

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C. 113

-by-

Robert Cunningham, operating Cunningham Trucking
(the “Employer”)

-of a Determination issued by-

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: E. Casey McCabe

FILE NO.: 97/78

DATE OF HEARING: May 22, 1997

DATE OF DECISION: June 26, 1997

DECISION

APPEARANCES

Colin Fortes appearing on behalf of Cunningham Trucking
Robert Cunningham appearing for Robert Cunningham, operating Cunningham Trucking
Blake Larose appearing for himself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Robert Cunningham operating Cunningham Trucking (“Employer”), from Determination dated January 17, 1997. The employer appeals from the Determination that it had breached Sections 18(1), 40, 58(3) and 120(5) of the *Act*.

ISSUE TO BE DECIDED

Did the employer breach Sections 18(1), 40, 58(3) and 120(5) of the *Act*?

FACTS

Robert Cunningham commenced employment with Laporte Bros. Moving & Storage Ltd. (“Laporte”) of Delta, B.C. in 1994. Laporte is an agent of Allied Van Lines who are in the business of moving furniture etc. on a local, national and international scale. In March of 1995 Mr. Cunningham purchased a local moving van from Laporte and commenced working on a contract basis as an owner/operator. He continued working on this basis until September 3, 1995 when he was injured and by September 28, 1995 had ceased operating Cunningham Trucking. The truck was returned to Laporte.

Blake Larose, the complainant, commenced employment with Laporte during 1993. In early 1995 he declined the offer from Laporte to buy a truck and to commence working on a contract basis. Instead, he transferred from Laporte to Cunningham Trucking. He stated that he did not get a Record Of Employment from Laporte at that time but rather just transferred over to Cunningham Trucking. Mr. Larose testified that he worked for Cunningham Trucking until September 30, 1995, when he was laid off. He testified that the last day that he worked with

Robert Cunningham was September 3, 1995. He testified that even though another driver operated Mr. Cunningham's truck during September of 1995, he did not work with that driver. In essence his last day of work with Cunningham Trucking was September 3, 1995, although his Record Of Employment shows his last day as September 30, 1995. He also testified that he received a final pay cheque of \$329.60 which bounced.

Mr. Larose testified that during his employment with Cunningham Trucking he took his orders from Mr. Cunningham. He received his pay cheques from Cunningham Trucking. He viewed Mr. Cunningham as his boss and did whatever Mr. Cunningham told him to do. He stated that he no longer paid any attention to Laporte.

Mr. Cunningham testified that his business operated locally. He did not take contracts that required him to travel into the United States or the Canadian Provinces. Mr. Cunningham testified that he commenced working with Mr. Larose when they were both employees of Laporte. He stated that they worked well together and that when he purchased the truck and contract in 1995 he took Mr. Larose on because Mr. Larose was the best employee. He agreed that Mr. Larose received pay cheques from Cunningham Trucking but stated that Terry Laporte of Laporte did all the bookkeeping. He further stated that Laporte supplied him with the contracts and that he was contractually bound to work only for Laporte or one of their related companies. He stated that both he and Larose wore uniforms with Laporte insignia on them. Mr. Cunningham testified that he would fill out the invoice when a job was complete in order to collect a cheque from the customer. He also stated that although Laporte supplied such things as the cardboard boxes and wardrobes for packing customer's belongings that he would mark up the cost of those boxes to the customer from what he paid Laporte.

Mr. Cunningham testified that Terry Laporte did all his bookkeeping, including payroll. She would prepare the pay cheques and stubs and Mr. Cunningham would sign the cheques. On occasions where Cunningham Trucking employed men other than Mr. Larose, Cunningham Trucking would be responsible for that payroll. In cases where extra men were required, he testified that Laporte would supply the extra men. He further testified that he believed that he would have the authority to dismiss employees, including Mr. Larose, if necessary. He also had the ability to reject employees that were provided by Laporte on jobs where extra men were needed. It should be noted that Mr. Larose worked exclusively for Cunningham Trucking and did not, after commencing work for Cunningham Trucking, move back to Laporte. When Mr. Larose was laid off on September 30, 1995 he did not return to Laporte.

There is one aspect of this case that merits attention. Laporte is a federally regulated company for the purposes of labour relations. Mr. Larose had complained under the *Employment Standards Act*, which is provincial legislation. The Determination was made under the provincial legislation. However, it should be noted that the Director's Delegate forwarded information to Labour Canada regarding Mr. Larose's complaint. Labour Canada reviewed the information and declined jurisdiction on the basis that Cunningham Trucking was a local trucking operation and therefore not subject to federal regulation. That decision was made with the knowledge of the contractual relationship that existed between Laporte and Cunningham Trucking. It should be noted that Cunningham Trucking is a proprietorship and not a limited company.

Mr. Fortes, on behalf of Cunningham Trucking, raises three points. Firstly, he argues that the Director's Delegate didn't make a decision. He argues that her Determination was made in default when Labour Canada declined jurisdiction. He argues that the Director's Delegate did not consider the facts before her and that indeed she had drawn the conclusion that Cunningham Trucking was also federally regulated. It was only after Labour Canada declined jurisdiction that she made her Determination against Cunningham Trucking, when initially it is apparent that the Director's Delegate felt that Laporte was the proper Employer. However, Mr. Fortes does not challenge the jurisdictional question. He argues that there has been a lack of exercise of judgment respecting this matter because the Director's Delegate did not properly consider the

facts and circumstances of the case, but rather made a decision to facilitate a solution to a problem.

Secondly, Mr. Fortes argues that even if the matter is properly viewed as falling under the *Act* that Cunningham Trucking does not fit the definition of Employer. He argues that Robert Cunningham lacked direction and control over Mr. Larose and that in fact Mr. Larose, despite working for Cunningham Trucking, effectively remained an employee of Laporte. He argues that Cunningham Trucking lacked the necessary control over the workplace to qualify as Mr. Larose's employer. He further argues that even though the staff of Cunningham Trucking were being paid out of a separate account under the name of Cunningham Trucking those staff members effectively remained employees of Laporte. Mr. Fortes argued that all the normal expenses associated with operating a business were paid for by Laporte and simply debited to the account of Cunningham Trucking. Mr. Fortes argues that the only real expenses paid for by Cunningham Trucking were those related to the salaries, wages, deductions and bank charges for Cunningham Trucking.

Thirdly, Mr. Fortes argues that if the Determination stands, that there has been a miscalculation in the quantum of the Determination. He argues that in effect holiday pay of 4% has been calculated twice on the sum of \$793.10 and that an adjustment should be made on this basis.

ANALYSIS

Turning to Mr. Fortes first argument, I do not accept that the Director's Delegate issued the Determination by default rather than judgment. The Director's Delegate investigated a complaint and referred the matter to Labour Canada for a determination of jurisdiction. I see nothing improper in that procedure in view of the fact that Laporte is a federally regulated company. Labour Canada reviewed the matter and determined that it did not have jurisdiction regarding Cunningham Trucking. That is, it viewed Cunningham Trucking as falling under provincial rather than federal regulation. The matter was referred back to the Employment Standards Branch. The Director's Delegate then made a determination based on the information available to her. The Director's Delegate may not have agreed with Labour Canada's determination of jurisdiction but once the file was remitted to her she determined the matter based on the facts before her. I do not accept the argument that she failed to exercise judgment on behalf of the Director.

Secondly, Mr. Fortes argues that Robert Cunningham operating as Cunningham Trucking does not fall within the definition of Employer under the *Act*. He argues that Robert Cunningham lacked control and direction of Mr. Larose. He argues that I should not be misled by the bookkeeping procedures between Laporte and Cunningham Trucking and despite the fact that Mr. Larose, and the other casual employees, were paid by cheques issued under Cunningham Trucking that the real employer is Laporte. He argues that the internal invoicing system developed by Laporte was simply a mechanism by which Laporte avoided the hassles of making the necessary statutory deductions on its behalf for the employees. He further argues that it was Laporte who controlled which jobs Cunningham Trucking would do and that it was Laporte who determined the number of men each job would require. He further argued that the normal business expenses such as licenses, insurance and fuel were actually paid by Laporte and were

charged back to Cunningham Trucking by a series of bookkeeping debits and credits. He further argued that Mr. Cunningham was really an employee of Laporte and was often referred to as a van foreman. He further argues that when Cunningham Trucking ceased operations in September of 1995 it was Terry Laporte who signed Mr. Larose's Record of Employment. He also pointed out that in an incident where there was a complaint by a customer about the manner in which Cunningham Trucking performed one of its contracts that Laporte reduced the bill for that customer and back-charged Cunningham Trucking without discussion with Rob Cunningham. All of the above factors, Mr. Fortes argues, leads to the conclusion that it was Laporte who exercised control and direction over Mr. Larose.

Part I of the *Act* states:

“Employer” includes a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee;

I am of the view that Robert Cunningham operating as Cunningham Trucking is an Employer within the definition of the *Act*. It was Mr. Cunningham who had day to day direction and control over Mr. Larose's activities. Mr. Larose took his orders from Mr. Cunningham. Mr. Larose received his pay cheques from Cunningham Trucking. When Mr. Larose commenced employment with Cunningham Trucking it was because Mr. Cunningham viewed Mr. Larose as one of the best employees and selected him on that basis. I find that there was an intention on Mr. Cunningham's behalf to create a relationship of employer/employee with Mr. Larose. I also note that Mr. Cunningham felt that he had the authority to dismiss employees of Cunningham Trucking including Mr. Larose. He also testified that he had the ability to send employees back to Laporte if he found them unsatisfactory when Laporte had determined that a job required extra men. I further note Mr. Larose's evidence that he perceived Mr. Cunningham to be his employer not Laporte.

I do not find that Laporte's supplying work to Mr. Cunningham or providing the bookkeeping services is sufficient to make Laporte the real Employer. Although Laporte would have signed the contracts Mr. Cunningham had a great discretion in how the work was done. Mr. Larose worked exclusively for Cunningham Trucking - he did not move back and forth between Cunningham Trucking and Laporte. I find that Mr. Larose was an employee of Cunningham Trucking and that it was Mr. Cunningham who exercised fundamental control and direction over Mr. Larose.

I turn now to Mr. Fortes third argument regarding the calculation of the quantum. The total determination of wages and interest was in the amount of \$2156.06. Part of that figure included a calculation of \$793.10 for unpaid wages, overtime and vacation pay for the period of July to September 30, 1995. A further element of that determination was a calculation for unpaid vacation pay based on wages on the T4 slips for 1995. Gross wages were \$7087.00. The third component of that calculation was the two weeks' compensation in lieu of notice. I agree with Mr. Fortes that it does appear that the 4% calculation for vacation pay was made on both the

\$793.10 figure and the \$7087.00 figure. It also appears that the final pay cheque in the amount of \$368.50, which was the cheque that bounced, is included in both the \$7087.00 figure and the \$793.10 figure. The matter should therefore be remitted back to the Director's Delegate for recalculation.

There is one final point that requires consideration. Mr. Fortes argues that the file material does not disclose how the Director's Delegate arrived at the overtime calculation. Mr. Fortes states that the evidence does not disclose that Mr. Larose worked the overtime hours as claimed. Mr. Larose in answer to that argument states that he provided all of the records that he had to the Director's Delegate at the time he filed the complainant. Mr. Fortes argues that the onus should be on Mr. Larose to provide documentation to substantiate the claim for overtime or, alternatively, that the Director's Delegate should provide the documentation upon which she based her calculation. In response Mr. Larose testified that he had provided the necessary records and documentation at the time that he filed his complaint. This matter is an appeal by the Employer. The onus rests on the employer. The employer has control over its payroll records. If the Employer wishes to challenge the determination then it must provide the evidence to show that the determination is in error. The Employer has failed to do so in this case. I will not disturb the findings of the Determination with respect to overtime pay.

ORDER

The Determination dated January 17, 1997 is confirmed in substance with the matter to be remitted back to the Director's Delegate for recalculation of the vacation pay.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal