

An appeal

- by -

Brock Services Ltd.
("Brock")

- 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: Carol L. Roberts

FILE No.: 2004A/146

DATE OF DECISION: October 15, 2004

DECISION

SUBMISSIONS

Dan Brock	on behalf of Brock Services Ltd.
Berhane Semere	on behalf of the Director of Employment Standards
Steven Genn	on his own behalf

OVERVIEW

This is an appeal by Brock Services Inc. ("Brock"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 13, 2004.

Steven Genn worked as a plumber for Brock Services Ltd., a plumbing and heating business, from September 9, 2003 until he quit on December 25, 2003. Mr. Genn filed a complaint alleging that he was owed regular wages for travel time from his home to work and back, minimum daily pay, and compensation for length of service.

The Director's delegate held a teleconference hearing into Mr. Genn's complaint on May 27, 2004. Mr. Brock appeared on behalf of Brock, and Mr. Genn appeared on his own behalf.

The delegate determined that Brock contravened Section 18 of the *Employment Standards Act* in failing to pay Mr. Genn wages. He concluded that Mr. Genn was entitled to premium pay for all hours worked in excess of 8 hours per day and 40 hours per week, in the total amount, with interest, of \$2,167.00. The delegate also imposed a \$500 penalty on Brock for a contravention of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.

The delegate determined that Mr. Genn was not entitled to minimum daily pay or compensation for length of service.

Although Brock sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

1. Whether the delegate erred in law in finding that Mr. Genn was entitled to wages for travel time, and
2. Whether the delegate failed to observe the principles of natural justice in making the determination in failing to allow Maryann Brock to testify as a witness in the proceedings.

FACTS AND ARGUMENT

As Brock disagrees only with the finding with respect to travel time, I will not refer to the facts relating to the other issues in the Determination.

Brock provides plumbing, heating and air conditioning services to customers in Salmon Arm and surrounding areas, including Enderby, Westbank, White Lake, Armstrong and Vernon. Mr. Genn, a plumber, was provided with a company vehicle containing tools necessary for the job, including air compressors, a radio, materials and reference materials, which he used to travel from his home to the job sites and back. Each morning between 7:30 and 8:30 a.m., Mr. Genn called Brock's dispatcher to receive instructions regarding his first assignment. Mr. Genn was not paid for the time he travelled from his home to his first job, nor for the time he spent returning home from his last job, and Mr. Genn's time cards did not reflect his travel for those times, in accordance with the terms and conditions of employment that were communicated to him when he was hired. Mr. Genn was paid regular wages for all other trips during the day.

Mr. Genn contended that his workday started when he called the dispatcher for his first assignment until he returned home from his last job because he was under the direction and control of the employer during that entire time, and was required to take the company vehicle home. He argued that all customers, including the first and last ones of the day, were charged flat rates for trips, and that Brock benefited from those trips. Mr. Genn argued that, had he not been required to take the vehicle home, Brock would have been required to pay him from the time he arrived at the shop to pick up the vehicle until he returned it at the end of the day.

Mr. Brock contended that providing an employee with a vehicle was an employee benefit since it saved the employee the cost of gas as well as the maintenance of the vehicle. Mr. Brock also argued that the arrangement did not benefit the employer, and that the provision of a company vehicle accorded with industry standards. Mr. Brock relied on the Tribunal's decisions in *Cambridge Exteriors Ltd.* (BC EST #D672/01), and *Irvine J. Millar* (#D208/97) and on an Employment Standards fact sheet regarding travel in support of his position that Mr. Genn was not entitled to wages for his first and last trips of the day. In the alternative, Mr. Brock submitted that if Mr. Genn was entitled to compensation for travel time, it should be at the minimum wage rather than his regular wage rate.

Mr. Brock also disputed the accuracy of Mr. Genn's records about where and when he travelled, and noted several discrepancies that Mr. Genn acknowledged were in error.

The delegate found that while the *Act* and *Regulations* do not specifically address travel time, all time spent by an employee for the benefit of an employer under the control and direction of the employer is considered work for which an employee is entitled to wages. The delegate referred to the definition of wages in Section 1 of the *Act* and concluded that travel time would be compensable if it could be demonstrated that the time spent travelling was for the employer's benefit.

The delegate considered the following factors (set out in the Branch's fact sheet) in assessing whether Mr. Genn's travel time fell within the statutory definition:

- Whether the travel was part of the employee's duties
- Whether the employer provided a vehicle

- Whether the use of an employer-provided vehicle was mandatory
- Whether the vehicle was required at the work site
- Whether the employee brings with him a factor of production to the worksite
- Whether the employee travels according to the employer's instructions, or is under the employer's direction and control during the drive to and from the worksite each day
- Whether there is a marshalling point

The delegate found that the nature of the job duties required Mr. Genn to travel to various communities using the company vehicle, the vehicle contained tools and equipment with which to do the job and was required at the worksite. He found that Mr. Genn was expected to take the company vehicle home at the end of the workday for safekeeping and for use the following day. He further determined that Mr. Genn was dispatched from his home between 7:30 and 8:30 for his first job, and thus was under the control and direction of his employer from the time he received his instructions. The delegate also noted that because Brock charged its customers flat rate for all travel times, the notion that Brock benefited from Mr. Genn's travel time was reinforced. Finally, the delegate considered that because Mr. Genn was paid regular wages for all travel time during the day, Brock recognized that he was under the direction and control of the employer during that time.

The delegate found the Tribunal's decisions in *Cambridge* and *Miller* were of no assistance in arriving at a decision in the case before him, given that the facts of those cases were significantly different.

The delegate determined that Mr. Genn was entitled to his wages for all his travel time, including the trips he took to his first job and the final trip of the day back to his home. The delegate further concluded that Mr. Genn was entitled to regular wages for those hours of work in light of the wage rate he was paid for all other travel time, in the absence of any other contrary agreement between the parties.

Finally, the delegate preferred Mr. Genn's estimate of travel times between communities over that of Mr. Brock based on the fact that Mr. Genn kept track of the time and Mr. Brock did not, the distances between the communities, and information contained on freetrip.com, a website that provided information about distance and time required to travel. Although the delegate found that the travel times estimated by Mr. Genn was preferable over that of Mr. Brock, he did not find Mr. Genn's records of the days he travelled to be reliable. The delegate dismissed Mr. Genn's claim for wages for those days where he was unable to give adequate or convincing responses to Mr. Brock's allegations of inconsistencies, as well as for those days that the delegate found Mr. Genn's evidence unconvincing for other reasons.

Argument

Mr. Brock submits that that his spouse, Maryann Brock, an equal owner of Brock, was given an option of listening to the proceedings without giving evidence, or giving evidence as a witness, in which case she would have been excluded from the proceedings until her evidence was given. Mr. Brock submits that Mrs. Brock should have been given the right to both testify and cross examine Mr. Genn.

The delegate says that Ms. Brock did not attend the May 27, 2004 hearing. He says that, at a pre-hearing teleconference on May 20, 2004, he advised Brock that he would not permit two sources of questioning,

and that if Mrs. Brock wanted to appear as a witness, she would have to testify first so that she could remain throughout the hearing and act as instructing witness if desired. He states that Mr. Brock chose not to call Mrs. Brock at the hearing, or have her participate as an instructing witness.

Mr. Brock also contends that the delegate wrongly concluded that he had agreed with some statements made by Mr. Genn. Mr. Brock argued that the practise of providing employees with vehicles so they could drive to work was the procedure used by most other construction companies, and was the industry standard. He says that it is a benefit for employees, as it saves them thousands of dollars each year in vehicle costs, fuel and insurance. Mr. Brock argues that the delegate dismissed the fact that it was more cost to the company and more of an advantage to Mr. Genn particularly since Mr. Genn lived in a more remote area than Salmon Arm.

Mr. Brock also expresses some concerns with respect to Mr. Genn's assertion at the hearing that he followed the same routine with his current employer that he did while employed by Brock, and the delegate declined to consider that evidence as he considered it irrelevant.

Finally, Mr. Brock says that these matters are only a "small sample" of the issues he wishes to advance on appeal, and that "they may not, in themselves show why 'travel time' is not due but I do feel that they show inconsistencies & doubt". Mr. Brock submits that, given the opportunity, he could prove his point to "an impartial board".

The delegate says that the issues raised by Mr. Brock do not, as he acknowledges, have any bearing on the decision regarding travel time. Further, he says that Mr. Brock has failed to demonstrate where the "inconsistencies and doubt" exist.

Mr. Genn submits that Mr. Brock has not demonstrated any errors in the Determination, and that it should be upheld.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;
or
- (c) evidence has become available that was not available at the time the determination was being made

The burden of establishing the grounds for an appeal rests with an Appellant. Brock must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate. All of the alleged errors of law must be set out in the appeal document at the outset.

Having reviewed the submissions of the parties, I am not persuaded that the Determination should be cancelled. I will address each ground of appeal separately, although Brock did not set out the issues in quite the same way.

Errors of law

The central issue before the delegate which forms the basis for the appeal is whether Mr. Genn was entitled to be paid regular wages for travel time to his first job and from his last job. While the delegate may have wrongly concluded that Mr. Brock agreed with some statements made by Mr. Genn, on which I make no findings, there is no evidence that those statements were central, or even relevant to the delegate's decision on this issue.

In general, employees are not entitled to wages for travelling to and from their place of work. However, if the time spent travelling is under the direction or control of the employer, and the employee is required to travel in such a manner, then the time spent travelling is considered work. The delegate considered the facts in light of the statutory definition of work and concluded that Brock had contravened the *Act*. It may be that Brock was following industry procedure in not paying Mr. Genn wages for those two trips each day. However, that does not substantiate Brock's argument that the delegate erred in law.

I am also unable to find that the Tribunal cases relied on by Brock are of any assistance to him. In *Cambridge (supra)*, at issue before the Tribunal was the issue of whether an employee ought to be compensated for travel time. The Tribunal used as its starting point the definition of "wages" set out in Section 1 of the *Act*. In that case, the employee used his own vehicle to transport supplies to a job site for a significant number of days, and was provided with a credit card for his gas costs. The Tribunal concluded that the employee's time was not compensable, since he was not under the employer's direction and control during the drive to and from the work site each day, and that the employer did not benefit from the employee's efforts. The facts of this case are significantly different from those before me.

I have also considered the Tribunal's decisions in related cases (*Maid West* (BC EST #D090/97), *Spearhead Forestry Services* (BC EST #D488/97), and *Norton* (BC EST #D406/98)) and similarly find they do not assist Brock as the facts are quite different.

I am unable to find that Brock has substantiated its allegation that the delegate erred in concluding that Mr. Genn was entitled to wages for these trips.

Natural Justice

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. The principles include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (*Valente v. The Queen*, [1985] 2 S.C.R. 673 at p. 685)

Impartiality was discussed by the Supreme Court of Canada in *R. v. R.D.S.*, [1997] 3 S.C.R. 484 as follows:

[Impartiality] can also be described ...as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

Mr. Brock was given the option of calling his wife as a witness, or having her sit through the proceedings without being an active participant. That the delegate gave Mr. Brock this option was not a denial of natural justice. The delegate did not deny Brock the opportunity to know Mr. Genn's allegations or to respond fully to them. He did limit the right of cross-examination of Mr. Genn to one person on behalf of the company. There is no unfairness in this decision.

Mr. Brock apparently chose not to have his wife participate in any way even though he was entitled to call her as a witness. It may be that Mr. Brock did not appreciate the decision he made not to have his wife testify. However, I am unable to agree that Mrs. Brock's absence at the hearing constituted a denial of natural justice. Mr. Brock does not say whether Mrs. Brock's evidence would have been any different from his own and I infer it would not have been. I conclude that Brock's interests were ably advanced by Mr. Brock, and that Mrs. Brock's absence did not deprive Brock of a fair hearing.

Mr. Brock also states that he wants is an opportunity to be heard by "an impartial board". Mr. Brock does not say why he is of the view the delegate was not impartial apart from some general allegations that he made some errors in his factual findings on matters not relevant to the issue of wages for travel. Although it is clear Brock does not agree with the Determination, a disagreement with the result, in and of itself, is not a ground of appeal. An appellant must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal. Mr. Brock has not demonstrated those reasons.

I dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated July 13, 2004, be confirmed in the amount of \$2,667.00, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal