Employment Standards TRIBUNAL

An appeal

- by -

MacNutt Enterprises Ltd.
("MacNutt")

- 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:	April D. Katz
FILE No.:	2000/814
DATE OF HEARING:	April 25, 2001
DATE OF DECISION:	June 7, 2001

BRITISH COLUMBIA

DECISION

APPEARANCES:

Douglas H. Christie	on behalf MacNutt Enterprises Ltd.
Leigh P. Gagnon	on behalf Murray (Dale) Wilkinson
Rae Stea	on behalf of the Director

OVERVIEW

MacNutt Enterprises Ltd. ("MacNutt") operates a trucking company, which services 9 sawmills on south Vancouver Island. Dale Wilkinson ("Wilkinson") worked as a truck driver for MacNutt. When Wilkinson's employment ended in March 2000 he filed a complaint with Director claiming 6% holiday pay and overtime from MacNutt. The Determination supported Wilkinson's claim and ordered MacNutt to pay Wilkinson $13,749.22. MacNutt is appealing.

MacNutt calculated overtime based on the belief that Wilkinson was a "long distance truck driver" under the *Employment Standards Regulation.* The Determination concluded that Wilkinson was not a long distance truck driver and was entitled to overtime pay after 40 hours of work per week not 60 hours of work per week.

MacNutt considered Wilkinson's employment ended when he could not work due to a bad back in July 1998. When Wilkinson returned to work, in March 1999 MacNutt considered that a new employment period started for the purposes of calculating holiday pay. The Determination concluded that the period of absence was medical leave and the employment was continuous for the purposes of calculating holiday pay.

ISSUES

1. Did the Director err in concluding that Wilkinson was not a long distance truck driver under the *Employment Standards Act* ("*Act*") and *Regulations* ("*Regulation*")?

2. Did the Director err in concluding that Wilkinson's employment was continuous for the purposes of calculating holiday pay?

ARGUMENT

Truck Driver

Counsel for both parties made strong submissions on the issue of which truck drivers should fall within the definition of "long-distance truck driver" under the *Act*.

MacNutt's position is that Wilkinson was a long distance truck driver because he drove more than 160 km each day.

Wilkinson's position is that long distance truck driver was intended to apply to truck drivers who were more than 160 km 'radius' from the base during the work day. The concept of 160 km radius from the driver's home terminal is used in the national safety code standards which applies to truck drivers. The British Columbia *Motor Vehicle Regulations* under the *Motor Vehicle Act* uses the criteria of "radius of 160 kilometres of the driver's home terminal". Long distance drivers are expected to keep daily logs and are exempt only if they drive less than the 160 km radius from their home terminal under section 37.17 of the *Regulation*. MacNutt's drivers do not keep logs. Wilkinson argued that MacNutt's drivers do not keep daily logs because they are not long distance truck drivers.

Medical Leave – Continuous Employment

MacNutt's position is that Wilkinson's employment ended on July 8, 1998 when Wilkinson could no longer work due to two herniated discs. When Wilkinson started to work in 1999 MacNutt considered it a new employment period. There was no guarentee of work or a position held for Wilkinson.

Wilkinson's position is that he was off on medical leave from July 1998 until February 1999 and therefore his employment was continuous pursuant to the definition of employee under the *Act*.

THE FACTS AND ANALYSIS

In an appeal the evidentiary burden is on the appellant to show that there was an error in the Director's Determination. The appeal states that "the Determination is wrong because"

1. Wilkinson was "travelling more than the required number of miles per day, although not always in a straight line but always away from his space of operations".

2. Wilkinson "quit his job" and did not work" due to ill health resulting from back problems".

Counsel for MacNutt lead evidence about statutory holiday pay and argued the evidence but there was no notice to the Tribunal or Wilkinson in the appeal of any dispute of the findings about statutory holiday pay entitlement. Counsel for Wilkinson objected to consideration being

given to any submissions in this regard and I find that there was no appeal of the Determination with respect to statutory holiday pay entitlement.

Long Distance Truck Driver

The facts with respect to long distance driving were not in dispute. Wilkinson normally drove more than 500 km around the southern Vancouver Island every day. If Wilkinson was assigned to drive in Victoria he would drive in excess of 250 km a day. Wilkinson was not compensated for overtime if he drove for less than 60 hours a week. Wilkinson frequently drove in excess of 40 hours per week.

MacNutt's evidence was that the industry standard for companies like MacNutt is that the drivers are exempt from overtime wages unless they drive more than 60 hours a week. Wilkinson's evidence was that his payroll showed overtime paid that was not. He was only ever paid straight time. Wilkinson's evidence was that no one expected overtime from MacNutt. The drivers could work lots of hours and were grateful to be working. Wilkinson's evidence was that the other companies he has driven for on the Island could not give him 40 hours of driving a week so overtime was not an issue.

The definitions referred to by counsel are set out below. The *Regulation* state

> "long-distance truck driver" means a person employed to drive a truck normally 160 km or more from their base;"

The Motor Vehicle Act regulations state

> " . . . drive a commercial motor vehicle in a day beyond the radius of 160 kilometres of the driver's home terminal,"

The 160 km reference comes from the national safety code and the inter provincial standard.

The Tribunal has not had to interpret this section since it was introduced in 1997 in B.C. Reg. 358/97. In July 1996 the British Columbia Trucking Association ("BCTA") asked Tribunal to recommend to the Lieutenant Governor in Council that Intra-Provincial Truck Drivers be permanently excluded from Sections 31-38 and 40-42 (Hours of Work and Overtime provisions) of the Act. The BCTA focused its application for exclusion on Section 31 (Hours of work notices) and Section 35 (Maximum hours of work) of the Act. BCTA stated its purpose was to "ensure parity between the ESA and the Canada Labour Code for all intra-provincial truck drivers".

Following an extensive review of Employment Standards throughout British Columbia, Professor Mark Thompson issued a report to the provincial government entitled, "Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British

Columbia". On page 31 of his report, Professor Thompson expressed this view about exemptions from the Act:

> "One of the basic principles of this Report is that coverage should be more inclusive. To reiterate the intent of that statement, minimum standards legislation should apply as broadly as possible, and exclusions from coverage should be based on factors inherent to the work performed, not merely inconvenience to the employer."

The new Act, which has been in force since 1 November 1995, reflected these recommendations, including the discontinuation of the exclusion for truck drivers from Sections 27 (Notice of hours of work), 32 (Eating period and periods free from work), 33 (Split shifts) and 35 (Hours free from work) of the former Employment Standards Act (S.B.C. 1980, ch.10). These sections correspond to Sections 31 (Hours of work notices), 32 (Meal breaks), 33 (Split shifts), and 36 (Hours free from work) in the current *Act*.

BCTA's initial application for exclusion included from the current Act:

Section 34 (Minimum daily hours),

Section 35 (Maximum hours of work),

Order in Council ("OIC") No. 0572, dated 25 April 1996 amended the Employment Standards Regulation, (B.C. Reg. 396/95) by adding the following section:

Intraprovincial truck drivers

37.3 (1) Sections 31 to 38 and 40 to 42 of the Act do not apply to a person employed as an intra-provincial truck driver.

(2) This section is repealed on September 30, 1996.

OIC No. 1065 dated 19 September 1996, extended the effective date for repealing Sections 37.2 and 37.3 until 28 February 1997.

Hearings were held in Prince George, Kamloops, Richmond, and Castlegar between 18 November and 26 November1996. In addition to these hearings, the Tribunal received numerous written submissions from interested parties.

Finally the Tribunal made a recommendation which stated the following.

> "Pursuant to its power under Section 109 (1)(a) of the Employment Standards Act (S.B.C. 1995, ch. 38), the Tribunal recommends to the Lieutenant Governor in Council that a regulation be enacted which would exclude "long-distance highway

> truck drivers" from Section 35 (Maximum hours of work), Section 40 (Overtime wages for employees not on a flexible work schedule), and Section 41 (Overtime wages for employees on a flexible work schedule) of the Act, provided that any such regulation would also contain the following two provisions:
>
> (i) "long-distance highway truck drivers" would be defined clearly to include only truck drivers who drive tractor/trailer combinations which exceed a certain gross vehicle weight (G.V.W.) and have at least 5 axles and normally operate outside a radius of 160 kilometres from their base; and
>
> (ii) requires that an employer must pay overtime to a "long-distance highway truck driver" if the employer requires or, directly or indirectly, allows such an employee to work more than 60 hours in a week at least double the employee's regular wage.

The Tribunal's recommendation went on to say

> It is appropriate at this juncture to reiterate briefly how the current Act differs from the former Employment Standards Act (S.B.C. 1980, ch. 10) with respect to truck drivers.
>
> Section 13(1)(b) of the former Employment Standards Regulation (B.C. Reg.37/81) contained a provision that the following Sections of the former Act did not apply to a truck driver, swamper or helper:
>
> Section 27 (Notice of hours of work)
>
> Section 32 (Eating period and periods free from work)
>
> Section 33 (Split shifts)
>
> Section 35 (Hours free from work)

It is noteworthy that truck drivers, swamper and helpers were **not** excluded from requirements concerning the payment of overtime wages as set out in Section 28 (Maximum hours of work) and Section 30 (Overtime pay).

In the recommendation the Tribunal restated the guiding principles for the *Act*.

> "Guiding Principles
>
> Professor Thompson's report, "Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia" described three principles which guided his review in the following terms:

> Most employees in this province should and do enjoy generous living standards. Therefore;
>
> - The first principle is that the law should concentrate on ensuring that those workers who do not share in this living standard are protected rather than attempting to enforce detailed regulation of the circumstances of a large proportion of the labour force. (p 25)
> - The second principle for these recommendations is the needs of employees or employers in this province. In general, recommendations do not favour changes based on legislation elsewhere when there was no demonstration that a problem exists or is likely to exist in British Columbia. (p 25)
> - The third principle underlying recommendations in this Report will be the negotiated working conditions in the organized sectors of the British Columbia economy. (p 25)

However, Professor Thompson also stated:

> One of the basic principles of this Report is that coverage should be more inclusive. To reiterate the intent of that statement, minimum standards legislation should apply as broadly as possible, and exclusion from coverage should be based on factors inherent to the work performed, not merely inconvenience to the employer. (p 31)"

The Tribunal considered the BCTA's application in the context of Section 2 of the *Act* which sets out the purposes of the Act as follows:

> (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,
>
> (b) promote the fair treatment of employees and employers,
>
> (c) encourage open communication between employers and employees,
>
> (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,
>
> (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and
>
> (f) contribute in assisting employees to meet work and family responsibilities.

The Tribunal noted that the Act does not contain a set of criteria on which the Tribunal should or must base its recommendations to exclude a "class of persons". The Tribunal adopted the following criteria in making the recommendation:

- Any exclusion of a "class of persons" which is recommended by the Tribunal should not contravene the purposes, as set out in Section 2, of the Act.
- Any exclusion of a "class of persons" which is recommended by the Tribunal should not contravene the purposes of the specific section of the Act from which an exclusion is recommended. For example, if the purpose of the overtime provisions in the Act is to act as a disincentive for employers to require employees to work excessively long hours, then it would be inappropriate for the Tribunal to recommend an exclusion from that section of the Act merely because a long-standing practice in an industry makes it difficult to calculate overtime wages.
- Any recommendation by the Tribunal to exclude a "class of persons" must pertain to a clearly definable class of persons and that class must be of such a nature that it clearly falls outside the normal, rational administration of the Act.

The Tribunal also considered it important to state explicitly that the legitimate concerns which were expressed by all parties were neither overlooked nor ignored in formulating our recommendation. However, it noted that the issue of safety does not fall within the ambit of this Act, rather it is expressly within the ambit of the Motor Vehicle Act and, specifically, Division 37 of the Motor Vehicle Act Regulations.

The Tribunal's recommendation concerning an appropriate definition of "long-distance highway truck drivers" was intended to reflect, in part, two existing regulations. Section 44 (b) of the Employment Standards Regulation (B.C. Reg. 396/95) which states that Sections 40 and 41 of the Act (Overtime wages) do not apply to:

(b) a truck driver or a truck driver's swamper or helper who**, at a location more than 160 km from home**, is employed on a truck that

(i) has a mechanical breakdown, unless

(A) the breakdown resulted from the employer's negligence, or

(B) the truck driver, swamper or helper was actively engaged in repairing the truck, or

(ii) is immobilized due to weather conditions, road blockage, an accident or any other cause completely beyond the employer's control;

The Tribunal considered the following factors as s contextual backdrop to its deliberations about its recommendation under Section 109(1)(a) of the Act.

According to Fred P. Nix (The Trucking Industry in Canada, August 1994) data compiled in 1991 concerning B.C.'s trucking industry reveals that there were:

- 1,612 carriers;
- 17,621 employees; and
- 20,596 trucks and vans:

These statistics were based on the location of company head offices which probably explains why, in 1995, the B.C. Motor Carrier Commission reported approximately 40,000 commercial vehicles were licensed to operate in B.C. while no major national trucking companies have their head office in this province.

Motor Carrier Commission data for 1994 indicates the following statistics:

- 1,874 intra-provincial for-hire carriers (operating an average of 3.79 vehicles).
- 3,893 extra-provincial for-hire carriers (operating an average of 10.27 vehicles).
- Inter-aprovincial highway carriers constitute approximately 11 per cent of the trucking industry in British Columbia. This proportion would double if logging and dump trucks were included.

The Province signed an Agreement on Internal Trade (MT) and a Memorandum of Understanding Concerning Regulatory Review (MOU), cosigned by all Canadian jurisdictions and the federal government. These agreements committed British Columbia to liberalize economic regulation of the trucking industry by 1 January 1998.

The intention of the legislature in adopting the *Act* was to be inclusive and to use exemptions sparingly where the industry could justify a need. In this situation the need is to comply with the MOU and the national and international standards.

Given this context and purposes of the *Act,* the exemption in section 37.3 of the *Regulation,* for long-distance truck drivers appears to be directed at commercial truck drivers who go at least 160 km away from their base as a measurement of the radius. These drivers cannot go home easily. These drivers might sleep in their trucks. Periods of rest are of great concern for safety standards. The distance reflects the greater potential to leave the jurisdiction of British Columbia and hence to concern to standardize the practices across the continent.

If I adopt the interpretation of the “radius” or “crow flies” view then there is a consistency when I look at section 44 of the *Regulation*. The language used in this section is “at a location more than 160 km from home”. This is the same as saying a radius from home.

I tried to think of another interpretation other than ‘radius’ from the base that would still apply the national standards of 160 km. I cannot contemplate such an odd amount as 160 as opposed to 200 or 300 unless the intent was to be consistent with another standard.

I contemplated courier companies and other local drivers who do not have this exemption. There does not appear to be a rational difference unless I accept the conclusion that “160 km from the base” in this section means “as the crow flies” from the base or the “radius from the base”.

The national inter provincial standards are not relevant to the operation of MacNutt which confines its business to Vancouver Island. It was not normal in the last year of his employment for Wilkinson to go more than 160 km radius from his base. I therefore conclude that the Determination did not err in this interpretation.

Continuous Employment

The second issue is whether the time away from work from July 8, 1998 to February 1999 was leave. The *Act* defines employee as

> "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;”

The question is whether Wilkinson was on “leave”. Leave is not defined in the *Act*. There is no statutory requirement for sick leave.

MacNutt’s wife, who was the office manager, gave Wilkinson a record of employment on July 13, 1998 stating “Mr. Wilkinson is having problems with his lower back”. The code on the Record of Employment stated he was off for injury or illness. The Record of Employment was obtained by Wilkinson from the Employment Insurance office. It shows the employer was aware of the need for leave and the employer paid for an MRI so the condition could be diagnosed and Wilkinson could return to work. Wilkinson’s position is that he was on medical leave with the

employer's knowledge and his employment was not severed. He had not quit but he could no longer work.

MacNutt argued that his wife had no authority to issue Wilkinson a Record of Employment without consulting him. MacNutt and his wife divorced and she left her employment in the office shortly after Wilkinson left. MacNutt had no expectation that he could find any paper work from his wife's period with the company although there were many boxes of records on site. He did not provide a copy of the Record of Employment to the Director's Delegate or Wilkinson. Wilkinson obtained a copy from the Employment Insurance Office.

MacNutt's evidence was that his wife had fired Wilkinson in 1991. I find that part of MacNutt's wife's authority included ending employment relationships, issuing lay off notices and records of employment and that she had ostensible authority to do so.

Wilkinson's May 28, 1998 pay stub had the following note on the bottom.

> "Murray,
>
> John wants to talk to you before I make out your Record of Employment Form.
> Says he keeps get answering machine,
>
> Please try to phone him."

MacNutt indicated in his evidence that he knew Wilkinson's back was bad. The note on the pay stub indicates MacNutt had known about the problem in May. On July 8, 1998 Wilkinson lost feeling in his legs and could not drive. Wilkinson received the Record of Employment from MacNutt's wife on July 13, 1998. MacNutt offered to pay for an MRI so that Wilkinson could get an early diagnosis. Wilkinson had surgery and was anxious to return to work.

MacNutt has no sick leave policy and is not required by law to have one. MacNutt's evidence was that Wilkinson had been with the company off an on since 1987 for most of 10 years. Wilkinson had worked for MacNutt continuously from 1993. MacNutt was willing to help but he did not consider the employment relationship was continuing. MacNutt had recognized that Wilkinson could not do the full job when he returned in 1999 and had tried to assign less strenuous work. MacNutt had started to look for office work for Wilkinson in 2000 when the work was obviously more than Wilkinson could do.

There is no doubt that MacNutt treated Wilkinson very fairly during his poor health. Wilkinson ultimately quit in March 2000 over a dispute on holiday pay.

Was this continuous employment? In Reycraft (c.o.b. Creative Embroidery West) BCEST #D236/97 the Tribunal was dealing with an employee who was off for illness and receiving unemployment illness benefits. The Tribunal stated as follows:

> "There is no dispute in the evidence that the reason why Ms. Mahil was not at work between April 18, 1995 and July 3,1995 was that she was ill and under medical care. The ROE which was issued by Creative Embroidery at the time confirms that "illness or injury" was the reason for her absence from work. I received no evidence to suggest that Creative Embroidery treated her absence as anything other than a leave of absence due to illness.
>
> Section 1 of the Act defines an "employee" and includes "...a person on leave from an employer."
>
> For these reasons I find that Ms. Mahil's employment was continuous, for purposes of the Act, from March 24, 1992 to July 26, 1996 and confirm the findings made by the Directors delegate in that respect."

When Wilkinson had left MacNutt in the past he had quit or was fired. This departure for ill health was not intended to end the relationship. Wilkinson was away with the full knowledge of MacNutt. MacNutt had issued a Record of Employment and conducted itself as if Wilkinson had a job to return to if he could do it. Based on the standard in *Reycraft* I find that Wilkinson was on leave until he could return to work.

Based on this conclusion I confirm the findings in the Determination

CONCLUSION

Based on the evidence and my analysis I conclude that there are no errors in the Determination.

ORDER

Pursuant to section 115 (1)(a) the appeal is dismissed. The Determination dated November 6, 2000 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal