Employment Standards TRIBUNAL

An appeal

\- by -

Timber's Disposal 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 Savage

FILE No.: 2004A/133

DATE OF DECISION: October 15, 2004

British Columbia

DECISION

SUBMISSIONS

Ted Mitchell, Delegate of the Director of Employment Standards

Norm Walden, on behalf of Timber's Disposal Ltd.

OVERVIEW

This is an appeal of a determination of the Director which awards the complainant Mr. Ron Hanson $120.23 for unpaid wages and fines the employer, Timber's Disposal Ltd., $1000 in administrative penalties for two first time offences.

Before the Director there were two issues, (1) whether there was unpaid overtime and (2) whether the dismissal of the complainant was without just cause such that severance was owed upon termination.

The major issue at the hearing was the question of whether the complainant's termination was without just cause. With respect to this issue the Delegate accepted the evidence of Mr. Norm Walden, the principal of the Employer, whose evidence was corroborated by other witnesses.

There was a culminating incident at the Employer's place of business. Using language laced with expletives Hanson challenged Norm Walden to fire him, cursing at Walden, denigrating the Employer's business, and physically threatening and intimidating Walden.

The Delegate found that "I am satisfied that the complainant challenged the employer with his use of loud and abusive language and behaved toward the employer in a physically threatening and intimidating manner. In consideration of the sworn testimony given by the employer and his witness, and the two letters submitted in evidence by the employer … I am persuaded that the complainant's conduct on August 15, 2003, was inconsistent with the continuation of employment". Thus the Delegate found just cause for immediate dismissal.

With respect to claims regarding unpaid overtime of $1214.25 the Delegate found, after reviewing the Employer's records over a period of 6 months prior to the complaint, that $120.23 was owed. Indeed, at the hearing the Employer did not dispute that there was unpaid overtime, as some time in excess of 45 hours per week was paid at only straight time rates.

According to the complaint form, the complainant's total claim was for $2,534.25.

The Employer was, then, largely successful on the issues described in the Reasons for Determination. Following these findings the Employer was nevertheless assessed $1000 in administrative penalties for two first time contraventions of the Act.

The employer does not appeal the determination that there was unpaid wages and interest due of $120.23.

The Employer appeals the administrative penalties as "unfair".

ISSUE

The issue in this appeal is whether there is an error in the Determination that allows or justifies the Tribunal's intervention under Section 115 of the *Act* with respect to the imposition of the administrative penalties.

ANALYSIS

With respect to the administrative penalties, the Delegate found that the employer contravened two provisions of the *Employment Standards Regulation*. Penalties of $500 each were assessed for contravention of section 37.3 and section 46 of the *Employment Standards Regulation.*

Administrative penalties under the Act and Regulations are payable to the Crown.

Section 37.3

Section 37.3 of the Regulation provides that short haul drivers are to be paid overtime for hours worked in excess of 9 hours a day and 45 hours a week. Over 6 months that was not done and that finding is not challenged. Over the 6 month period examined the Delegate found that $120.23 including interest was unpaid that should have been paid.

Indeed, the Employer admitted this at the appeal. The Delegate noted that "The employer did not dispute that there were weeks when the complainant worked in excess of 45 hours per week but was paid at the regular hourly rate". It is not clear from the Determination whether the Employer was of the view that his business was "long-haul" rather than "short-hall", however, the Delegate specifically found that the "short-haul" provisions apply. In any event, in the result, there was a contravention of section 37.3 of the Regulation.

While a $500 fine for this breach of the regulation might appear excessive the Delegate correctly notes in his submission that the legislation does not provide for graduated penalties.

It may be that, as regard administrative penalties only, the maxim *de minimus non curat lex* should have application.

In *Canadian Pacific Ltd. v. Ontario* (1995), 99 C.C.C. (3d) 97, 125 D.L.R. (4th) 385, sub nom. R. v. Canadian Pacific Ltd. (S.C.C.), the question of the apparent literal interpretation of a statute was discussed by Lamer C.J.C. At pp. 110-111 Chief Justice Lamer notes:

> The presumption that a statute's literal meaning, as construed in the context of the statute as a whole, best reflects legislative intention is valid in ordinary circumstances. However, the presumption is not irrebuttable. In cases where special circumstances exist, these circumstances can lead a court to conclude that a statutory provision's apparent literal meaning does not, in fact, provide an accurate reflection of the legislature's intentions, and that an alternative understanding of the words in the statute would be more appropriate, provided that the words of the statute reasonably bear such an alternative interpretation. One situation where such special circumstances can occur is in cases where a statutory provision would be unconstitutional if it were to be interpreted literally. In such cases, the presumption that the legislature intended that effect to be given to the plain meaning of its enactments can be countered by the competing presumption that the legislature ordinarily does not intend to violate the constitution.

In the same case Gonthier J. said at pp. 134-135:

> . . . a statute should be interpreted to avoid absurd results. Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Quebec: Éditions Y. Blais, 1991), observes at pp. 383-4 that consideration of the consequences of competing interpretations will assist the courts in determining the actual meaning intended by the legislature. Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from from its enactments, judicial interpretations should be adopted which avoid such results. One method of avoiding absurdity is through the strict interpretation of general words (at p. 330). Driedger on the *Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), states the relationship between the absurdity principle and strict interpretation as follows, at p. 94: "Absurdity is often relied on to justify giving a restricted application to a provision". Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature. In particular, because the legislature is presumed not to have intended to attach penal consequences to trivial or minimal violations of a provision, the absurdity principle allows for the narrowing of the scope of the provision. In this respect, the absurdity principle is closely related to the maxim, *de minimus non curat lex* (the law does not concern itself with trifles).

In this case the Delegate found that 13.5 overtime hours were worked but only paid for at straight time during the previous 6 months of employment.

While the dollar amount is small, in light of the legislative purposes of the Act, I cannot find this to be a trivial or minimal violation of the provision.

Section 46

With respect to the second administrative penalty imposed, section 46 of the *Employment Standards Regulation* requires that “A person who is required under section 85(1)(f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required”. As noted in *Re: D.E. Installations Ltd*., [1998] B.C.E.S.T.D. No. 30 (Q.L.), (14 January 1998), BCEST #D397/97 (McCabe, Edelman, and Thompson), “…fair procedures must be followed…” in determining contraventions of this section.

Attached to the submission of the Delegate of the Director was “…the subject Determination in addition to the Record that was before the Delegate at the time of the hearing”. Section 112(5) of the Act provides as follows:

> (5) On receiving a copy of the request under subsection (2)(b) or amended request under subsection (4)(b), the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.

Unfortunately, there is very little in the Record that addresses this matter. It should be noted, however, that in the decision of the Delegate the failure to produce records is *not described as an issue at the hearing*. The only issues enumerated are those of unpaid overtime and unjust dismissal.

There is nothing in the record provided to establish that the description of the issues in the decision of the Delegate was not an accurate description of the parties understanding of the issues at the hearing. If failing to produce records was an issue in the hearing then this fact should have been brought to the

attention of the Employer. Failing to raise this as an issue denies the Employer the opportunity to be heard on the issue, which is a breach of natural justice.

Secondly, the Record which was filed by the Director for this appeal does not include any requirement to produce or deliver records. It did not contain the "Demand for Records" referenced in the Delegate's decision. The Director is required to file "the record that was before the Director at the time the determination…was made" for this appeal. If failing to produce or deliver records was an issue in the hearing one would also expect to see the Demand for Records requiring the production of records as an exhibit in the hearing forming part of the Record before the Delegate.

The submission of the Director is that "a careful review of the payroll documentation provided by the employer was set out in the determination. In brief, the employer's 'paperwork' (payroll records) fell short of full compliance with the regulation". In my opinion this statement indicates a misinterpretation of these provisions.

Section 85(1)(f) of the *Employment Standards Act* requires that "For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:.(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c)". Paragraph (c) allows the Director to "…inspect any records that may be relevant to an investigation…".

The submission of the Delegate seems to suggest that because of the state of the records of the Employer there has been a contravention of section 46 of the *Employment Standards Act Regulation*. Section 46 of the Regulation, however, is directed to another purpose. The offence described in section 46 of the Regulation is one of failing to *produce* or *deliver* records *as and when required*, i.e., pursuant to a demand.

This interpretation is confirmed by an analysis of section 85 of the *Employment Standards Act*. That section authorizes the Director to "enter…any place", "inspect, and question", "inspect any records", "remove the record", "require a person to disclose", and "require a person to produce…any records". In short, section 85 enumerates a list of powers of the Director to assist the Director in fact finding.

It is the failure to produce or deliver a record after a demand has been made for the record that attracts a sanction under section 46.

As has been noted by this Tribunal, the term "record" in section 85 is broader than the kinds of records that an Employer is required to keep under the Act: *Re Lowe (c.o.b. Sweepers Canada),* [1998] B.C.E.S.T.D. No. 533 (Q.L.), (10 November 1998), BCEST #D502/98. Thus, assuming that the issue is properly raised, to make out an offence against section 46 it is necessary that the Demand for Records be produced together with the Employer's response to the Demand or failure to respond. Only by comparing the demand and the response can it be determined whether the response complied with the demand.

In the instant case I have found that the failure to produce a record pursuant to a demand is not recorded as an issue at the hearing. It would be a breach of natural justice to fail to give notice to the Employer that this was an issue at the hearing and thus that a penalty for failure was in contemplation by the Delegate at the hearing. The order of the Delegate imposing a penalty for an alleged breach of section 46 was thus made without jurisdiction.

In any event, in this case the record provided by the Director does not include any document that might be a demand for records under section 85. In the circumstances it is not possible to determine whether the records provided satisfied the demand that was made. As a result the offence contemplated in section 46 could not be made out in the Record before the Delegate.

Because of this finding it is unnecessary to determine whether due diligence is a defence to an allegation of a breach of section 46 and 85, and whether that defence would apply, although I note that this Tribunal on one occasion has found that it is a defence: see *Re Royal Plumbing Heating & Sprinklers Ltd.,* [1998] B.C.E.S.T. Mo. 298 (QL), (8 July 1998), BCEST #D168/98.

With respect to due diligence it is noted in the decision of the Delegate that "…the employer asserted that a substantial amount of his payroll records were damaged and / or destroyed by flooding in his basement…." The Delegate, however, makes no finding on whether the employer's assertion is factual, was disputed, or is otherwise questioned.

Parenthetically I would note that if, *caeteris paribus*, records were destroyed as a result of an outside agency, such as a flood, it could not be a breach of the regulation to fail to produce records which for that reason do not exist. Intervention of an outside agency or person can operate as a relieving circumstance in a variety of contexts: *Pacific National Investments Ltd. v. Assessor of Area No. 01 – Saanich / Capital* (1994) SC 328, No. VI01675 Victoria Registry, May 20, 1994 (B.C.C.A.).

ORDER

The appeal is allowed, in part.

The decision of the Director is varied to require only that (1) the Employer pay the sum of $120.23 plus interest in respect of the complaint and (2) the Employer pay an administrative penalty of $500.00 with respect to the breach of section 37.3.

John Savage
Member
Employment Standards Tribunal