Employment Standards TRIBUNAL

An appeal

- by -

Triple S Transmission Inc. o/a Superior Transmissions
(the “Employer”)

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/53

DATE OF DECISION: April 28, 2003

DECISION

INTRODUCTION

This is an appeal filed by Triple S Transmissions Inc. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on February 6th, 2003 (the "Determination").

The Director's delegate determined, following an oral hearing held on January 10th, 2003, that the Employer owed its former employee, Mr. Robert Marlikowski ("Marlikowski"), the sum of $930.43 on account of unpaid vacation pay ($904.80) and section 88 interest ($25.63).

By way of a letter dated March 24th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). I might add that none of the parties--neither the Employer, Mr. Marlikowski nor the delegate--requested that the Tribunal hold an oral hearing in this matter.

THE APPEAL

The Employer operates an automobile transmission repair facility under the trade name "Superior Transmissions". Mr. Marlikowski was employed by the Employer for over 3 years and, when his employment ended, held the title of "Head Technician and Shop Foreman".

As set out in the delegate's written reasons, the Employer acknowledged that if Marlikowski was entitled to vacation pay, the amount owed was $904.80. Among other arguments, the Employer asserted that it did not owe Marlikowski any vacation pay since Marlikowski owed the Employer $1,000 for some tires he purchased through the Employer. The delegate's reasons--rejecting the Employer's argument on this latter point--are reproduced below:

> Both parties agree there is no dispute that Marlikowski owes [the Employer] for the tires purchased. There is a dispute in the amount that is owed.
>
> Under section 21(1) of the Act an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> [The Employer] did not produce a written assignment of wages from Marlikowski. Section 22(4) states that an employer may honour an employee's written assignment of wages to meet a credit obligation.
>
> In conclusion, I find from the evidence presented, that [the Employer] is in contravention of Section 22(4) of the Act.

With respect to this latter finding of the delegate, so far as I can tell, there is no evidence that the Employer contravened section 22(4) by *failing* to deduct monies from wages in accordance with a lawful

assignment. The Employer's position is that it is entitled to deduct certain monies from wages otherwise due to Mr. Marlikowski by virtue of an assignment given by Mr. Marlikowski in favour of the Employer.

The Employer asks that the Tribunal vary the Determination under section 115(1) of the *Act* on the ground that the Director failed to observe the principles of natural justice in making the Determination [section 112(1)(b) of the *Act*]. Specifically, the Employer says:

> In the Reasons for the Determination it is stated that [the Employer] did not produce a written assignment of wages from Mr. Marlikowski. We attach herewith a copy of an assignment signed by Mr. Marlikowski dated April 21, 2002 in which it states that [the Employer] has permission to deduct purchases from his pay.

In light of the foregoing, the Employer asserts that in accordance with "section 22(4) we would like to withhold holiday pay to put towards the debt of Mr. Marlikowski for the tire purchase".

APPEAL PROCEDURE: GROUNDS OF APPEAL

At this juncture, I wish to make some preliminary comments regarding the general matter of identifying particular grounds for appeal. Section 112, as amended, now directs appellants to specify one or more of three statutory grounds of appeal. This amended appeal provision, which came into force on November 30th, 2002, is to be contrasted with the former section 112 which stated only that a determination could be appealed to the Tribunal. It was left to the Tribunal to develop its own jurisprudence regarding what sort of circumstances would constitute valid grounds for appeal--for example, misinterpretation of the *Act*, failure to comply with the rules of natural justice, improper findings of fact, etc.

Following the introduction of statutory grounds of appeal, the Tribunal developed a 2-page "Appeal Form" which identifies the statutory grounds in the form of a "checklist" which tracks the language of section 112(1) of the *Act;* elsewhere on the form, the appellant is requested to provide further details about its grounds of appeal. In preparing the form, an appellant need only "check off" one or more of the boxes that the appellant believes describes the basis for their appeal. And therein lies the rub.

While some appellants are represented by legal counsel or otherwise obtain legal advice prior to filing their appeal, the vast majority of appellants do not have any formal legal training and, in essence, act as their own counsel. For example, Tribunal statistics indicate that over the past two years approximately 28% of all appellants were represented by legal counsel and only about 18% of all parties had legal representation.

Although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.

The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making

that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

Undoubtedly, there will be cases where, even on a most liberal reading of the appellant's material, no proper ground of appeal is disclosed. In such cases, the Tribunal may well summarily dismiss the appeal under one or more of subsections 114(1)(a), (b) or (c) of the *Act.* However, when considering a summary dismissal, I am of the view that any reasonable doubt about whether the Tribunal's jurisdiction has been properly invoked ought to be resolved in favour of the appellant.

With these comments in mind, I shall now turn to the Employer's ground of appeal.

THE EMPLOYER'S GROUND OF APPEAL

Although the Employer, in its appeal form, characterized its ground of appeal as a denial of natural justice, in my view, the Employer's position is more accurately characterized as an assertion that the Director's delegate erred in law [section 112(1)(a)] or perhaps that it has "new evidence" under section 112(1)(c).

In essence, the Employer says that it now has evidence of the wage assignment and that the delegate issued the Determination on a faulty factual premise, namely, that there was no such assignment in place.

FINDINGS AND ANALYSIS

Relevant provisions of the Act

This appeal concerns, in part, the proper interpretation of sections 21 to 23 of the *Act:*

> **Deductions**
>
> 21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
>
> **Assignments**
>
> 22. (1) An employer must honour an employee's written assignment of wages
>
> (a) to a trade union in accordance with the Labour Relations Code,
>
> (b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the Income Tax Act (Canada),

(c) to a person to whom the employee is required under a maintenance order, as defined in the Family Maintenance Enforcement Act, to pay maintenance,

(d) to an insurance company for insurance or medical or dental coverage, and

(e) for a purpose authorized under subsection (2).

(2) The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit.

(3) An employer must honour an assignment of wages authorized by a collective agreement.

(4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

Employer's duty to make assigned payments

23. An employer who deducts an amount from an employee's wages under an assignment of wages must pay the amount

(a) according to the terms of that assignment, or

(b) within one month after the date of the deduction,

whichever is sooner.

The Employer's position

The Employer appended the following document, purportedly signed by Mr. Marlikowski, to its appeal form:

> EMPLOYEE NAME: "Robert Marlikowski"
>
> I HEREBY GIVE SUPERIOR TANSMISSIONS PERMISSION TO DEDUCT FROM MY PAYCHEQUE ANY AMOUNTS PURCHASED BY MYSELF THROUGH THE COMPANY'S SUPPLIERS
>
> "Robert Marlikowski" — "Apr. 21.02"
> EMPLOYEE SIGNATURE — DATE

Mr. Marlikowski's name is hand-printed at the top of the form and what appears to be his signature appears at the bottom of the form. The Employer submits that the above form complies with section 22(4) of the *Act* and that it constitutes a written assignment to meet a credit obligation, namely, the debt incurred with respect to Marlikowski's tire purchase.

Mr. Marlikowski's position

Mr. Marlikowski, in his February 26th, 2003 submission to the Tribunal asserts that he had never seen the purported assignment until February 21st, 2003 when it was provided to him during the course of these proceedings. Further, he says that the signature on the document is not his and that the document is a forgery. In that regard, Mr. Marlikowski submitted various signed documents and asks that the Tribunal compare the signatures and then conclude, based on the comparison, that the signature on the assignment is not, in fact, Mr. Marlikowski's signature.

Findings

With respect to Mr. Marlikowski's allegation of forgery, in the absence of any expert evidence with respect to that matter I am unable to determine whether the assignment is a *bona fide* document. However, in light of the view that I take with respect to the merits of the Employer's appeal, the validity of the assignment is simply not relevant.

As noted above, the Employer asserted that the Director's delegate failed to observe the principles of natural justice. This is not a case, however, where the Employer tendered the assignment at the hearing before the delegate and, for some reason, the delegate ruled the document inadmissible. As is conceded by all parties, the assignment was *not* tendered at the hearing and, accordingly, the delegate quite properly did not give any effect to a document that was not even produced at the hearing.

It is apparent that the document is "new evidence" in the sense that it was not tendered at the hearing before the delegate. However, section 112(1)(c) of the *Act* imposes an additional criterion, namely, that the evidence was not "available" at the time the determination was being made. If the Employer's record-keeping system failed it (or it simply carried out a sloppy search for the document)--and, thus, the document could not be produced at the hearing--it does not follow that the document was "not available" in a legal sense.

The foregoing findings, standing alone, are sufficient to dispose of this appeal. However, even if the assignment was properly before me, I would still conclude that this appeal must fail.

As I understand the situation, the Employer claims that it is entitled to "setoff" the sum of $1,000 against its obligation to pay Mr. Marlikowski vacation pay under section 58 of the *Act.* The Employer submitted an invoice in the amount of $1,064.55 from an Abbotsford "Fountain Tire" dealer. The invoice was issued to the Employer on February 6th, 2002 and represents the cost of five tires and wheel balancing for "MR. ROBS TRUCK".

Even if one accepts that this latter invoice represents a personal purchase by Mr. Marlikowski (through the Employer's account)--and this does not appear to be in dispute--it does not follow that a "permission to deduct" executed over two months later (and which does not identify the February 6th tire purchase in any fashion) amounts to an assignment to satisfy a "credit obligation" within section 22(4) of the *Act.* Further, it would appear, assuming the validity of the document, that the Employer did not treat it as such since Mr. Marlikowski's employment continued until May 31st, 2002 and during the period from February 6th to May 31st the Employer never purported to rely on the assignment and deduct the amount in question from Mr. Marlikowski's wages. Pursuant to section 23 of the *Act*, the employer must deduct and pay the amount assigned no later than "within one month after the date of the deduction".

There is no documentary evidence before me (note the requirement of a "written assignment") of any "credit obligation" arising as a result of the February 6th invoice. Finally, on its face, the assignment in question--again, assuming its validity--only authorizes a wage deduction with respect to purchases made after the date of the document (April 21st, 2002). If the assignment was intended to address existing liabilities, one would have thought that such amounts would have been specifically identified. On the face of the assignment, one cannot determine the precise monetary value of the authorized deduction; in other words, one cannot determine the monetary value of the "credit obligation" in question. In my view, the *Act* demands much greater specificity than is provided in the document before me.

Finally, I should note that my decision does not, in any fashion, foreclose the Employer from filing a claim for reimbursement of any amount that is lawfully owed by Mr. Marlikowski. However, such a claim must be filed in the Provincial Court--Small Claims Division. The Employer cannot rely on a unilateral "self-help" remedy in the form of a "setoff and deduction" against wages otherwise owed to Mr. Marlikowski.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued in the amount of **$930.43** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal