

An appeal

- by -

Al's Custom Autobody Ltd.
("Al's" or the "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.: 2001/15

DATE OF DECISION: May 24, 2001

DATE OF DECISION: June 7, 2001

DECISION

APPEARANCES:

Nancy Giddings for the employer

Corren French, Mike French

John Dafoe for the Director of Employment Standards

OVERVIEW

This is an appeal by the employer, Al's Custom Autobody Ltd. ("Al's" or "employer"), of a Determination dated December 5, 2000 ("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"), concerning payment of wages to Mike French (the "employee"). The employer alleged errors in the findings of the Delegate concerning hours worked, the amount paid by the employer to the employee, and amounts not permitted as deductions from wages. The employer did not keep proper records concerning the hours worked by the employee, as the employer considered the employee on a "flat rate" pay system, and "on contract". The employee kept inadequate records of the time worked. At the hearing, the employer showed no error in the Delegate's assessment of the hours worked. The Delegate assessed the evidence concerning payment of wages, and in particular properly accepted the evidence of cash payments only where the receipt was acknowledged by the employee. The Delegate determined correctly that amounts of money paid to the employee as moving expenses, were not wages, and were not recoverable from wages by the employer. The employer's "self help remedy" was a clear violation of s. 21 and 22 of the *Act*. I confirmed the Determination.

ISSUES TO BE DECIDED

1. Did the Delegate err in the assessment of the hours worked by Mr. French, and the wages earned by Mr. French?
2. Did the Delegate err in findings of the amount of wages paid to Mr. French by the employer?
3. Did the Delegate err in finding that deductions from Mr. French's pay was a breach of s. 21 and s. 22 of the *Act*?

FACTS

Procedural Matters:

On December 5, 2000, the Delegate issued separate Determinations against the employer, Al's Custom Autobody Ltd. ("Al's" or "employer"), in respect of Coreen French and Michael French for wages owing to these employees. This decision addresses the employer's appeal of the Determination concerning Mr. French. The decision on the employer's appeal in Mrs. French's case is dealt with by way of a separate decision. I note that in separate written decisions, I have disposed of an appeal from the Determinations made by Mrs. French (*Coreen French, BCEST #D154/01*) and by Mr. French (*Michael French, BCEST #D153/01*).

This matter was heard, at the same time as the employer's appeal concerning Coreen French, Mr. French's wife. I followed this procedure, with the oral consent of the parties, in order to avoid duplication in evidence, and for the efficient conduct of the appeals. I heard from Nancy Giddings, (the principal of the employer), Tammy McIntyre (bookkeeper), and Les Carlisle (shop manager and Ms. Giddings' brother). I also heard from Mr. and Mrs. French. I also heard from John Dafoe, the Delegate of the Director of Employment Standards.

The employer filed an appeal of the Determination which did not give satisfactory detail concerning the grounds for appeal. There were other issues related to the number of witnesses that the employee proposed to call. I held a pre hearing conference with the parties, by telephone, on May 17, 2001. Following that conference call, I gave directions concerning witnesses and defined the issues, as set out above, for consideration at the hearing. As I noted at the pre hearing conference, there was a substantial body of information filed by both parties as appeal submissions, which was irrelevant to the issues before me.

Facts:

Mike French moved from Nakusp to take up work with the employer in Smithers on or about July 19, 1999. He worked as a bodyman in the employer's autobody shop until September or October of 1999. He left to take up other employment in the helicopter logging industry. He returned to the employer and worked for three days in December of 1999. The costs of the move for Mr. French, his wife and children, were paid for by the employer, either by cash advance or by authorizing Mr. French to use Ms. Giddings's credit card. The parties dispute whether the moving expenses were to be borne by the employer, or given as a loan by the employer to the employee. The Delegate made no finding on that point. Mr. French alleged further pre-employment misrepresentations by the employer which induced him to move to Smithers, however, the Delegate did not find any breach of s. 8 of the *Act*. This issue is not a live issue in this appeal, and Mr. French's appeal of this point was disposed of by me, subject to reconsideration.

Prior to and during the period of Mr. French's employment, the employer was being investigated by the Insurance Corporation of British Columbia for billing irregularities. On September 9, 1999, ICBC revoked the billing number of the employer, and ultimately the flow of work to the employer was drastically reduced.

The employer paid Mike French on a cash basis up until September of 1999. The employer did not provide any acknowledgements signed by Mr. French of cash received, nor did it have any system in place to account properly for cash. The employer claims that Mr. French was "on contract" meaning that the employer did not keep regular payroll records, and statutory deductions for EI, CPP and Income Tax were not made by the employer. There was evidence before me that the employer conducted its business affairs in an irregular manner, and accepted cash to avoid payment of GST, PST, and income tax. There is a dispute between the employer and employee as to why the employer paid cash. It is unnecessary for me to resolve this point, in order to resolve this appeal. I note that there was no finding by the Delegate as to why the employer paid the wages in cash.

The Delegate determined based on a review of the invoices that Mr. French was entitled to regular wages, daily overtime, annual vacation pay and statutory holiday pay in the amount of \$2,693.88, with interest of 184.75, for a total of \$2,878.63.

Credibility:

I did not find that the principal of the employer, Nancy Giddings, gave credible evidence. I prefer the evidence of Mr. and Mrs. French when her evidence conflicts with that of Mr. and Mrs. French. I have considered the approach set out in *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.). The particular conflict in the evidence which causes me considerable concern about the veracity of any of Ms. Giddings' evidence, is the contradiction between her evidence and the evidence of the shop foreman, Les Carlyle, concerning the "need for an employee". This point is fundamental to her argument concerning a "loan for moving expenses". Mr. Carlyle's evidence at the hearing was that there was a vacancy in the shop and that an employee was required by the employer. This supports Mr. French's evidence that he was recruited for the position because the employer needed a bodyman. Ms. Giddings's submission was essentially that the employer took Mr. French on because he was "down and out". In her written submission faxed to the Tribunal on February 15, 2001 she represented that "We certainly didn't need anyone at the time he moved to Smithers". The true facts are that Mr. French left a position that paid an hourly wage in Nakusp to take on employment with this employer. Mr. French was recruited by Ms. Giddings because there was a vacancy in the shop. At the time that he took up employment, Mr. French was unaware that the employer was under investigation for billing irregularities by the Insurance Corporation of British Columbia. In my view, Ms. Giddings submission to the Tribunal was deceitful as it related to the commencement of the employment relationship.

Hours of Work:

The employer kept no records concerning the hours worked by Mr. French, but kept records of the estimate of the amount of work for each job. The invoices could be tracked to an employee. This is the basis on which the Delegate determined the hours worked by Mr. French. The Delegate obviously struggled with the incomplete information and I quote from the Determination:

Although French claims to have worked substantial additional hours, there is no evidence of any sort with respect to hours of work other than the records submitted by the employer and the matching “incomplete” records submitted by M. French. I find that these records represent the best evidence of hours worked in each month. In order to determine the hours of work on a daily basis, I have assumed a 5-day week and averaged the hours over the number of working days in the period. For September, all invoices are signed off as worked completed by 23 September 1999. I am assuming, therefore that this was the last day worked in September. For December 1999, I am assuming that the 13.7 hours worked was spread equally over the 3 days and have nominally chosen 1, 2, and 3 December as the days worked in the absence of any evidence as to the actual days worked.

At the hearing, the employer did not lead any evidence concerning the hours worked by Mr. French. The employer’s evidence was limited to attempting to show that Mr. French was paid on the basis of the time estimates made by ICBC on the estimate sheet, as the shop was a “flat rate” shop. I accept that Mr. French was hired to work at a rate of \$19.75 per hour, and not on a flat rate. Had he kept proper records, he might have been able to prove an entitlement, in excess substantially, of the amount found to be owing by the Delegate. I accept the argument of the Delegate that whether the employment agreement was that Mr. French would be paid on a “flat rate basis” or an hourly basis, is irrelevant because there is no cogent proof by Mr. French of hours worked in excess of the employers estimate, because neither the employer, nor the employee kept proper records.

This evidence led by Ms. Giddings at the hearing, together with her written submissions, did not assist me in determining whether the Delegate erred with respect to the findings concerning the hours worked and the amount of wages attributed to the hours worked.

Deductions from Pay:

Ms. Giddings purported to recover monies which she claimed were loaned, or provided as payroll advances, to Mr. French to move from Nakusp to Smithers. I make no finding concerning whether the employer agreed to pay Mr. French’s moving expenses. The Delegate found that there was no satisfactory proof, and this was not a live issue in this appeal. I note that Mr. French’s appeal on this point was dismissed on the point of timeliness by me in decision *Michael French, BCEST #D153/01*, and this may be subject to review. The employer sought to

recover the monies by payroll deductions. On the employer's records there was still a balance owing by Mr. French at the end of the relationship. The question in this case, is whether there is any basis in law for the employer's recovery of the expenses from wages earned by Mr. French.

The employer made a number of deductions from the pay to Mike French. The employer purported to deduct monies described as "money borrowed to move" and "loan", for moving expenses and cash transmitted to Mr. French before he commenced employment. After the employment relationship commenced, the employer purported to deduct amounts that it says that it paid Mr. French in cash as advances from the end of the month cheque. The employer also purported to deduct payments for "storage" and a UAP- NAPA invoice from the employee's pay. The employer did not make payments by cheque to the employee until shortly before the employment relationship ended in September or October of 1999.

The Delegate did consider that the amounts given to Mr. French by the employer prior to his commencement of employment were wages. The Delegate only "counted" cash which Mr. French acknowledged receiving. The employer alleges that this was an error on the part of the Delegate, and asks me to prefer her evidence, and Exhibit "1", as evidence that no money is owing to Mr. French.

There was no written assignment given by Mr. French to permit deductions of any amounts from Mr. French's wages. Ms. Giddings claimed that Mr. French did not object to the recovery of monies from his pay. Mr. French claims that he did object. I note that, if Mr. French did not object, the failure to object is not fatal to his claim for wages. Section 4 of the *Act* provides that an agreement which is contrary to the *Act*, is of no effect.

The employee does not agree that the cash amounts were paid, as alleged by the employer. Given the irregularities in the employer's records, the Delegate relied on the records of Mr. French, and confirmation of receipt of cash by Mr. French. The Delegate determined the following amounts were paid on account of wages to Mr. French by the employer:

23 July 99	\$500.00
29 July 99	\$30.00
31 July 99	\$600.00
31 July 99	\$1,007.25
7 Aug 99	\$200.00
11 Aug	\$70.00
14 Aug	\$1,000.00
23 Aug 99	\$200.00
28 Aug 99	\$200.00
10 Sept 99	\$450.00
20 Sept 99	\$311.07
30 Sept 99	\$400.00
Total	<u>\$4,968.32</u>

The Delegate found that Mr. French was not entitled to compensation for length of service because Mr. Smith completed only two months of employment prior to quitting to go heli-logging. This was not an issue before me in this appeal.

Employer's Argument:

At the hearing, the employer filed as Exhibit "1", a handwritten document purported to be a reconciliation of the pay and cash and loans made by the employer to Mr. French. Ms. Giddings compared Exhibit "1" to Document c 3 of 12, and noted the Delegate had not included certain amounts as received by Mr. French. Document c3 of 12 was the "ledger" of cash advances provided by the employer to the Delegate. I note that in Exhibit "1", the employer characterizes monies paid prior to the start of the employment relationship as "cash advances". This is a different characterization than was before me as document c3 of 12 in the documents provided to the Delegate. In Exhibit 3 of 12 the items were noted as "money borrowed to move" and "loan". Exhibit "1" also purports to show that Mr. French started the employment relationship owing the employer approximately \$1,500. By August 28, 1999 the employer claims that it was owed \$4,803.25 by Mr. French. At the end of the employment relationship the employer claims to be owed \$2,172.27 by Mr. French. The employer claims that her document balances to the penny and therefore should be accepted. She claims that "when one considers the monies Mr. French repaid to her from payroll together with the money he received", he was paid \$8,764.82.

It is clear that the employer alleges that its records concerning cash paid to Mr. French should be preferred, and that it should be entitled to take into account moving expenses and other items which it says was advanced for the benefit of Mr. French. When these items are taken into account, the employer argues that the employee actually owes her money, and there is nothing due and owing to the employee.

I note that the employer suggests that Mr. French wished to work for cash. She suggests that she had to make multiple cash advances because he was in serious financial difficulty. Mr. French asserts that once he got to Smithers the employer suggested that he work for cash "under the table", that the employer was having cash flow problems, and paid him as cash became available. In Mr. French's written submission he further suggests that the suggestion of cash was made in connection with the employer's suggestion that he go on Employment Insurance benefits during the summer of 1999, because of a lack of work. It is not necessary, for the purposes of this proceeding to resolve this disputed fact. I note that the "lack of documentation" made it difficult for the Delegate to resolve the facts. The lack of documentation has effected both parties. Mr. French was unable to prove to the Delegate all the hours that he alleged that he worked. The employer was unable to prove to the Delegate all the wages it alleges it paid.

ANALYSIS

The burden rests with the appellant, in this case the employer, to establish an error in the Determination such that I should vary or cancel the Determination. In a situation where an

employer fails to keep the records required by the *Act*, an employer may well have a difficult task in establishing an error in the Determination, if the point is disputed and one that requires documentation for adequate proof.

Hours Worked:

The employer conducted its business affairs in an irregular manner, and did not keep proper records with regard to the hours worked by Mr. French. This is a violation of s. 28(1)(c) of the *Act*. Whether the shop was a flat rate shop or whether Mr. French was entitled to payment of wages by an hourly rate, the employer has an obligation under s. 28(1) (c) to keep records:

- 28 (1) For each employee, an employer must keep records of the following information:
 - (c) the employee's wages rate, whether paid hourly, on a salary basis or on a flat rate basis

It is clear that the Delegate struggled with the evidence given to him by the employer in this matter. I quote from the Delegate's September 6, 2000 letter to Ms. Giddings:

I have made the best sense that I can of the various records provided by you and Tammy McIntyre. The dispute is going to boil down to a determination of several basic issues. The first is the issue of payroll deductions for the French's moving expenses. They claim that the promise that you made, when you recruited Mike French to come up and work, was that their moving expenses would be paid. Further, the dispute your assessment of the amount that have been deducted. It is not necessary for me to determine what the agreement was, however, as the Employment Standards Act expressly forbids taking deductions from an employee's pay without a written assignment of wages from the employee.

There was no evidence lead by the employer in this appeal which suggested any error in the Determination with regard to the hours worked by Mr. French. The employer failed to demonstrate any error in the Determination with regard to the hours worked by Mr. French.

Wages Paid:

Most businesses, pay their employees by cheque or direct bank deposit, and there is proof of payment by way of an audit trail. There are source documents to back up each transaction. Proper bookkeeping is a requirement of the general law, both federal and provincial, apart from the employer's record keeping responsibilities under s. 28 of the *Act*. The book keeping for this employer was highly irregular, without proper systems to account for cash, or taxes payable. Further it is apparent that this employer accepted "cash" from customers to avoid remitting GST, PST and paying income tax. The employer's records are unreliable. In particular, I am not prepared to accept Exhibit "1", as reliable evidence showing payments made to Mr. French, or

monies owing by Mr. French to the employer. Exhibit “1” was not a business record, prepared in the usual course of business, which might be considered to be reliable.

Generally, if an employer chooses to pay its employees in cash, it should receive an acknowledgement of receipt of the cash from the employee. Mr. French acknowledge receipt of certain amounts of cash. The Delegate recognized those amounts of cash as wages received, when acknowledged by the employee. Given that the employer breached its record keeping responsibilities, in my view this is the only sensibility method to resolve the amount of wages paid. In my view, the Delegate made the correct assessment of the evidence with regard to cash payments alleged to be paid by the employer. The employer has shown no error by the Delegate with regard to any findings of wages paid to Mr. French.

Deductions from Wages

The Delegate did not treat amounts paid by the employer to Mr. French prior to his start date in Smithers as wages. Wages are defined in section 1 of the *Act* as including

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
- ... but does not include
- (h) allowances or expenses

In my view, applying the definitions in the *Act*, the Delegate correctly concluded that amounts paid by the employer to the employee, prior to employee taking up employment in Smithers, were something other than wages. The Delegate found it unnecessary to resolve what the agreement was between the parties concerning amounts provided for moving expenses. The Delegate did not determine whether the amounts were a “loan” or an allowance or expense paid pursuant to an employment agreement. It was not necessary for me to make a finding on this point in order to resolve the employer’s appeal. It is open to the employer to litigate this issue in small claims court, if the employer believes that it has any legitimate claim to repayment of monies. The jurisdiction of this Tribunal does not permit the “set-off” of monetary claims made by the employer, against the employee, arising out of the employment relationship which cannot be characterized properly as a dispute relating to the calculation of wages. While the employer has “access to the employee’s pay packet”, an employer, who is a creditor of the employee, cannot help itself to the pay packet. It must establish its right to its claim, in court, and then collect its claim in accordance with the usual methods used by creditors.

The employer’s actions in deducting amounts which the employer believed were due to it from Mr. French, are clear violations of s. 21(1) of the *Act*. Section 21(1) of the *Act* reads as follows:

- (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.

Section 22(1) of the *Act* reads as follows:

An employer must honour an employee's written assignment of wages (e) for a purpose authorized under subsection (2).

and section 22(2) reads as follows:

(2) The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit;

There was no written assignment given by Mr. French. The employer's deductions for moving, and other expenses not authorized by an assignment, is clearly a self help approach by the employer which is forbidden by the *Act*.

For all the above reasons, I dismiss the appeal of the employer from the Determination.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated December 5, 2000 is confirmed, with interest in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal