

An appeal

- by -

Autotek Collision Repair (Downtown) 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/63

**DATE OF DECISION:** August 4, 2004

## DECISION

### SUBMISSIONS

Jason Jacubec	Counsel on behalf of Autotek Collision Repair (Downtown) Ltd.
Matt McGuinness	On his own behalf
Pavlos Kaltsidis	On his own behalf
K.J. MacLean	Delegate on behalf of the Director

### OVERVIEW

This is an appeal by Autotek Collision Repair (Downtown) Ltd. (referred to herein as "Autotek") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination dated March 8, 2004 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.

Autotek operated an auto repair business and employed five employees who subsequently filed complaints with the Director. They alleged that Autotek failed to pay wages, statutory holiday pay, annual vacation pay, compensation for length of service and certain costs that should have been paid by the business.

A delegate of the Director held a hearing on October 31, 2003. The employees attended but no one attended on behalf of the Autotek. The delegate subsequently issued a determination in which he determined that Autotek was liable to pay \$50,465.55 in wages to the five employees together with Five (5) Penalties arising out of the one situation. These penalties totalled \$2,500.00. The total liability imposed was \$52,965.55.

Autotek appeals on several grounds. Firstly Autotek explains why no-one appeared at the hearing. It is submitted that prior to the hearing settlements had been reached with four of the five employees. Autotek alleges that the employees undertook to advise the Director that all their issues had been settled and that a hearing was no longer required in regard to their complaints. It is alleged that they agreed not to attend the hearing. Autotek has provided a copy of a settlement agreement dated September 30, 2003.

Autotek submits that it was only upon receiving the written determination that they realised a hearing had taken place.

Autotek also submits that there should have been no liability for compensation for length of service because the employees either left of their own volition or were offered alternative employment, an issue not addressed in the determination. It is submitted that the fifth employee, Mr. McGuinness quit his job

despite being asked to work and being offered alternative employment. Autotek has provided evidence from the other four employees that McGuiness quit his job.

Autotek has provided evidence that settlements were paid to the employees before the hearing but these amounts were either not disclosed to the delegate or not properly taken into account in calculating wages owing. Autotek claims that Statutory and Vacation pay was included during the course of employment.

## ISSUE

The issue in this case is whether the Appellant has raised established sufficient grounds to warrant the Tribunal varying, cancelling or referring the matter back to the Director.

## ANALYSIS

Without repeating the summary of the facts set out in the overview above it is clear that Autotek was taken by surprise by the determination. It appears that Autotek had reasonable grounds to believe that most of the matters had been settled and that the hearing would not be proceeding.

The Tribunal has previously held in a number of decisions that it is within the intent of the legislation that early settlement be encouraged. Where settlements have been reached and, as in this case, releases signed it is in the public interest and within the intent of the legislation to uphold those settlements: see for example *Lawrence Bellman* EST #RD 003/04 (Reconsideration of EST #D203/03) and previous decisions 611/01; 059/01; 286/99; 032/98; 211/99.

It is also important to analyse the issue around the offer of alternative employment to McGuiness and whether he declined that employment or just declined to return to work when required to do so. There are very clearly serious and significant issues that were not resolved during the hearing of October 31, 2004. Fundamental fairness requires that these issues be addressed in a full and fair process. If the delegate chooses to engage in a hearing process then it is essential that the process complies fully with the principles of natural justice. It is evident that only one party was heard at the hearing and that has resulted in a determination that cannot be sustained.

I am satisfied that the appellant has provided significant and substantial new evidence that should have been presented to the Director's delegate but was not through no fault of the employer. In the interests of fundamental fairness these issues need to be addressed.

While the settlement and releases might well dispose of four of the five claims I have decided not to cancel those determinations to allow the delegate to fully consider the circumstances surrounding the settlement and the releases. In regard to the fifth employee there are a number of issues that have been raised that require further investigation.

While it is not within my authority to require a new hearing it certainly seems to me that a new hearing involving all of the parties, with full opportunity to present evidence, call witnesses and to cross examine witnesses would most likely achieve the fairest assessment of this case.

I also understand that it is the policy of the Director to not impose separate penalties for one set of circumstances and it may be that the penalties in this case should also be reviewed.

**ORDER**

I order, under section 115 of the *Act*, that the Determination herein dated March 8, 2004 is referred back to the Director.

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**John M. Orr**  
**Member**  
**Employment Standards Tribunal**