

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Lawrence S. Balitsky  
("Balitsky")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File No.:** 96/438

**Date of Decision:** September 16 1996

## DECISION

### OVERVIEW

This is an appeal by Lawrence S. Balitsky (“Balitsky”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 003120 issued by a delegate of the Director of Employment Standards (“Director”) on July 3, 1996. In this appeal Balitsky claims that he is entitled to overtime wages and termination pay as he did not “quit” his employment, he merely refused to operate equipment that was unsafe.

I have completed my review of the written submissions made by Balitsky, Bicchieri Enterprises Ltd. (“Bicchieri”) and the information provided by the Director.

### FACTS

Balitsky was employed by Bicchieri as a driver commencing employment in 1990 and last working in June 1995.

Balitsky’s employment was interrupted on several occasions by normal seasonal shutdowns.

A Record of Employment (“ROE”) issued August 25, 1994 indicates that the reason for issuing was “E”, which is the code for quit.

Balitsky began working again October 3, 1994 and continued until March 13, 1995 spring breakup .

The ROE issued at that time indicates that the reason for issuing was “A” which is the code for shortage of work.

Balitsky began working again on June 1, 1995 and ceased employment on June 9, 1995.

Balitsky filed a complaint with the Employment Standards Branch (“Branch”) on October 18, 1995 alleging that he was entitled to overtime wages and termination pay.

The delegate of the Director investigated the complaint and subsequently Determination No. CDET 003120 was issued in the amount of \$88.17.

### **ISSUE TO BE DECIDED**

The issues to be decided in this appeal are:

1. What is the period of employment which should be considered for the purposes of Balitsky's complaint made October 18, 1995?
2. Is Balitsky entitled to overtime wages in excess of that determined by the delegate of the Director?
3. Is Balitsky entitled to compensation for length of service?

### **ARGUMENT**

Balitsky made lengthy and comprehensive submissions to the Tribunal in support of his allegations.

Balitsky argues that:

- he did not quit in August 1994 , he merely took a leave of absence and that the ROE was issued incorrectly;
- he was not asked to sign a "statement of intent" with respect to his continued employment prior to being laid off in March 1995;
- he had the seniority to operate a specific truck, #331, and on his return to work in June 1995, he should have operated that truck;
- he operated an old gravel truck, #641, on his return to work in June 1995 with the belief that when the truck that he previously operated, #331, was put into service, he would be the operator;
- he is legally obligated by the provisions of the National Safety Code to not operate a vehicle which is unsafe;
- his refusal to operate truck #849 was a legal requirement as he believed it to be unsafe;
- he made numerous requests for repairs to be made to truck #641 during the period June 1 - 9, 1995;
- he did not quit his employment on June 9, 1995, he was merely upholding the requirements of the National Safety Code by refusing to operate a vehicle which was unsafe.

I have only reproduced those arguments provided by Balitsky which were relevant to the issues in dispute.

Bicchieri argues that the information contained in the file is sufficient to render a decision and he need not make any further submission beyond that supplied to the delegate of the Director during the original investigation. That information was:

- Balitsky had quit and returned to work on more than one occasion;
- when Balitsky did not sign the form containing the statement of intent to return to work after spring breakup in March 1995, it was understood that the employment relationship was finished;
- he attempted to call Balitsky during the breakup period, but his phone was disconnected;
- he contacted one of Balitsky's friends who informed him that Balitsky had moved to Vancouver Island.

The delegate of the Director contends that:

- on the balance, the arguments and evidence favour the employer's version of what transpired during the course of the conversations at or near breakup (probably on or about Feb. 28, 1995);
- As Balitsky quit in August 1994, his complaint filed October 18, 1995 is not timely with respect to his employment prior to October 1994;
- Balitsky did in fact quit his employment in March 1995, therefore, his complaint is also not timely with respect to his employment from October 3, 1994 to March 13, 1995;
- Balitsky was owed overtime wages for the period of employment June 1 - 9, 1995 and the amount owing was set forth on the Determination issued;
- Balitsky is not entitled to compensation for length of service as the period June 1 - 9, 1995 is less than 3 months.

## **ANALYSIS**

With respect to issue #1 (that is, the period of employment to be considered for the purposes of Balitsky's complaint) I determine that:

- a) The information accepted by the delegate of the Director with respect to the "conversations at or near breakup (on or about Feb. 28, 1995)" is clearly contradicted by the ROE issued by the employer on March 24, 1995 in which it is stated that the reason for issuing is "A" shortage of work. I cannot accept that this employer, who allegedly considered that Balitsky had quit because he refused to sign a form which indicated his intention beyond the breakup, would then issue an ROE approximately 2 - 3 weeks later, which stated that Balitsky was laid off for shortage of work.

- b) I prefer the documentary evidence of the ROE and conclude therefore that Balitsky did not quit his employment in March 1995.
- c) With respect to whether Balitsky quit in August 1994, in the absence of any dispute of that ROE at the time it was issued, I prefer the documentary evidence of the ROE issued in August 1994 and conclude therefore that Balitsky did in fact quit his employment at that time.
- d) The period of employment which is to be considered for the purposes of the complaint and this appeal is the period commencing October 3, 1994 and ending June 9, 1995.
- e) The complaint filed by Balitsky on October 18, 1995 is therefore timely with respect to the above period of employment.

With respect to issue # 2 (that is, whether Balitsky is owed overtime wages in excess of that determined by the delegate of the Director) as a consequence of my decision on issue #1, I conclude that Balitsky may, after review of the payroll records for the period October 3, 1994 - June 9, 1995, be owed additional overtime wages.

With respect to issue #3 (that is, whether Balitsky is entitled to compensation for length of service) I find that Balitsky's allegation that he was legally constrained by the National Safety Code from operating unsafe equipment not to be credible in light of the fact that he did operate truck #641 from June 1 - 9, 1995, a vehicle which he acknowledges was unsafe. Having demonstrated his willingness to operate #641 even though it was unsafe (see his submission to the UIC Board of Appeal and/or Umpire dated May 12, 1996), he cannot then take refuge in the National Safety Code with respect to refusing to operate another allegedly unsafe vehicle. Further to Balitsky's contention that as a "senior" driver, Bicchieri should have placed him back on truck #331 upon his return to work in June 1995, there is no provision in the *Act* which requires an employer to have regard to "seniority" of employees in making work assignments.

Therefore, based on the evidence provided, I conclude that Balitsky quit his employment on June 9, 1995 by refusing to operate a vehicle as directed by his employer.

The appeal by Balitsky is therefore upheld to the extent set forth above with respect to issues # 1 and #2 and dismissed with respect to issue #3.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 003120 be varied to the extent that the issue of overtime wages for the period October 3, 1994 to June 9, 1995 be referred back to the Director.

**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

HS:je1