

An appeal

- by -

Thomas Lea
("Lea")

- 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.: 2003A/154

DATE OF DECISION: July 17, 2003

DECISION

INTRODUCTION

This matter comes back before me following the issuance of my order (see B.C.E.S.T. Decision No. D137/03) referring a particular issue back to the Director for further investigation.

The original appeal was filed by Thomas Lea (“Lea”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) and concerned a Determination that was issued by a delegate of the Director of Employment Standards (the “delegate”) on January 24th, 2003 (the “Determination”). The Director’s delegate determined that James Prince, operating as Tsal’ Ts’ul Forest Services (the “Employer”), owed Lea the sum of \$464.18 on account of unpaid regular wages, overtime pay, vacation pay and section 88 interest.

Mr. Lea’s position was that the Director’s delegate ought to have awarded him nearly \$4,400 in unpaid wages rather than the substantially lesser sum actually awarded and thus he appealed the Determination on the grounds that the Director’s delegate erred in law [section 112(1)(a)] and failed to observe the principles of natural justice in making the Determination [section 112(1)(b)].

The appeal was almost completely unsuccessful. I did, however, refer one particular matter, raised by Mr. Lea but not addressed in the Determination, back to the Director for further investigation. That matter concerned Lea’s possible exemption from taxation flowing from his First Nations status. My reasons on this particular issue are reproduced below:

Income tax and other remittances: Mr. Lea claims that: “...when I filled out the TD-1 for [the Employer], who is a first nation contractor, I claimed tax-exemption by providing my first nation status number on the form”. Mr. Lea says that given his status he is exempt from “having income tax and CCP deductions taken from [his] earnings”.

Without accepting the correctness of the above assertions, I find that the delegate improperly fettered his jurisdiction with respect to this issue which, in turn, amounts to an error of law. With respect to this matter, the delegate’s position (March 3rd, 2003 submission to the Tribunal, at p. 4) is as follows:

A pay stub submitted by the Employer indicates that he made statutory deductions from the appellant’s wages (see attachment #2). The appellant claims he is of First Nation status and objects to these deductions.

Matters relating to taxes are outside the jurisdiction of the Employment Standards Act. (my italics)

I do not agree that “matters relating to taxes” are beyond the ambit of the *Act*. Section 21(1) states that an employer is not entitled to withhold or deduct all or part of an employee’s wages for any purpose except as permitted or required by the *Act* or some other provincial or federal statute. Income tax and pensions are governed by federal statute law. If (and I make no finding in this regard) the Employer improperly deducted

income tax and pension payments from Lea's wages, then section 21(1) is implicated. Since the delegate made no finding on this point--by reason of his, in my view erroneous, conclusion that he had no jurisdiction to do so--this matter is referred back to the Director for determination.

I then issued the following Order:

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that the matter of Mr. Lea's "exemption" from federal taxation or other obligations (and the related matter of the Employer's allegedly unlawful wage deduction on these accounts) be referred back to the Director for determination.

In all other respects, the Determination is confirmed as issued.

SUBSEQUENT PROCEEDINGS AND FINDINGS

The delegate has now submitted a one-page letter to the Tribunal dated May 30th, 2003. In this letter, the delegate quotes subsection 21(1) of the *Act* and then notes that the Employer deducted income tax pursuant to this latter section and that the monies were remitted to the Canada Customs and Revenue Agency ("CCRA"). The delegate's letter concludes: "It is therefore, my finding that there is no contravention with respect to this issue".

Subsection 21(1) provides as follows:

Deductions

21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

The fact that the Employer deducted and remitted federal income tax from Lea's paycheque is not in issue; indeed, that action was the subject of Mr. Lea's complaint. My Order directed the delegate to investigate whether this deduction was "permitted or required" in light of Lea's First Nations' status. That question has still not been addressed by the delegate.

However, the file material before me indicates that although the delegate's May 30th report was forwarded to both parties, neither party chose to file any sort of response with the Tribunal. Both parties were invited, by the Vice-Chair's June 2nd, 2003 letter, to reply by no later than June 23rd, 2003. In light of the fact that the monies are currently being held by CCRA, I would anticipate that Lea should be able to rectify the situation directly with CCRA if there was, in fact, an improper deduction in the first instance. I see no utility in continuing these proceedings even though, as I previously noted, the delegate has not, in my view, complied with my previous Order. It may well be that the delegate was not provided with any information from Mr. Lea that would have allowed the delegate to assess the legal correctness of Mr. Lea's position.

In light of the foregoing, I am now issuing an order confirming the entire Determination.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$464.18** 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