

An appeal

- by -

Daniel King

- 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 M. Orr

FILE No.: 2004A/137

DATE OF DECISION: November 3, 2004

DECISION

SUBMISSIONS

Daniel King	On his own behalf
Tom Smithwick, Q.C.	On behalf of Fern's Airfreight (1986) Ltd.
Graham Jickling	Delegate on behalf of the Director

OVERVIEW

This is an appeal by Dan King ("King") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination dated July 7, 2004 by the Director of Employment Standards (the "Director").

Under Section 103 of the *Act*, Section 36 of the *Administrative Tribunals Act* (the "*ATA*") applies to the Tribunal. Under Section 36 of the *ATA*, the Tribunal is not obliged to hold an oral hearing and has concluded that the appeal can be properly addressed through written submissions.

Daniel King worked for Fern's Airfreight (1986) Ltd. ("Fern") from October 2001 until September 26, 2003 as a driver doing pick-ups and deliveries. Fern always treated King as an independent owner-operator. Revenue Canada likewise ruled that King was an independent contractor. However, following the termination of his relationship with Fern, King made a claim to the Employment Standards Branch that he was at all times an "employee" as defined by the *Act*.

The Director analysed the legislation and the circumstances of King's activities with Fern and determined that under the *Act* King was at all times an "employee" for the purpose of the British Columbia legislation. It was determined that the federal legislation had no application in determining whether or not King was an employee for the purpose of the *Act*.

Having determined that King was an employee, the Director determined that King was entitled to certain unpaid vacation pay and statutory holiday pay, which together with interest at the time of the determination totalled \$2,997.35.

King initially appealed two aspects of the Determination. He claimed that the Director had failed to include one statutory holiday to which he was entitled and secondly that the Director had miscalculated the vacation pay entitlement. Subsequently, King added to his appeal a claim that the Director was in error in not reimbursing him for expenses occurred in the performance of his employment, in particular fuel expenses.

Fern did not appeal the finding that King was an employee but raises King's independent status as a defence to any further claims by King.

ISSUE

The issue in this case is whether the appellant has raised issues that amount to errors in law or breaches of natural justice that would persuade the Tribunal to vary the Determination in regard to his entitlement to additional statutory holiday pay, vacation pay and/or reimbursement for expenses.

ANALYSIS

King's appeal of the ruling in regard to reimbursements of expenses was added to his appeal months after the timelines for appeals but I have chosen to address the issue without further submissions from the parties given my view of the appeal on this point.

On receipt of the appeal further submissions were requested from the parties in regard to the statutory holiday issue and the Director's delegate submitted that an error had been made in not awarding one of five statutory holidays that fell within the last six months of King's employment.

Under the circumstances described by the delegate this mistake was understandable but nevertheless it amounts to an error in law that requires correction. Accordingly, the Determination will be varied to reflect a correction of this error.

In regard to King's submission about a miscalculation of annual vacation pay I am not satisfied that King has raised any new or persuasive evidence that was not properly considered by the delegate. While King disagrees with the manner in which vacation pay was calculated I am not persuaded that there has been any error in law or breach of natural justice that would warrant any interference in the calculations performed by the delegate.

In regard to King's claim for reimbursement of fuel expenses incurred in performance of his employment duties, I am satisfied that the delegate properly interpreted the *Act* as not including reimbursement of allowances or expenses in a claim for 'wages'. Section 1 of the *Act* specifically excludes such items from the definition of wages. Section 79 provides for the Director to issue a determination for the payment of wages. It does not refer to reimbursement of expenses of the nature claimed by King.

In conclusion, I am not persuaded that there is any basis to interfere with the determination of the Director except to correct the absence of pay for one of the mandatory statutory holidays.

The delegate determined that each statutory holiday entitlement amounted to \$119.92 plus 4% vacation pay. Accordingly King is entitled to a further \$124.72.

The Determination provides that wages payable amounted to \$2,415.94 (not including any interest required under section 88). This should be increased by \$124.72 giving an amended total of wages payable of \$2,540.66.

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated July 7, 2004 is varied to provide that wages payable total \$2,540.66 together with any interest calculated in accordance with the Act and the administrative penalty imposed by the Director.

John M. Orr
Member
Employment Standards Tribunal