Employment Standards TRIBUNAL

An appeal

- by -

J.M.C. Industries Ltd.
("JMC" or "Employer")

- 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: Paul E. Love

FILE No.: 2003A/194

DATE OF DECISION: October 15, 2003

DECISION

SUBMISSIONS BY

James Canaday	for J.M.C. Industries Ltd.
Lynne Egan	for the Director of Employment Standards
Michelle Alman	Counsel for the Director of Employment Standards

OVERVIEW

This is an appeal by an employer, J.M.C. Industries Ltd. ("JMC" or "Employer"), from a Determination dated May 30, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Employer claims that it is entitled to offset insurance premiums it paid, from wages owing to the Employee. The Employer alleged a breach of natural justice, because it did not receive a "self help kit" from the Employee or from the Delegate before the hearing. It is apparent that the Employee did not produce a copy of the kit to either the Employer or to the Delegate, and therefore it is not a breach of natural justice for the Delegate to fail to produce something it never had. The Employer was well aware of the issues for hearing from receiving two demands for documents, and also from its receipt of a draft statement of facts and issues, which sets out the issue of vacation pay. I dismissed the Employer's claim for breach of natural justice.

The true substance of the dispute was that the Employer refused to pay vacation pay, because it considered the Employee owed to it a larger sum of money for repayment of insurance premiums. The Employer claims that it had the right to recover these amounts from the Employee. It was apparent, however, that the Employer was not authorized to deduct this claim from wages, by virtue of sections 21 and 22 of the *Act*. The Tribunal has no jurisdiction to deal with the set off of contractual claims, against the Employee's statutory entitlement.

ISSUE:

Did the Delegate breach natural justice by failing to provide a copy of a "self help kit" to the Employer?

Did the Delegate err in holding that the employer was not entitled to withhold payment of vacation pay?

FACTS

The Delegate issued the Determination and written reasons on May 30, 2003. In terms of process, there was some initial conduct between a Delegate (a different Delegate than the one conducting the hearing) and the Employee and the Employer. When it was clear that this matter could not be resolved, this matter proceeded before the Delegate by way of an oral hearing on April 30, 2003. Jesse Simpson (the "Employee") attended, and James. E. Canaday, a representative of the Employer attended.

This appeal proceeds by way of a consideration of the written submissions of the Employer, and counsel for the Director. The Employee did not file a submission in these proceedings.

Mr. Jesse Simpson worked for J.M.C. Industries Ltd. from March 8, 2002 to the end of October 2002, and was employed as an automotive parts rebuilder. He resigned from his employment. The Employee filed a complaint with the Employment Standards Branch on December 16, 2002 alleging that the Employer failed to pay vacation pay. The Employer did not pay vacation pay to the Employee. The Employer admits that it did not pay vacation pay, and has not disputed the amount of the vacation pay. The amount of the Determination is $517.63, consisting of vacation pay in the amount of $504 and interest in the amount of $13.63.

The Employer alleges that at the time of hire, the Employer agreed to pay on behalf of the Employee, insurance premiums for benefits to an insurer, provided that the Employee would repay those amounts to the Employer if the Employee left employment with the Employer, before a year was up. The Employee signed an enrollment form with the Automotive Retailers Group ("ARG"), for benefits. The Employer says that the Employee signed the form with a handwritten endorsement

> J.M.C. to pay until employee completes 1 yr of work less than 1 yr employee to pay.

The Employee resigned before the year was up. The Employer had paid the premiums to ARG in the amount of $610.32. The amount of the premiums paid exceeded the amount of the vacation pay determined by the Delegate. The Employer sought at the hearing before the Delegate to oppose any payment to the Employee, on the basis that the Employee owed him money for repayment of insurance premiums.

While the Employee made no allegation of non-payment of overtime, the Delegate investigated an overtime claim. The Delegate was hampered in his investigation because the Employer never kept a daily record of hours worked by the Employee, as required by section 28 of the *Act*. This breach of the *Act*, resulted in a penalty Determination, and a separate appeal by the Employer and Decision, by me.

The Delegate determined that there was not sufficient information to find a violation with respect to overtime hours. It was apparent that the Employer did not keep daily records. The Delegate found:

> I do not have enough information to determine whether or not a violation of Section 27 occurred. Simpson's evidence is that he was never given wage statements, however, Canaday's evidence suggests that the employer complied with Section 27(4). The employer is hereby cautioned that Section 27 must be complied with.
>
> Jesse Simpson is entitled to annual vacation pay. The employer is not entitled to withhold these wages. The employer failed to pay Simpson's vacation pay within the 6 days after Simpson resigned his employment as required by Section 18. Therefore, contraventions of Section 58(1)(a) and Section 58(3) have occurred.

Employer's Submission:

The Employer has filed an appeal alleging that the Director failed to observe the principles of natural justice. The Employer says that the Delegate made the Determination based on items not discussed at the hearing. In particular the Employer refers to a self help kit. Its representative says that a self help kit was never provided to him by the Employee or by the Delegate. The Employer wishes to change or vary the

Determination and to have a new hearing so that it can produce witnesses to dispute the Employee's claims. In essence the Employer argues that it is not aware of the issues for hearing. The Employer also argues that the Delegate referred wrongfully to payment for sick days when making the Determination.

Director's Submission:

The Director submits that there has been no breach of natural justice by the Delegate in making the Determination. The Director submits that the Employer was aware of the nature of the complaint, through receipt of telephone calls from the Delegate, receipt of the Demand to Produce Documents, and by receipt of a draft agreement of facts and issues some six weeks before the hearing date. The Director submits that there is no merit to the complaint that the Employer was unaware of the issues for hearing. The Director submits that the failure of the Delegate to provide to the Employer a self help kit, was not a breach of natural justice.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(c) of the *Act* provides for an appeal on grounds that:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

In this rather odd appeal, the Employer does not dispute that the Employee was entitled to vacation pay, the amount of vacation pay, or that it did not pay the vacation pay to the Employee. The Employer says that it was denied natural justice. The claim of breach of natural justice would not have any impact on the quantum of the Employee's entitlement, if the Employer succeeds, given clear admissions made by the Employer at the hearing concerning non-payment of vacation pay. The Employer wants another hearing to "produce witnesses so that it can dispute the employee's claims". Such a hearing, however, would not be productive because there is only one claim, for vacation pay, and the Employer admits to not paying it.

In a submission to the Tribunal dated August 26, 2003 JMC stated as follows:

> [...] I have already stated several time why I have not paid vacation pay owing to the fact of what Simpson signed as a contract to work 1 full year or be charged for benefits the only time I saw Simpson was at the April 30/2003 hearing.

The real substance of this dispute is whether the Delegate erred in concluding, (at page 6) that:

> Section 21 prohibits the employer from withholding Simpson's vacation pay for any reason. The note on the A.R.A. enrollment form does not constitute Simpson's written assignment of wages pursuant to Section 22.

The substance of this dispute is whether the Delegate erred in failing to set off the Employer's claim for repayment of insurance premiums, against the Employee's statutory claim for vacation pay. I wish to first address the Employer's natural justice argument, and then address the true substance of this appeal.

Allegation of Breach of Natural Justice:

In order to arrive at the Employer's position that the Employee should be entitled to nothing, the Employer alleges a breach of natural justice arising from the failure of the Delegate to provide a copy of the employee self help kit. It is apparent from a review of the affidavit filed by the Delegate who initially reviewed this matter, prior to hearing, that the Employee did not provide a self help kit to either the Delegate or to the Employer. The self help kit was not filed as an exhibit at the hearing, and it is not part of the record before the Delegate conducting the hearing. In my view, the Employer has not proven that the Employee prepared a self help kit, and that the Delegate withheld that document from the Employer. It is a document which was never made, or in the possession of the Delegate. It is apparent that the Delegate could not have relied on a "non-existent document" in deciding this employment dispute. There was nothing for the Delegate to provide, and therefore no failure to observe the principles of natural justice.

I note that there is no statutory requirement in section 74 of the *Act* that an Employee provide a "self help kit" before filing a written complaint. I note that the usual practice of the Director is to require the Employee to file a self help kit and attempt to resolve the dispute with the Employer prior to filing a complaint. This complaint was filed on December 16, 2002. I note that the complainant has checked the box on the complaint form indicating that he used the self help kit and the problem was not resolved. The true facts, however, seem to be that the Employee did not provide the self help kit to either the Employer or the Delegate It is not entirely clear why the initial Delegate did not require production of the self help kit, however, there was a complaint before the Delegate in writing, and the Delegate apparently exercised his or her discretion to proceed with the investigation and adjudication, pursuant to section 76(3) of the *Act*.

In my view, the Employer cannot seriously contend that it was not aware of the issues for the hearing. A Delegate delivered to the Employer a Demand for Employer Records, which was undated, but provided for a requirement to produce all employment records by April 4, 2003. The records specified were

1. any and all records relating to wages, hours of work and conditions of employment.

2. any and all documents relating to annual vacation earned, taken and outstanding, as well as, a copy of the Record of Employment.

A Delegate delivered to the Employer a second Demand for Employer Records dated April 30, 2003. The demand was for any and all payroll records for each pay period relating to wages and hours of work, from March 8, 2002 to October 25, 2002. The specified documents were:

1. the hours worked by the employee on each day (28(1)(d),

2. the benefits paid to the employee by the employer Sec. 28(1)(a)

3. each deduction made from the employee's wages (Sec. 28(1)(g), and

4. the dates of the statutory holidays taken by the employee and the amounts paid by the employer (Sec. 28(1)(h)

In my view, a reasonable person reviewing the demands would have concluded that vacation pay was an issue under investigation. The Delegate also provided to the Employer a draft Agreed Statements of Facts. This was received by the Employer on March 13, 2003, but the Employer did not respond to the Delegate or sign the document. The Agreed Statement of Facts reads as follows:

> [...]
>
> ***Issue in dispute:***
>
> Non-payment of annual vacation
>
> *The parties confirm agreement to the following fact(s) relating to the issues in dispute:*
>
> Mr. Simpson worked as a mechanic at J.M.C. Industries, located at #10 - 7550 River Road, Richmond, BC, V4G 1C8 from March 8, 2002 until October 25, 2002 at which time he resigned.
>
> Mr. Simpson's starting wage was $9.00 per hour, increasing to $10.00 on May 24th and $11.00 on October 4th. Over the period of his employment his total wages amount to $12,425.02.
>
> Mr. James Canaday, the employer, and a Director and Officer of J.M.C. Industries Ltd., confirms that no annual vacation pay has ever been paid by the employer to Mr. Simpson.

It is apparent from a review of these documents, that the Employer was well aware of the issue for hearing, and cannot have been surprised that the issue was vacation pay.

The Employer alleges:

> 3) Determination was made on a question in regards to time off work due to illness this question was never asked or discussed at hearing. This question was the deciding factor in the director's determination.

The Delegate made two references to sick days in the Determination:

> at p 5:
>
> Simpson's hours of work were Monday to Friday, 8:00 a.m. to 4:00 p.m. with some Saturday morning work required. Employees are paid wages for a regular work week of 40 hours, regardless of actual hours worked. No daily time records are maintained by the employer for any employee because this is a small business. When specifically asked about what happens when an employee is away from work due to illness, Canaday replied that the employee is paid for 40 hours regardless.

The handwritten notation beside this paragraph in the employer's appeal is " I was never ask about sick day pays." In my view, it is clear that the Delegate's questions were in relation to "record keeping". The Employer admitted at the hearing that it did not keep daily hours records for the employee, and this was the subject of a separate administrative penalty determination.

At page 6 of the Determination, the Delegate commented:

> Section 59 prohibits an employer from reducing or withholding vacation pay in cases where the employee is paid a bonus or sick pay or where the employee is previously given annual vacation in excess of the minimum entitlement of the Act.

Section 59 of the *Act* provides that an Employer must not reduce annual vacation or vacation pay because an employee was paid a bonus or sick pay. This is a correct statement of section 59, and does not give rise to any errors in natural justice.

The next reference in the Determination to sick days or illness is at page 7:

> Given that the employer did not provide accurate information about Simpson being paid when he was off work due to illness, his statement about Simpson being aware of and agreeing to repay the benefit premiums is questioned. As Simpson disputes the employer's statement in this regard, I find Simpson's evidence to be more credible than the employer's evidence.

In my view, it is apparent that the Employer withheld payment of vacation pay, because it considered that the Employee owed the Employer the cost of insurance premiums paid for benefit coverage. It appears to be the position of the Employer that there was a written agreement that the Employee would pay the premiums if he remained employed for less than a year. I note that the Employee denies making such an agreement. The evidence on the making of such an agreement is mixed. The Employer asserted that the Employee signed the copy of the agreement bearing the handwritten endorsement concerning repayment. The Employee denies signing the agreement. The Delegate found that the Employer had not proven an agreement.

In my view, the Delegate erred in using the "absence of the recording of daily hours", and payment when sick, as evidence of credibility with respect to whether the Employee signed the enrollment card with the handwritten notations regarding to the repayment of premiums. In my view, this was not a proper basis for rejecting the Employer's evidence, and I would have set aside the findings with regard to "lack of agreement". I have considered whether this matter should be sent back to the Delegate for a consideration of the other evidence, and a proper finding on the issue of whether the Employee signed the agreement to repay the premiums. I, consider a referral back unnecessary for the purpose of the fair and expeditious disposal of this dispute over the interpretation of the *Act*.

True Substance of Dispute - Withholding Vacation Pay:

It was unnecessary for the Delegate, to make a finding on the existence or non-existence of an agreement to repay insurance premiums. It is also my view that the Delegate erred in finding that there was no agreement. This is, however, an error which is irrelevant to the outcome of this appeal. The Employer has to show that the Delegate erred in the finding that the Employer was "not entitled to withhold vacation pay", before the Employer can succeed in this appeal. I expressly refrain from resolving this issue of credibility, concerning whether the Employee signed the ARA enrollment form, bearing the handwritten endorsement, as it is unnecessary for the purpose of deciding this appeal.

At best, the Employer argues that it has a contractual claim against the Employee for repayment by the Employee to the Employer, of insurance premiums paid by the Employer to an insurance company. The claim for non-payment of vacation pay is a claim for wages, or a claim under the *Act*, or a "statutory claim". A Delegate is empowered to make a finding and a Determination on this point. The claim by the Employer for repayment of insurance premiums, is a contractual claim, and not a statutory claim, pursuant to the *Act*. It is not a claim made properly by the Employer pursuant to the *Act*, and there is no statutory basis for the recovery of the amount claimed by the Employer, using the remedies set out in the *Act*.

The Tribunal has the jurisdiction to deal with appeals from a Determination. The Tribunal has no jurisdiction to "generally consider", other claims that an employee has with respect to an employer, or other claims made by an employer against an employee. The Tribunal is not a court of general jurisdiction.

An employer cannot, as a self help remedy, set off non-statutory claims against wages otherwise owing by an Employer to an Employee. Here there is a valid statutory claim for vacation pay, and it is not a defence to the statutory claim to allege that "the Employee owes me money for premiums paid, because he left earlier". If the Employer has a claim, it is based on an allegation that the Employee breached the employment contract by failing to repay premiums.

There is a very limited basis, in law, for an Employer to deduct amounts from wages otherwise owing to an employee. This limited right is set out in sections 21 and 22 of the *Act*.

> 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.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those monies.
>
> 22 (1) An employer must honour an employee's written assignment of wages
>
> [...]
>
> (d) to an insurance company for insurance or medical or dental coverage, and
>
> [...]
>
> 23. An employer who deducts an amount from an employee's wages under an assignment of wages must pay the amount
>
> (a) according to the terms of the assignment, or
>
> (b) within one month after the deduction whichever is sooner

In my view, section 22(2) provides that an Employer must honour the employee's written assignment to an insurance company for premium payments. If an agreement was reached, between JMC and Simpson it was not for an assignment of wages to an insurance company, but for recovery by the Employer of monies it paid to an insurance company, after the employment relationship ended, if the relationship ended before a year had expired. In my view, section 22 has been given a strict construction by the Tribunal, and the Employer must show that the amount sought to be deducted falls within the exceptions in section 22. Section 23 makes it plain that when an Employer deducts an amount from wages, it must be paid, in accordance with the terms of an assignment. The alleged agreement does not operate to transfer premium payments from the Employee to the insurer, but is a mechanism for the Employer to recover money it says it paid on behalf of the employee to the insurer, if a condition in the future is not met. I am not satisfied that this alleged agreement falls within the intent of section 22.

I note that the Delegate found (at pa 6) that:

> Section 21 prohibits the employer from withholding Simpson's vacation pay for any reason. The note on the A.R.A. enrollment form does not constitute Simpson's written assignment of wages pursuant to Section 22.

In my view, the Delegate has correctly interpreted section 21 and 22 of the *Act*, and correctly found that the endorsement, if made by Simpson, did not amount to an assignment. It might have been helpful if the Delegate had given more detailed reasons as to why an Employer has no right to offset contractual claims, or claims for money owing, against wages. The Tribunal has no general jurisdiction to offset non-statutory claims against wages. The Director has no general jurisdiction to offset non-statutory claims against wages. If the Employer chooses to proceed against the Employee to recover its non statutory claim, it must do so in the appropriate forum. I simply decide in this case, that the *Act* is not a proper method for the Employer to press its claim for recovery of insurance premiums paid, and that the Employer is not permitted to help itself to the Employee's wages in order to recover this claim.

The Employer clearly breached section 18(2) of the *Act*, by failing to pay the vacation pay to the Employee within 6 days after Mr. Simpson terminated his employment. The Delegate was correct in the interpretation of sections 21 and 22 of the *Act*.

For all the above reasons, I dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated May 30, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal