

An appeal

- by -

Fast Trac Enterprises Ltd.
("Fast Trac")

- 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.: 2002/633

DATE OF DECISION: June 6, 2003

DECISION

OVERVIEW

This is an appeal filed by Fast Trac Enterprises Ltd. (“Fast Trac”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Fast Trac appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on November 29th, 2002 (the “Determination”).

Fast Trac, in its appeal documents, challenges the Determination on the basis of alleged errors of fact and law. In addition, Fast Trac says that the delegate’s investigation was tainted by breaches of the rules of natural justice.

This appeal was originally set for hearing at the Tribunal’s offices in Vancouver on April 14th, 2003 at which time counsel for the Director made a motion that Fast Trac’s representative, Mr. Albert G. Constantini (“Constantini”), be prohibited from appearing as the agent for Fast Trac in these proceedings. Counsel for the Director did not object to Mr. Constantini appearing as a witness solely for the purpose of testifying about relevant facts and circumstances relating to Mr. Robert Glen’s unpaid wage claim. Counsel for Mr. Glen supported the Director’s counsel’s motion.

After hearing all parties, I reserved decision on the motion and subsequently issued reasons for decision allowing the Director’s motion (see B.C.E.S.T. Decision No. D143/03). I have reproduced, below, the order and further directions that I issued concurrent with my reasons for granting the Director’s motion.

FURTHER DIRECTIONS AND ORDERS

At the conclusion of the hearing of the motion, all parties expressed the view that this appeal could be adjudicated on the basis of written submissions. In my view, this is not a particularly complicated matter and can readily be adjudicated solely on the basis of written submissions (see section 107 of the *Act*). I might add that the parties have previously filed detailed and lengthy submissions and I would not expect, in the ordinary course of events, that any party would have anything further to meaningfully add to the material that has already been filed. Nevertheless, I will allow the parties one final opportunity to provide submissions to the Tribunal.

Mr. Constantini vigorously expressed the view that regardless of my ruling on the motion, Fast Trac would not be retaining independent legal counsel to act on its behalf. Even so, I think it appropriate to give Fast Trac one last opportunity to reconsider its position. Accordingly, all parties will be given 21 days from the issuance of these reasons to file, if they choose to do so, a final submission with respect to this matter. Mr. Constantini, for his part, may only file a submission setting out the relevant facts and documents within his own personal knowledge. If Fast Trac wishes to file any legal argument, that submission may only be prepared and filed by a barrister and solicitor duly qualified to practise law in the province of British Columbia.

The Tribunal’s Administrator will advise the parties regarding the actual deadline by which all final submissions must be received.

As noted above, at the conclusion of the hearing on April 14th, 2003 all parties agreed that, irrespective of my decision with respect to the Director’s motion, the merits of this appeal should be addressed on the basis of written submissions and that a further evidentiary hearing was not necessary. The parties were

subsequently advised by the Tribunal's Administrator that any final submissions must be received by no later than 4:00 P.M. on May 21st, 2003.

The only further submission that was filed was a voluminous submission from Mr. Constantini dated May 20th and filed May 21st, 2003. Having reviewed this latter submission, I should note that it goes well beyond the permissible scope of my earlier order and, in large measure, amounts to a fundamental refusal on Mr. Constantini's part to respect and abide by my earlier order.

I shall now address the merits of this appeal.

THE DETERMINATION

As set out in the Determination, Fast Trac operates an excavating business and employed Mr. Robert Glen ("Glen") as a truck driver during the 6-month period from September 9th, 2000 to March 6th, 2001; Mr. Glen's wage rate was \$17 per hour. The Director's delegate determined that Fast Trac owed Mr. Glen the sum of \$4,317.46 on account of one week's wages as compensation for length of service, statutory holiday pay, overtime pay, vacation pay and section 88 interest.

The following findings of fact and circumstances are set out in the Determination:

- Mr. Glen commenced his employment with Fast Trac on September 9th, 2000;
- Mr. Glen's last working day was March 6th, 2001 at which time he went on medical leave due to a work-related injury for which he received WCB benefits (a broken wrist);
- Mr. Glen was temporarily laid off on June 14th, 2001 and this temporary layoff was, by reason of section 63(5) of the *Act*, deemed to be a termination as of June 14th since Mr. Glen was never recalled to work;
- on January 17th, 2002 the delegate issued a demand to Fast Trac for production of all employment records relating to Mr. Glen, however, although Fast Trac did produce some WCB documents relating to Mr. Glen's compensation claim it not produce any payroll records (such as time sheets and wage statements);
- The delegate calculated Mr. Glen's overtime and statutory holiday pay entitlements based on the hours worked as reflect in his pay stubs which were prepared by Fast Trac and which were submitted by Mr. Glen to the delegate.

The Determination represents one week's wages as compensation for length of service, payment for four statutory holidays and overtime earned but not paid during Mr. Glen's employment. With respect to the matter of overtime, Fast Trac acknowledged that Mr. Glen was paid on a "straight-time" basis for all hours worked. Mr. Glen's overtime entitlement was calculated based on Fast Track's wage statements that were provided to the delegate by Mr. Glen.

REASONS FOR APPEAL

Fast Trac says that Mr. Glen's unpaid wage claim was incorrectly determined and that the entire "case should be sent back to [the] Delegate for further investigation of all facts with full exchange of all documents relied on by each party". In a December 20th, 2002 memorandum appended to its appeal form, Fast Trac more particularly outlined its objections to the Determination as follows:

- "Mistake in the facts:...since the pay stubs generated by the computer did not set out payment of statutory holidays and included same as hours worked the Delegate assumed that statutory holiday was not paid. The Delegate then assessed the employer for payment of statutory holidays again even though same had in fact been paid."
- "Error in applying or interpreting [sic] the law: The Delegate took the position that the onus of proof was on the employer to disprove the claim of the complainant. It is our submission that the onus of proof rests with the complainant."
- "The Employer was denied a fair opportunity to respond during the investigation".

In addition to the foregoing, Fast Trac also challenges several other findings of fact made by the delegate. Indeed, in its various (and voluminous) submissions Fast Trac has attacked virtually every finding of fact or legal conclusion that the delegate made that might be considered adverse to Fast Trac's interests.

FINDINGS AND ANALYSIS

The Delegate's Findings of Fact

There was a great deal of conflicting evidence before the delegate. The delegate's various findings of fact, set out in the Determination, were made taking into account disputed evidence and then assessing what was the more probable result.

For example, Fast Trac says that Mr. Glen was terminated on March 6th, 2001. In rejecting this assertion the delegate noted, among other things, that Fast Trac did not issue a Record of Employment (a statutory obligation when terminating employees) on or around March 6th but only on June 14th, 2001 (about the same time that Mr. Glen's WCB claim was concluded). The delegate accepted Glen's evidence that in mid-June he contacted Fast Trac regarding his return to work only then to be told that he was being laid off and, as indicated, a Record of Employment was then issued (it might be noted that the Record of Employment is entirely consistent with Glen having been given notice of layoff due to shortage of work rather being formally terminated).

I have reviewed the delegate's various findings of fact and, having done so, cannot conclude that any of those findings was made in the absence of a proper evidentiary foundation. This appeal is not a trial *de novo* and I am not satisfied that the Fast Trac has shown, through clear and cogent evidence, that any of the delegate's findings ought to be overturned.

Statutory Holiday Pay

As noted above, the delegate awarded Glen an amount reflecting four statutory holidays. Fast Trac's payroll records do not indicate that Glen was paid for the four statutory holidays in question. Section

28(1)(h) of the *Act* states that the employer's payroll records must indicate any amounts paid on account of statutory holidays.

In light of that provision and in the absence of any cogent evidence that Glen was, in fact, paid for the days in question (Fast Trac's position amounts to not much more than a simple assertion that Glen did receive payment for the statutory holidays) I see no reason to disturb this aspect of the Determination.

Onus of Proof

I do not read the Determination as placing the burden on the Employer to disprove assertions made by Mr. Glen. The delegate reviewed the available evidence and, on the balance of probabilities, accepted Mr. Glen's version of events. The Determination was not issued on the basis that the employer failed to disprove Glen's allegations but, rather, on the basis that the probabilities militated in Mr. Glen's favour.

Fair Opportunity to Respond

This assertion is totally devoid of merit and, indeed, in my view, is frivolous and vexatious. The record before me shows an extensive effort on the part of the Employment Standards Branch to make the employer aware of Glen's complaint and the Branch solicited, received and considered the employer's various submissions with respect to the complaint.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$4,317.46** 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