), it is clear that the question of whether Sentes was disentitled to length of service compensation is based in part on evidence that was not submitted to the Director at the time the Determination was made although it was available. The Tribunal has taken a relatively strict view of attempts to submit additional evidence with an appeal. As well, the argument invoking Section 65 of the *Act* was not raised during the complaint process. As stated earlier, the Tribunal has taken a relatively strict approach to new evidence and new arguments.

25. Nevertheless, the Tribunal has some discretion in allowing new evidence and hearing new arguments in an appeal. I have decided to exercise that discretion and accept the evidence and argument relating to Section 65. I do so for two main reasons. First, the evidence goes to an issue that was only included in the complaint process at the complaint hearing and event though Urban was prepared to deal with it without an adjournment of the complaint hearing, Mr. and Mrs. Velecky may not have appreciated the potential for the application of Section 65 to Sentes. This reason reflects that principles of fairness and reasonableness are included in the purposes and objectives of the *Act*. Secondly, the statutory purposes of efficiency and finality are better achieved by considering the issue at this stage.

26. Returning to the grounds of appeal.

Error in Law

1. Does Section 63 apply to Sentes?

27. Urban says the Director erred in failing to apply subsection 65(1)(e) and finding Sentes was not entitled to length of service compensation. That provision reads:

> *65. (1) Sections 63 and 64 do not apply to an employee*
>
> *. . .*
>
> *(e) employed at one or more construction sites by an employer whose principal business is construction, . . .*

28. Logically, to bring Sentes within the above exclusion, Urban must show he was employed at a construction site and that Urban's principal business is construction.

29. The affidavit sworn by Mr. Velecky contains the following assertions of fact supporting this part of the appeal:

> 2. Urban Sawing & Grooving Company Ltd. has been in business for 29 years. There are two components to the business. One component is involved in concrete coring and testing, primarily on new construction projects.
>
> 3. The other aspect of the business involves service connections, primarily for new construction or renovations. In this aspect of the business, the Company makes it possible to connect building services as part of new construction or renovations.
>
> 4. The service work requires cutting of concrete or tarmac roadways, trenching to the services where the connection is required, and providing all the necessary shoring and trenching equipment. Once the work is complete, the trenches are filled and the roadway is re-built. Our work is mainly cutting the roadway for access by the service crews.
>
> 5. The Complainant, Jerry A. Sentes . . . was employed in the service side of the Appellant's business. . . .
>
> 6. The Appellant has ongoing contracts with the City of Vancouver and Terasen Gas among other clients. There is work from these clients available almost every day.

30. Urban says those facts establish their business and the services they perform are firmly rooted in and directed toward the construction industry.

31. In response, the Director says the assertions of fact made in the affidavit are, in some respects, inconsistent with the evidence provided by Mr. Velecky at the complaint hearing and, in other respects, is just new evidence which could have been provided during the investigation. The Director says, in any event, the principal business of Urban is not construction. The Director says Urban is a servicing company.

32. I do not need to address whether the assertions made in the affidavit are inconsistent. As indicated above, the Tribunal is not given the authority to consider appeals based on alleged errors in findings of fact made in a Determination, unless those findings amount to an error of law or an error on a question of law: see *Britco Structures Ltd.*, BC EST #D260/03. Urban might quarrel with the findings and conclusions of fact made by the Director, but Urban has not shown those findings and conclusions amount to an error of law or an error on a question of law. As a result, this appeal will be governed by the findings and conclusions of fact made in the Determination. The Determination does not indicate, however, there was any examination of whether Urban's principal business is construction.

33. Construction, as defined in the *Act* means, *"the construction, renovation, repair or demolition of property or the alteration or improvement of land"*. In *E. Nixon Ltd.*, BC EST #D573/97, the Tribunal made the following comment concerning that definition:

> The definition of construction in the *Act* is comprehensive. Such a broad definition raises certain difficulties, not the least of which is its limits. Technically, one could include in the definition such activities as minor household repairs and gardening. In the context of the *Act*, this is hardly

> appropriate. The *Act* is intended to have a general application to employees in the province. Provisions of the *Act* that allow for exceptions to the application of basic standards of compensation and conditions of employment are strictly construed.

34. In this case, Urban says Sentes was engaged in construction. This assertion is based on the submission that Urban's business is in the construction industry. Those assertions are quite circular and entirely unhelpful unless placed in a factual context. There is limited factual content provided by Urban with the appeal.

35. In the Determination, Urban is described as providing a concrete and asphalt cutting service for their clients. Only the City of Vancouver and Terasen Gas are identified as Urban's clients. The affidavit of Mr. Velecky indicates Urban also performs concrete coring and testing, an activity which Urban submits is in the construction industry. The BC Labour Relations Board decision *R.M. Hardy & Associates Ltd.*, BCLRB No. 41/77; [1977] 2 Can LRBR 357, is cited as authority for that submission. There is no evidence of the scope of this aspect of the business relative to the other aspect of the business, which Mr. Velecky says "involves service connections", a function described in paragraph 4 of Mr. Velecky's affidavit. Based on the Determination and the record, the "service connections" are residential and commercial water and sewer connections done by the City of Vancouver and natural gas connections made by Terasen Gas. Mr. Velecky says Urban's service work "is mainly cutting the roadway for access by the service crews".

36. I am not persuaded on the available evidence that the principle business of Urban is construction. While Urban has asserted its business is in the construction industry, there is no analysis in the appeal submission to indicate why that assertion should be accepted. The facts, including the affidavit of Mr. Velecky, show that Urban cuts pavement and concrete for the City of Vancouver water and sewer operations and for Terasen Gas. The record, which includes daily logs of Sentes' activities for the City of Vancouver over a period of 4 ½ months, from April 1 to August 16, 2004, indicates that Urban's work, and by extension Sentes' work, consists of receiving information from the City of Vancouver showing the location where cutting is required, a description of the material being cut - asphalt or concrete - and the "quantity" (length) of the required cut or receiving a dispatch from Terasen Gas to cut pavement and/or concrete. The information relating to work performed for the City of Vancouver shows that Sentes could attend up to a dozen locations a day and typically spend less than an hour at each of those locations doing his work. There is no indication in the material that Urban, or Sentes, was involved in any activity other than asphalt and/or concrete cutting at any of these locations or even that City of Vancouver crews were at those locations performing any work while Urban was present. In this respect I note that the purpose of cutting the asphalt and concrete is to provide access through roadways and curbs on public property or rights of way for the service crews of the City of Vancouver and Terasen Gas. As Mr. Velecky described the service work, there would be no other work done until the cutting was done. Once again, the material strongly suggests that Urban would move to another location once the required cutting was done and would not participate in work done by the service crew. In the *E. Nixon Ltd.* decision, the Tribunal indicated the reference to "*construction sites*" in Section 65 evoked the typical notion of a construction project involving the erection of a single permanent structure at a fixed location. As with the circumstances in the *E. Nixon Ltd.* decision, and without deciding if the location of the cut ever becomes a "construction site" once the activities of the City of Vancouver or Terasen Gas crews begin, it does not appear there is any construction taking place when Urban performs its cutting service at the assigned location.

37. It is difficult to see how the asphalt and concrete cutting being done by Urban for the City of Vancouver and Terasen Gas fits into the definition of "construction" in the *Act*. No attempt has been made by Urban to analyze the work against the definition, but on its face the work cannot be considered to be included in generally held notions of what is *"the construction, renovation, repair or demolition of property"* or *"the alteration or improvement of land"*. What must also be considered is that the exception in Section 65(1)(e) applies where the employer's *"principal business is construction"*, not simply where the employer is in a business related to construction.

38. Urban has not shown Sentes is a employee described in Section 65(1)(e) and this part of the appeal is dismissed

2. Was Sentes' employment terminated by Urban?

39. Having concluded that Section 63 of the *Act* applies to Sentes, Urban was liable to pay length of service compensation, unless that liability was deemed to have been discharged by one of the circumstances described in subsection 63(3), which says:

> *63. (3) The liability is deemed to be discharged if the employee*
>
> *(a) is given written notice of termination as follows:*
>
> *(i) one week's notice after 3 consecutive months of employment*
>
> *(ii) 2 weeks' notice after 12 consecutive months of employment*
>
> *(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year to a maximum of 8 weeks' notice.*
>
> *(b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or*
>
> *(c) terminates the employment, retires from employment, or is dismissed with just cause.*

40. Urban argued at the complaint hearing that Sentes had quit. The Director rejected this argument and found Sentes' employment had been terminated by Urban based on events occurring on August 16 and 17, which are summarized in the Determination. Urban seeks to alter that finding in this appeal.

41. Urban argues this part of the appeal as though the termination was a "constructive dismissal" as that term is used at common law. The Tribunal has said however, in *Ernest J. Hillicker*, BC EST #D338/97 (Reconsideration of BC EST #D357/96), that the common law of constructive dismissal is not replicated in the *Act*. The view expressed in the original *Hillicker* decision, and relied on by Urban, that the "condition altered" must be a fundamental term of the employment contract did not survive the reconsideration, where it was stated:

> In my opinion, the adjudicator has erred in identifying and defining the elements of Section 66 of the *Act*. The term "conditions of employment" is defined in Section 1 of the *Act*:
>
> ***"conditions of employment"*** *means all matters and circumstances that in any way affect the employment relationship of employers and employees; . . .*

> If the above definition is applicable to Section 66 of the *Act*, it is apparent the term "condition" could not be interpreted to be a "fundamental" contractual term. In the context of the definition given to "conditions of employment" in Section 1, it is "all" matters and circumstances that would constitute "conditions", not only those that are "fundamental".

42. The question asked when considering Section 66 is whether there has the been a sufficiently serious unilateral alteration of the employment relationship that the employee and/or Director is justified in treating the relationship as ended. Accordingly, Urban's argument that the alterations were not to conditions which were fundamental to the employment contract is misplaced.

43. Nothing in Urban's argument persuades me the Director made any error in law in finding, on a reasoned objective analysis, that a substantial alteration of a condition of Sentes' employment occurred that justified treating the relationship as ended.

44. This ground of appeal fails.

Breach of Principles of Natural Justice

45. Urban says the Director denied them a fair hearing by considering Sentes' claim for length of service compensation when such a claim had not been raised with the Director in a formal manner or delivered to Urban.

46. The claim for length of service compensation was raised at the complaint hearing. Urban indicated they were unaware of this claim and were offered an opportunity by the Director to have the complaint hearing adjourned and rescheduled to a later date. Urban did not consider an adjournment was necessary and chose to deal with that part of the claim in the complaint hearing. Urban argues the Director failed to provide them with a reasonable opportunity to respond the claim. This argument is based on there being no "particulars" of or written claim for length of service compensation when the complaint hearing commenced.

47. This argument is grounded on an overly legalistic and technical view of the requirements of the *Act* for making a claim and a complete answer to it is found in the following excerpt from the Tribunal's decision *Bruce Cownden and Ronalyn Cownden operating as 486425 B.C. Ltd.*, BC EST #D069/01:

> In order to present a claim for filing with the Director, all the claimant need do is identify, in writing, that the complaint is a complaint under the *Act*. There is no requirement for the employee to particularize the details of the claim made. It is not essential that the complainant set forth the complaint with precision. The information must be sufficient to disclose an alleged violation of the *Act*. If those minimum requirements are set out, the Delegate will investigate the complaint. If, during the course of an investigation of a compensation for length of service complaint, the Delegate discovers an overtime complaint, I see no restrictions in the *Act* on the jurisdiction of the Delegate to investigate the complaint provided there is some disclosure that the "complaint is an hours of work or overtime complaint".
>
> The Director is empowered to investigate as long as the complaint is in writing under the *Act*.

48. Nor would the approach suggested by Urban be consistent with the statutory purpose of ensuring employees receive at least basic standards of compensation and conditions of employment and with the principles expressed in *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th)

336 (B.C.C.A.), *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Health Labour Relations Association of B.C. v. Prins*, (1982) 40 B.C.L.R. 313, 82 C.L.L.C. 14,215, 140 D.L.R. (3d) 744. In *J.C. Creations operating as Heavenly Bodies Sport*, BC EST #RD317/03, the Tribunal rejected taking an overly legalistic and technical approach to an appeal in favour of one considered substance over form.

49. In this case, there was a complaint in writing that was filed within the time required under the *Act*. Urban was put on notice of the claim for length of service compensation and was given an opportunity to respond to it. While the amount of notice of the claim was short, it was apparently sufficient notice, as Mr. and Mrs. Velecky passed on an opportunity for an adjournment of the complaint hearing in order to consider their position and indicated to the Director they would address it at the complaint hearing. This part of the appeal is really about Urban seeking to have Mr. and Mrs. Velecky relieved of that decision and provided with another opportunity to address the length of service compensation claim. There is no reason that should be allowed.

50. This part of the appeal is dismissed.

Section 83

51. Urban argues that the Director's finding of a contravention of Section 83 of the *Act* cannot stand because there was no "constructive dismissal". Section 83 says:

> *83. (1) An employer must not*
>
> *(a) refuse to employ or refuse to continue to employ,*
>
> *(b) threaten to dismiss or otherwise threaten a person,*
>
> *(c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or*
>
> *(d) intimidate or coerce or impose a monetary or other penalty against a person,*
>
> *because a complaint or investigation may or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.*

52. There is no reference in that section to "constructive dismissal" and my comments on that aspect of the appeal have been made above. The finding of a contravention of Section 83 was based on the evidence that Mr. Velecky had threatened Sentes, had taken his cel phone, had told him on August 17 not to come to work and had taken away the company leaving him with no way of getting to work, all because he had delivered a Self Help Kit claiming unlawful deductions by Urban had been made from his wages and that overtime wages were owed.

53. The short answer to this part of the appeal is that Urban has not shown there was error made by the Director in finding a contravention of Section 83 on the evidence.

ORDER

54. Pursuant to Section 115 of the *Act*, I order the Determination dated April 1, 2005 be confirmed in the total amount of $13,113.30, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal