Employment Standards TRIBUNAL

An appeal

- by -

Westminster Lift Truck & Services Ltd.
("WLT&S")

- 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: Alison H. Narod

FILE No.: 2004A/117

DATE OF DECISION: September 17, 2004

DECISION

OVERVIEW

This decision relates to an appeal pursuant to Section 112 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*Act*") brought by Westminster Lift Truck & Services Ltd. ("WLT&S"), of a Determination issued by a delegate of the Director of Employment Standards (the "Delegate") on May 28, 2004. The Determination concluded that WLT&S contravened various sections of the *Act* when it failed to pay its employee, Dan R. Beaverstock ("Beaverstock") annual vacation pay, statutory holiday pay, overtime, and compensation for length of service. As a result, WLT&S was ordered to pay $22,300.06 to Beaverstock and to pay a penalty of $500.00.

In the appeal, WLT&S submits that the Delegate erred in law and failed to observe principles of natural justice in concluding that Beaverstock was its employee, in finding his termination was not for just cause and in calculating the amount of wages owed. With respect to the latter point, it says that the wages calculated by the Delegate included monies which are not properly considered wages.

The Tribunal has reviewed the submissions and the extensive materials on file and has decided that an oral hearing is not necessary in order to decide this appeal.

ISSUES

The issues in this appeal are whether the Director erred in law or failed to observe principles of natural justice in determining that Beaverstock was an employee of WLT&S and not an independent contractor, that Beaverstock was terminated by WLT&S without cause, and that the wages owing were as calculated by the Delegate.

FACTS

The following is a non-exhaustive description of non-disputed facts.

Beaverstock, who describes himself in his complaint as a "dependent contractor", worked on a full-time basis (40 hours a week) for WLT&S from June 5, 1986 to September 11, 2003.

Beaverstock entered what is described as a "contract agreement" with WLT&S on June 5, 1996. According to that document, Beaverstock was to be part of WLT&S' "maintenance team". WLT&S undertook to handle all phone calls, dispatching, invoicing and accounts receivable relating to his services. Beaverstock agreed to represent himself as an employee of WLT&S. He would be paid at a rate of $40 an hour with overtime to be as agreed. His work would be performed on the basis of "an hour invoiced equals hours paid". He agreed to make up labour losses. He was permitted to bill 2.5% for shop supplies. All customers were to be the exclusive property of WLT&S. It was agreed that "all working expenses to be paid by Dan Beaverstock including insurance, W.C.B and all & any other related expenses."

Beaverstock performed the work of a mechanic; he repaired and installed dock boards in warehouses and repaired forklifts. WLT&S dispatched him to various customer locations. He used his own truck and tools. His truck carried company signage and he wore overalls with the company name on them.

Beaverstock supplied his own tools, including a compressor and welder. Additionally, he supplied his own cell phone for receiving dispatch calls. He would either bring the parts or a WLT&S employee would deliver them. If he worked on a job that required heavy lifting, WLT&S would send a forklift to perform that task. If he required assistance, WLT&S would pay for or supply helpers to assist. After the first two years of the relationship, the helpers supplied were WLT&S employees.

Beaverstock regularly submitted invoices to WLT&S listing hours worked and amounts to be paid. All of his work was recorded on WLT&S work orders. Beaverstock was required to work around WLT&S' hours of operation. He was required to let the dispatcher know when he would be away for holidays.

The parties agreed that Beaverstock would bill a set percentage of his rate to cover the costs of parts and supplies used in the course of performing his work. He was responsible for such daily supplies as bolts, tape, zap ties, penetrating oil, etc. His hourly rate, which started at $40 and was eventually increased to $43.50, included 3% to cover these items. In addition, he charged WLT&S 7% for GST on each invoice. Beaverstock obtained his own WCB coverage.

Beaverstock was not paid statutory holiday pay or vacation pay in accordance with the *Act*.

Beaverstock moonlighted in his spare time. Among other things, he would buy broken forklifts from time to time, rebuild and sell them.

Beaverstock's relationship with WLT&S terminated on September 11, 2003. He was not provided with prior warning or notice of termination. Nor was he provided with compensation for length of service in accordance with the *Act*.

ARGUMENT

(a) WLT&S

The argument of WLT&S can be summarized as follows:

WLT&S says the Delegate erred in law and breached the principles of natural justice in determining that Beaverstock was an employee and not an independent contractor, and in refusing to hear evidence of Beaverstock's prior and subsequent employment, and his attempts to secure other employment while working for WLT&S. WLT&S alleged at the hearing before the Delegate that Beaverstock worked as an independent contractor for four firms, whose names were not mentioned in the Determination. WLT&S argued before the Delegate that CCRA, WCB and GST have all ruled Beaverstock was an independent contractor and that the Delegate was bound by the principle of issue estoppel to follow the determinations of those bodies. It argues on this appeal that the Delegate erred in concluding he was not bound by issue estoppel.

WLT&S says that the Delegate breached the principles of natural justice by ignoring evidence supporting its position that Beaverstock was an independent contractor, such as evidence that he hired another employee and billed WLT&S for the employee on four occasions, that he had a shop at home where he

moonlighted as a mechanic, including doing the same kind of work in his own business that he performed for WLT&S.

WLT&S says the Delegate erred in law in finding, contrary to the contract between WLT&S and Beaverstock, that Beaverstock was entitled to statutory holiday pay and in including working expenses in the calculation of wages (such as insurance, fuel, cell phone, boots, tools, home shop and property etc.).

WLT&S says that the Delegate erred in law and breached the principles of natural justice in concluding that WLT&S provided inconsistent reasons for dismissal. WLT&S says that the reasons for dismissal comprised an accumulation of many kinds of misconduct, which included threats of physical violence to one of WLT&S' principals (made to another of its principals), a threat to quit WLT&S in order to harm the principal, theft by over-billing travel time and continual verbal abuse. Additionally, WLT&S says that Beaverstock provided notice to quit and therefore did quit.

WLT&S says that the Delegate breached the principles of natural justice by preventing it from giving evidence about Beaverstock's wage rate and cross-examining Beaverstock about it. It says that the wage rate calculations are based on a contract that stipulated the rate was to cover working expenses, insurance, etc. It says the Delegate prevented WLT&S' witness from testifying as to the rate and says no attempt was made to ascertain the expenses included in the wage rate stipulated in the contract. WLT&S also says that an employee would be paid $20.25 per hour to perform the same work as Beaverstock.

(b) Beaverstock

In response, Beaverstock says that he was indeed an employee and not an independent contractor. Prior or subsequent employment is not relevant. What is relevant is his seven years of employment with WLT&S and his dismissal from that employment. He says his income tax filings, which he declines to supply, would support the fact that 99% of his income came from WLT&S. He denies that he worked as an independent contractor for four different firms while employed by WLT&S.

Beaverstock acknowledges that he employed a helper in his first two years at WLT&S, but says that after that time WLT&S supplied its own staff as helpers. He says that he worked full time, 40 hours a week for WLT&S. After hours, he did some work for friends and neighbours in his garage at home. Additionally, he worked on two forklifts at home during his seven years of employment with WLT&S. Work done at home was on his own time. Beaverstock says that if he is not an employee, he is a dependent contractor.

Beaverstock says that his contract states he will pay his working expenses and will represent himself as a WLT&S employee.

Beaverstock says that the reasons given for dismissal were fabricated and denies WLT&S' allegations of misconduct. He says WLT&S' principal could not be worried about violence, because Beaverstock had recently had a heart attack. In response to the allegation that the work he did was not normally done by employees, he says his timecards show that 80% or more of his work was on forklifts. He denies that over-billing of travel time was a serious concern and he denies that he verbally abused anyone. He says that he would not have worked for WLT&S for $20.25 an hour plus expenses, as he could have found better remuneration elsewhere.

Beaverstock contends that he was employed on a full time basis for WLT&S. He opposes examination of his tax records, saying that it is an invasion of privacy and will not assist in this case. He says the wage rate was set by WLT&S' principal and should remain at that rate.

Beaverstock says that WLT&S' principal had no complaints about him for the first seven years of his employment. He was dismissed with no warning or real reason and feels that he has been badly treated in this regard.

(c) The Director

The Director makes brief submissions in response to the allegations that he erred in law and failed to observe the principles of natural justice in making the Determination. In response to the allegation that he ought to be bound by the principle of issue estoppel, the Delegate says that he told the parties that the determination of who is an employee within the meaning of the *Act* is based on various tests that have been developed by the courts, the Employment Standards Branch, and the Employment Standards Tribunal. Additionally, he says that a common misunderstanding is that one factor establishes an independent contractor relationship. Determinations made by federal ministries is taken into consideration, but is not determinative.

With respect to the allegations that the Delegate failed to observe the principles of natural justice, the Delegate says that prior to the hearing, both parties were asked how many witnesses they would be bringing forward and the relevance of the testimony they would be presenting. The Delegate did not tell WLT&S that any of its witnesses were not allowed to testify. WLT&S made its own decision to dismiss any of its witnesses. It presented four witnesses who gave testimony at the hearing. Additionally, before the hearing started, the Delegate read out a prepared statement regarding the process that would be followed in the hearing.

The Delegate asks that WLT&S' appeal be dismissed and the Determination confirmed.

LAW

The burden is on the Appellant, WLT&S, to persuade the Tribunal that the Determination ought to be set aside on the basis of one or more of the statutory grounds set out in subsection 112(1) of the *Act*. Subsection 112(1) states:

> 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.

Error of law

In determining whether there has been an error of law, the British Columbia Court of Appeal, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12-Coquitlam)* (1998), 62 B.C.L.R. (3d) 354, indicated that the following elements will be considered:

- a misinterpretation or misapplication of a section of the *Act*;
- a misapplication of an applicable principle of general law;
- acting without any evidence;
- acting on a view of the fact which could not reasonably be entertained; and
- exercising discretion in a fashion that is wrong in principle.

Natural Justice

In *CCD Corporate and Career Development Inc.*, [2004] B.C.E.S.T.D. No. 68, I said the following about natural justice at paragraph 23:

> The law takes a flexible approach to what constitutes a form of hearing sufficient to meet the requirements of natural justice. The question as to what is required depends on the facts and circumstances of each case and the subject matter under consideration (*Knight* v. *Indianhead School Division (No. 19)* [1990] 1 S.C.R. 653). For instance, the rules of natural justice do not require that there always be an oral or in-person hearing. An exchange of written materials may suffice (*Mobile Oil Canada Ltd.* v. *Canada Newfoundland Offshore Petroleum Board* (1998), 21 Admin. L.R. (2d) 248 (S.C.C.)). What is required is that the parties must know the case being made against them and be given an opportunity to reply. They must be given a fair opportunity to correct or controvert any relevant or prejudicial statement (*Emery* v. *Alberta (Workers' Compensation Board, Appeals Commission)*, 2000 ABQB 704).

REASONS

(1) Employee versus independent contractor

I have reviewed the Delegate's analysis in the Determination. I can find no error in his determination of what is the applicable law. He correctly noted and considered the definition of employee in s. 1 of the *Act*. He reviewed and found assistance in some of the traditional common law tests used for distinguishing between employees and independent contractors. The Delegate's Decision is based on an application of the statutory provisions and traditional common law tests to his findings of fact. I find no error of law in the Delegate's application of law to the facts as he found them.

Findings of fact are not reviewable by a Tribunal on appeal except in very limited circumstances, where they also amount to an error of law.

I conclude that I am not bound by the principle of issue estoppel to conclude that Beaverstock is an independent contractor because he may have been found to be an independent contractor by CCRA for the purpose of income tax or GST or by the Workers' Compensation Board for the purposes of the *Workers' Compensation Act* ("*WCA*"). No determinations made by those agencies about Beaverstock have been placed before me. The enactments governing the CCRA and the WCB) have different objects

and purposes. The fact that the CCRA or the WCB may treat a person as an employee or an independent contractor for the purposes of their governing enactments is not determinative of whether or not that same person is an employee for the purposes of the *Act*.

In the absence of the determinations themselves, I cannot conclude whether or not the same issues, evidence and considerations were canvassed in those cases, whether or not the parties to this appeal had the opportunity to make submissions in those matters and whether or not those determinations should have any determinative relevance to the instant case. (I note, however, that the determination of whether or not a person is covered by the *Workers' Compensation Act* turns on whether or not that person is a "worker" within the meaning of the statutory definition in the *WCA*. The statutory definition of "worker" is broad and includes persons who are not traditionally employees at common law. The definition of "worker" is not identical to the definition of "employee" under the *Employment Standards Act*.)

The question raised by WLT&S' submissions is whether the facts on which it now relies should result in a conclusion that the Delegate's findings of fact on which he based his conclusion amounted to an error in law. In order to succeed, it is my view that WLT&S must demonstrate that there was either no evidence at all to support the findings of fact made by the Delegate or that the view of the facts taken by the Delegate could not be reasonably entertained based on the evidence before him (see *Gemex, supra* and *Virtu@ally Canadian Inc. (c.o.b. Virtually Canadian Inc.)* (2004), B.C.E.S.T.D. No. 87, at paragraph 23).

WLT&S is correct in its submission that there is some evidence in this case supportive of a conclusion that Beaverstock was an independent contractor. There was, however, a substantial amount of evidence indicating that he was an "employee". The Delegate found "on the balance of probabilities" that Beaverstock was an employee and not an independent contractor. There was evidence to support the Delegate's conclusion in this regard. Moreover, the Delegate's conclusion on the basis of this evidence that Beaverstock was an employee was one that could be reasonably entertained.

As noted above, WLT&S challenges the Delegate's findings of fact, because he did not consider evidence of Beaverstock's prior or subsequent employment. In my view, the evidence of prior and subsequent employment is not determinative of whether or not Beaverstock was an employee or an independent contractor during the course of his engagement with WLT&S. A person may be an independent contractor in relation to other parties, but be an employee in relation to his primary employment.

As noted, WLT&S says Beaverstock hired another employee and charged it for that employee's services on four occasions. Beaverstock says that occurred in the first two years of his seven year engagement. Although that evidence may tend towards indicating that Beaverstock was an independent contractor, it must be considered in light of the whole of the evidence and, in my view, does not affect the fact that the preponderance of the evidence supported the finding that Beaverstock was an employee.

As noted, WLT&S says that Beaverstock conducted a business at his home outside of work hours. The Delegate considered, assessed and weighed this evidence in reaching his conclusion that, on a balance of probabilities, Beaverstock was an employee and not an independent contractor. This was a view of the facts that he was entitled to reasonably entertain based on the evidence before him.

As noted, WLT&S relies on the fact that Beaverstock paid some of his own working expenses out of monies paid to him by WLT&S and this was in accordance with the contract between them. The fact that a person pays employment expenses is a matter to be considered, but is not determinative. If it indicates that he is carrying on an independent business, it may point in the direction of independent contractor

status. However, it may also indicate that an employee is paying some of the business expenses of the business of his employer. The Delegate considered the fact that Beaverstock paid for certain expenses, such as insurance, WCB and other related expenses, that he owned the truck he used for work and paid for its insurance and that he supplied his own tools. On the evidence before him, he was entitled to take a view of these facts, together with the rest of the facts, as being more indicative of an employee/employer relationship than an independent contractor/principal relationship.

In short, there was evidence to support the findings made by the Delegate. Moreover, the view of the facts taken by the Delegate was one that could be reasonably entertained, based on the evidence before him. I am unable to conclude that the Delegate's findings of fact amounted to an error of law.

With respect to the allegation that the Delegate breached the principle of natural justice in reaching his conclusion that Beaverstock was an employee and not an independent contractor, it is my view that the Delegate did not breach those principles as alleged with respect to the issue of employee status. WLT&S knew the case it had to meet and was provided with an opportunity to make its submissions. The Delegate is entitled to manage the case before him and to decline to hear evidence that is not relevant. The fact that a Delegate does not refer in the Determination to evidence that was before him which one party thinks is relevant does not necessarily mean that it was not considered. Nor does it mean that there was a failure by the Delegate to observe the principles of natural justice.

(2) Termination With or Without Cause

As noted, WLT&S alleges that the Delegate committed an error of law and breached the principles of natural justice in concluding that Beaverstock was dismissed without cause and is entitled to compensation for length of service. In particular, WLT&S submits that the termination was justified by the accumulation of many kinds of misconduct.

The Delegate found that Beaverstock was terminated without just cause. The Delegate found that the employer provided inconsistent testimony and evidence regarding the reasons why Beaverstock was terminated. The Delegate appears to have viewed the conduct for which Beaverstock was dismissed as substandard performance and not the type of conduct justifying summary dismissal without notice for just cause. The Delegate concluded that WLT&S had not satisfied its obligations to Beaverstock in dealing with his substandard performance, such as identifying or instructing him as to how to meet expected performance standards and specifically advising him that continued failure to perform to acceptable standards of performance will result in dismissal.

In my view, the error of law alleged is essentially that the Delegate's findings of fact respecting the reasons given for dismissal amounted to an error of law. In my opinion, there was evidence to support the Delegate's conclusions and the view of the facts taken by the Delegate could reasonably be entertained based on the evidence before him. Moreover, the evidence does not substantiate the allegation that Beaverstock quit. Accordingly, the Delegate did not err in law.

With respect to the alleged breach of natural justice, I find that WLT&S was provided with the opportunity to respond to this issue and availed itself of that opportunity. Accordingly, there was no breach of natural justice as alleged.

(3) Wage Rate

My view of the issue of Beaverstock's wage rate differs from my view of the other issues raised by WLT&S.

The term "wages" is defined in section 1 of the *Act* as follows:

> "Wages" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
>
> (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
>
> (d) money required to be paid in accordance with
>
> (i) a determination, other than costs required to be paid under section 79(1)(f), or
>
> (ii) a settlement agreement or an order of the tribunal, and
>
> (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,
>
> but does not include
>
> (f) gratuities,
>
> (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
>
> (h) allowances or expenses, and
>
> (i) penalties; ...

WLT&S contests the inclusion in the calculation of Beaverstock's wage rate of "all working expenses to be paid by Beaverstock, including insurance, fuel, cell phone, boots, tools, home shop and property, etc." and WCB costs. It says all of this was to be paid out of the hourly rate of $43.50 per hour it paid to Beaverstock. Additionally, WLT&S says that the hourly rate of $43.50 included holiday and vacation pay. Further, WLT&S says that it was prevented from giving evidence and cross-examining Beaverstock about the wage rate and the expenses included in it.

The Delegate noted that the parties disagreed about what was the applicable wage rate. He noted that WLT&S argued that the wage rate was actually $20 to $25 an hour with the balance to pay for Beaverstock's fuel, business and vehicle insurance, parts and supplies, such as bolts, tape, zap ties, rags, penetrating oil, etc. WLT&S' payroll records indicated that Beaverstock's hourly rate was $43.50 per hour plus $1.20 for shop supplies and 7% for GST. The original contract signed by the parties in 1996 recorded, "Rates are $40 per hour, overtime as per agreement". The Delegate went on to find that Beaverstock's rate of pay during his last six months of employment was $43.50 per hour.

There does not appear to be any dispute between WLT&S and Beaverstock that a portion of Beaverstock's wage rate was paid to cover the expenses enumerated by WLT&S. There is no analysis given by the Delegate explaining why he concluded that the wage rate was $43.50 and why he dismissed WLT&S' argument that Beaverstock's rate included expenses.

The Tribunal has confirmed that the term "wages" does not include "expenses". For example, it has concluded that it does not include mileage expenses (*Re Boyko*, [1996] B.C.E.S.T.D. #121), gas expenses (*Glenwood Label & Box Mfg. Ltd.* [1994] B.C.E.S.T.D. No. 75), travel expenses (*Re Visiluk*, [1997] B.C.E.S.T.D. #8, *Re Mitchell* (31 March 1997), B.C.E.S.T. #D145/97), telephone charges (*Re Bateman*, [1997] B.C.E.S.T.D. #438), and vehicle allowances (*Re Aleza West Contracting Ltd.*, [1999] B.C.E.S.T.D. #110).

The Tribunal has held that amounts that fall within the meaning of "expenses" cannot be included as "wages" for the purposes of calculating such items such as an employee's entitlement to overtime pay, vacation pay, statutory holiday pay and compensation for length of service. (See for example *Taylor*, [2003] B.C.E.S.T.D. #82 and *Sitter*, [2002] B.C.E.S.T.D. No. 515).

In *Gateway West Management Corp.*, [1997] B.C.E.S.T.C. No. 379, the Tribunal said:

> … an "allowance" or an "expense" is a monetary amount allocated to an employee in order to reimburse the employee for actual or expected outlays incurred on the employer's behalf. The rationale for excluding such monies from the definition of wages lies in the notion that the employee does not personally benefit from the outlay in question.

Additionally, the *Act* prohibits an employer from requiring an employee to pay any of the employer's business costs, except as permitted by the Regulations (s. 21(2)). According to ss. 21(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.

As noted, in the instant case, at the commencement of Beaverstock's employment, the parties agreed to the following terms:

> All working expenses to be paid by Dan Beaverstock including insurance, WCB and all and any other related expenses.
>
> and:
>
> Rates are $40 per hour ...".

In the instant case, the contract between the parties and their conduct affirm that their intention was that the rate paid would cover both wages and expenses. Moreover, the parties have long operated on the basis that Beaverstock would pay certain working expenses out of his hourly rate and their practice confirms that he did so. There is no suggestion that Beaverstock received a personal benefit from the expenses at issue. It is clear that the hourly rate included an amount to cover expenses. What is not clear, at present, is the quantum of those working expenses, as Beaverstock declines to produce his records that would establish the value of the expenses paid.

Had the parties specifically stated in the contract between them that the rate to be paid to Beaverstock included an amount to be allocated for payment of expenses, there would be no doubt that that amount would not be included in the calculation of the "wages" to be used as the basis for determining Beaverstock's vacation pay, statutory holiday pay and compensation for length of service. The question which arises is whether that result should be any different where the parties have operated as though that was the case, but not specified the amount to be allocated for payment of working expenses. Although

the amount in the latter case may be more difficult to calculate, it may be calculated and it ought not to be disregarded merely because its calculation may be difficult.

As WLT&S says, Beaverstock's tax returns will indicate what were his expenses. Alternatively, he could supply his receipts for these expenses. For instance, one would expect that he would have access to documentation concerning how much he paid for vehicle insurance and Workers Compensation assessments. Beaverstock objects to the production of his tax returns, but one must remember that it is he who asserts who must prove. Beaverstock is the person making the complaint and seeking payment of unpaid wages and he must prove what his wages were. He cannot hide behind his unwillingness to produce documentation in support when that documentation is in his possession and/or control.

There may be an argument that the payment by Beaverstock of working expenses was in fact a payment by an employee of the employer's business costs and is contrary to section 21(2) of the *Act*. Moreover, it may be argued that the money paid by Beaverstock of the employer's business costs is deemed to be wages and may be recovered under s. 20(3) of the *Act*. That is not an issue before me and therefore need not be decided. It is possible that, had Beaverstock sought to recover the monies he paid as expenses, he could have been successful in that regard. However, that does not alter the fact that such expenses are not to be included in the calculation of his unpaid vacation pay, statutory holiday pay, overtime pay and compensation for length of service.

Accordingly, the Director ought to have determined what amounts represented wages within the meaning of the *Act* and based his calculations of payments owing on that amount. Therefore, this matter is referred back to the Delegate to recalculate the amounts owing in accordance with these reasons.

SUMMARY

The Determination is confirmed on all issues except the issue of the calculation of Beaverstock's wages. This issue is referred back to the Delegate for reconsideration and recalculation in accordance with these reasons.

Alison H. Narod
Member
Employment Standards Tribunal