

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 -

Inter-Urban Delivery Service Ltd.
("Inter-Urban")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/173

DATE OF HEARING: May 22, 1998

DATE OF DECISION: June 18, 1998

DECISION

APPEARANCES

Walter McDonald	on behalf of Inter-Urban Delivery Service Ltd.
Dan McDonald	on behalf of Inter-Urban Delivery Service Ltd.
Warren Montgomery	on behalf of Inter-Urban Delivery Service Ltd.
Bryan Freeland	on his own behalf

OVERVIEW

This is an appeal by Inter-Urban Delivery Service Ltd. (“Inter-Urban”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination which was issued by a delegate of the Director of Employment Standards (the “Director’s delegate”) on February 19, 1998.

The Director’s delegate determined that Inter-Urban owed wages in the amount of \$1470.31 (including interest) to Bryan Freeland (“Freeland”) under Section 34 of the *Act* (Minimum daily hours).

Inter-Urban’s appeal is twofold: a) the process was biased because the Director’s delegate did not make reasonable efforts to give it an opportunity to respond to Freeland’s complaint, and b) Freeland is not owed wages because he chose to work less than 4 hours per day.

This appeal was conducted by way of an oral hearing held in Abbotsford on May 22, 1998.

ISSUES TO BE DECIDED

Did the Director’s delegate make reasonable efforts to give Inter-Urban an opportunity to respond during the investigation?

Is Freeland entitled to be paid a minimum of 4 hours of pay for each day that he worked?

FACTS

Freeland commenced working at Inter-Urban as a driver on July 15, 1996. He supplied his own vehicle; signed a contract acknowledging that he was an owner-operator; submitted invoices to Inter-Urban; and handled his own source deductions. The parties agree that Freeland was an independent contractor until at least January of 1997.

From approximately November of 1996 to January 19, 1997 Freeland took time off work. When he returned on January 20, 1997 he worked in the warehouse from Monday to Thursday at a rate of pay of \$9.00 per hour. His employment was terminated by Inter-Urban on October 1, 1997.

On October 28, 1997 the Employment Standards Branch office in Abbotsford received a complaint from Freeland alleging that he was owed wages by Inter-Urban.

The Director's delegate sent letters to Inter-Urban dated December 4, 1997 and February 5, 1998 regarding Freeland's complaint. In a submission to the Tribunal dated March 18, 1998 the Director's delegate stated that he also had telephone conversations with the employer on December 10, 11, and 22. Dan McDonald, the Credit Manager at Inter-Urban, responded by fax to the delegate on February 16, 1998 stating "Ref your letter of Feb 5/98 & your conversations with our President. Mr. Freeland is not due any money as he chronically left early with work undone and caused us to pay others to complete his undone work. There was sufficient work for him to do but he consistently chose not to do it. He chose not to work."

The Director's delegate issued a Determination on February 19, 1998. It was sent to the attention of the President of the company, Walter McDonald ("McDonald"). In the Determination the delegate stated:

The investigation revealed a lengthy list of days in which (Freeland) worked less than four hours per day. You have already been provided with a copy of that list. Your response was that Mr. Freeland chose not to complete the work assigned and left early. Since this was not your immediate response to my advice to you on the nature of the complaint when we spoke in December, 1997, I choose to prefer the allegations of the complainant that he completed all work as assigned.

The list of days indicates that Freeland worked in the warehouse from one to three hours per day. The delegate determined that Freeland was owed an adjustment of 154 hours of pay pursuant to Section 34 of the *Act*.

Inter-Urban states that the Determination should be cancelled because the process was biased and Freeland is not owed any wages.

Inter-Urban argues that the Director's delegate did not make reasonable efforts to give it an opportunity to respond to Freeland's complaint. The Director's delegate never met face to face with any representative of Inter-Urban although he did meet with Freeland. The President of the company had two telephone conversations with the delegate, but the first one only concerned the delegate's request for records and during the second conversation no particulars were provided concerning the nature of the complaint. Inter-Urban did not receive a copy of Freeland's complaint form until after the appeal was filed and the complaint form is undated and unsigned. The particulars of the complaint were not made known to Inter-Urban until the delegate's February 5, 1998 letter was received and in this

letter the delegate indicated he had already made a decision that wages were owed to Freeland.

Inter-Urban further argues that Freeland is not owed any wages as he chose to work less than 4 hours per day. McDonald stated that he told Freeland when he came back to work in January that there was extra work in the warehouse. He said he doesn't know exactly how many hours he told Freeland to work but there was at least 4 hours of work. McDonald described the work in the warehouse as a "top-up" to the time Freeland spent as a driver. He said that Freeland had occasionally done "top-up" work before January and he considered Freeland to be an independent contractor, who did some hourly work, because the time that Freeland worked was not in his control.

McDonald and Warren Montgomery (Freeland's supervisor) stated that Freeland's work from January 20 to October 1 consisted of sorting a vet account (AVP), which would take one and one-half to two hours to complete; assisting drivers which would take about two and one-half hours; doing cleanup which would take one hour; and doing a security check/lockup which would take 15 minutes.

McDonald said that Freeland did the AVP sort properly but he did not do the other tasks on a consistent basis. On several occasions he and Montgomery spoke with Freeland about his lack of performance and leaving work undone and they reminded him to do all the work. Freeland would temporarily improve, but eventually he would return to not doing all of his job. McDonald said he finally decided to dismiss Freeland due to his lack of performance.

Montgomery concurred that McDonald dismissed Freeland due to his poor performance. He said that Freeland did the AVP sort and the lockup properly. He did the cleanup on a sporadic basis, and then not very well, and he never assisted the drivers. He said he would ask Freeland once or twice a week why this work was not done, and Freeland would reply that he didn't have time or did not know it was to be done. Montgomery said that he attended one of the several meetings that McDonald had with Freeland concerning the latter's performance. He also said that he told McDonald that drivers were complaining that Freeland wasn't helping them.

McDonald stated that Freeland was unsupervised and responsible for keeping his own time. Inter-Urban paid Freeland based on the hours that he submitted and these hours, which are the ones the delegate used in his calculations, were less than 4 per day. According to McDonald, Freeland is not entitled to an adjustment as he chose to leave early each day with the result that the majority of the work was not done. He further stated that this has always been his position notwithstanding the statement in the Determination that he initially took a different position on this matter. Inter-Urban is therefore not required to pay Freeland 4 hours of pay each day as his work was suspended for a reason completely beyond its control: Freeland chose not to work.

Freeland argues that he is entitled to be paid at least 4 hours of pay for each day that he worked between January 20, 1997 and October 1, 1997.

Freeland stated that he started driving one of Inter-Urban's vehicles in September of 1996 on a salary basis. He also did the AVP sort during the month of September. During that time there was no cleanup involved in the warehouse and he worked close to 4 hours per day doing the sort. He understood that more work would be available in January doing the AVP sort.

Freeland said that when he returned to Inter-Urban on January 20, 1997 he only worked in the warehouse and did not do any driving. He says that he was no longer an independent contractor but an employee because he did not submit invoices and deductions were taken off his final cheque.

Freeland stated that when he started in January, McDonald told him there was work available doing the AVP sort, but he was not given any specific hours. Freeland said that he found the AVP job had been streamlined and it no longer took 4 hours. He said he started the job when the truck came in and he usually left after one to three hours when the work was finished. He said he would leave after one to three hours because there was nothing to do. He said there was not much work to do in the way of assisting drivers and he was not able to do it in any case as he was responsible for doing the AVP sort at that time. Freeland stated that sometimes he would do cleanup when he was not busy and he said that he was told to do cleanup about once a month and usually he would do it, but sometimes he would not. He admits that he had at least a couple of conversations with McDonald concerning his performance and that he was told to assist the drivers and do cleanup. He would then do these tasks once in a while, but not everyday, because it was his understanding that he had been hired to do the AVP sort only and cleanup was not his job.

Freeland believes he was fired because of a rumour that he was going to the Labour Board. McDonald denies that this was the reason he fired Freeland. Freeland said that he went to the Labour Board after he was fired to find out about his hours because just prior to his dismissal he learned he should have been paid at least 4 hours per day.

ANALYSIS

The burden in this appeal rests with the Appellant, Inter-Urban, to show that the Director's delegate erred in the Determination.

The first issue is whether the Director's delegate made reasonable efforts to give Inter-Urban an opportunity to respond during the investigation in accordance with Section 77 of the *Act*.

In this case, the Employment Standards Branch received a complaint from Freeland on October 28, 1997 regarding unpaid wages. The fact that the complaint form was undated and unsigned does not invalidate Freeland's complaint. There is no doubt he made the

complaint and it was received by the Employment Standards Branch within the 6 month statutory time limit under the *Act*.

Subsequently, the delegate met personally with Freeland and he had at least two telephone conversations with the President of Inter-Urban. As well, the delegate sent two letters to Inter-Urban. The first letter indicated that a complaint concerning unpaid wages (regular wages, vacation pay and statutory holiday pay) had been received and Inter-Urban was asked to submit records. Further, Inter-Urban was afforded the opportunity to dispute the complaint. In the second letter dated February 5, 1998 the delegate advised Inter-Urban that he had reviewed its records and the records of Freeland and it seemed that Inter-Urban had not complied with Section 34 of the *Act*. The delegate advised Inter-Urban that if it did not pay the wages within ten days a Determination would be issued for the wages plus interest. Inter-Urban replied by fax eleven days later stating that Freeland was not owed wages as he chose not to work. Then, on February 19, 1998, the delegate issued the Determination.

In these circumstances I am not convinced that the investigation was conducted in an unfair or biased manner. I am satisfied that Inter-Urban was advised of the particulars of the complaint and was given a chance to reply before the issuance of the Determination. The delegate advised Inter-Urban of the particulars of the Section 34 issue in his February 5 letter and Inter-Urban was aware of Freeland's wage complaint approximately two months prior to that letter. Moreover, Inter-Urban did in fact respond to the investigation by forwarding records and the February 16 fax to the delegate. I also note that in the February 16 fax there is no mention of the delegate's failure to provide the particulars of the complaint prior to his February 5 letter to Inter-Urban. Furthermore, the Determination itself does not indicate that the delegate approached the investigation with less than an open mind or was predisposed to a particular outcome. Finally, the fact that the delegate met personally with only one of the parties and did not provide a copy of the complaint form to Inter-Urban does not in itself justify a conclusion that he was biased. Consequently, I do not accept Inter-Urban's argument that the Determination should be cancelled because the process was biased and it was not afforded the opportunity to respond during the investigation.

The second and final issue is whether Freeland is entitled to 4 hours pay as per Section 34(2) of the *Act*.

I am satisfied that during the period January 20, 1997 to October 1, 1997 Freeland was an employee of Inter-Urban. The *Act* defines an employee as a person receiving wages for work performed for another and as a person an employer allows to perform work. An employer is defined under the *Act* as a person who has control or direction of an employee or who is responsible for the employment of the employee. During the period January 20 to October 1 Freeland worked in the warehouse. Inter-Urban stated that Freeland was also driving during this period but it offered no evidence on its own behalf to show the extent of his driving. Freeland said he did no driving, but records submitted by the delegate titled Drivers Commissions Report, which he apparently received from Inter-Urban, show he did do some pickups during this period. However, given the limits of these records in terms of

months reported, as well as the absence of any records of actual hours spent driving, I conclude that Freeland worked primarily in the warehouse from January 20 to October 1. During that time he was paid an hourly rate of pay; deductions were taken off his cheque; he was subject to a supervisor; McDonald had discussions with him regarding his performance; and he was dismissed by McDonald. These factors indicate that an employee/employer relationship existed between Inter-Urban and Freeland. I do not accept that that Freeland was an independent contractor during this period of time. Accordingly, Freeland was covered by the *Act*, including Section 34, from at least January 20, 1997 to October 1, 1997.

Section 34(2) of the *Act* states that an employer must pay an employee who reports to work at least 4 hours of pay. The only circumstance under which an employer is not required to pay a minimum of 4 hours pay is when the work is suspended for a reason completely beyond the employer's control.

There is no dispute that Freeland worked less than 4 hours per day in the warehouse. What is in dispute is whether Freeland was aware that his job involved cleanup and assisting drivers and whether there was at least 4 hours of work available to him per shift. If so, did he voluntarily leave work each day prior to completing 4 hours of work.

Considering all of the evidence, I am not convinced, on the balance of probabilities, that Freeland was clearly aware his job involved cleanup and assisting drivers on each shift and, further, that 4 hours of work was available to Freeland. I offer the following reasons.

Inter-Urban did not provide a schedule of hours to Freeland, nor did it display, contrary to Section 31 of the *Act*, his start and end times of work. McDonald testified that he did not know exactly how many hours he told Freeland to work when he came back in January. Montgomery testified that when he would ask Freeland why the work involving cleanup and assisting the drivers was not done, one of his replies was that he did not know it was to be done. These facts do not support a conclusion that there was at least 4 hours of work available to Freeland per shift. Nor do they support a conclusion that Freeland was aware that his job included assisting the drivers and doing cleanup on a daily basis.

Freeland worked one to three hours per shift and in the main he worked two hours or less per shift. According to Inter-Urban there was five and one-half to five and three-quarter hours of work available to Freeland each day which would mean that Freeland left almost one-half of his work undone per shift and, for the majority of his shifts, he left over one-half of his work undone. I find it to be highly unlikely that Inter-Urban would have allowed Freeland to leave this amount of work undone on each and every shift for a period of eight months. In its appeal Inter-Urban indicated it was forced to hire others to do the work which Freeland left undone and it submitted some cheques made out to another individual during the relevant period of time. These cheques are inconclusive, however, and in the absence of any other evidence on this point, I am unable to conclude that other employees had to do Freeland's work.

Finally, many of the time sheets which are stamped as paid by Inter-Urban only make reference to AVP Hours or AVP Sorting. This is consistent with Freeland's evidence that he was only hired to do the AVP sort.

For all these reasons, I am not satisfied that there was a minimum of 4 hours of work available to Freeland and that he was clearly aware that his job included on a daily basis tasks beyond the AVP sorting job.

An employee who reports to work must be paid at least 4 hours of pay unless work is suspended for a reason beyond the employer's control. In this case, Freeland was not provided unequivocally with work in excess of three hours. This circumstance was clearly within Inter-Urban's control. Freeland's departure from the work site each day prior to 4 hours was not voluntary, but caused by a lack of work.

Consequently, I do not accept Inter-Urban's argument that the Determination should be cancelled because Freeland is not owed wages. I am satisfied that the delegate did not err in finding that Freeland is entitled to 4 hours minimum daily pay. Further, in the absence of any dispute regarding quantum, I am satisfied that the delegate's calculations are accurate.

ORDER

I order pursuant to Section 115 of the *Act* that the Determination dated February 19, 1998 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal