

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.: 2001/16

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, issued by a Delegate of the Director of Employment Standards pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "Act"), concerning payment of wages to Coreen French. The employer alleges that Ms. French worked for two separate employers, and therefore, had no entitlement to overtime wages. The employer also alleges that it had the right to deduct monies from Ms. Corren French's wages on account of monies the employer claimed were due and owing from Mike French, Ms. French's husband. On the basis of the information before me there was no basis for concluding any error on the part of the Delegate. Ms. French's time was recorded by punching a clock at the workplace of Al's. She was paid with cheques drawn on Al's account, she was issued one record of employment naming Al's as the employer, the employer never disclosed to Ms. French that she was "employed" for two separate employers. The employer's "self help remedy" was a clear violation of s. 21 and 22 of the *Act*. I confirmed the Determination.

ISSUE TO BE DECIDED

Did the Delegate err in the calculation of overtime calculations?

Did the Delegate err in finding that deductions from Ms. French's cheque were 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 Ms. French. The decision on the employer's appeal in Mr. 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 Michael French, Ms. French's husband. 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. Gidding's brother). I also heard from Mr. and Mrs. French. I also heard from John Dafoe, the Delegate of the Director of Employment Standards.

Facts

Ms. French worked as a "detailer" cleaning cars, at the business premises of Al's Custom Body Shop Ltd. in Smithers, British Columbia. She worked between September 3, 1999 to November 1, 1999 inclusive. When she left her employment she was given a record of employment which named Al's Custom Body Ltd. as the employer. She was paid on cheques drawn on Al's account. Ms. French punched in with a time clock. The hours that she worked are not in dispute.

Ms. French "detailed" cars which were clients of Al's Custom Autobody Ltd. , and also cars which were from the rental agency. Ms. French was never advised that she was working for two different employers.

The Delegate found that Ms. French was entitled to the sum of \$328.14 plus interest of \$24.80. The Delegate also assessed a zero penalty for the employer's violation of sections 18(2), 40(1)(2), 48(3) and 34(2) of the *Act*.

Employer's Argument:

The employer argues that the Delegate erred in finding an overtime entitlement for Mrs. French. She says that Mrs. French worked for two different companies, Al's Custom Autobody and Thrifty Rent a Car. She says that the time was split between the two companies and therefore no overtime was owing. The employer says that she was entitled to deduct "loans or advances" made to Mike French from Coreen French's paycheque. The employer called its bookkeeper, who indicated that she tried to contact Ms. French about the deductions, and when she failed to contact Ms. French deducted the entire amount of Ms. French's paycheques in payment of an obligation that Ms. Giddings claimed was due and owing to the employer.

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. I am satisfied on the facts of this case that Al's was the employer of Mrs. French. Mrs. French was not advised that she had two employers, and on all the objective evidence which includes, attendance at Al's workplace, punching Al's time clock, receiving cheques and record of employment naming Al's as an employer, I have no hesitation in concluding that Ms. French had one employer. I reject the testimony tendered by the employer that Ms. French was employed by two employers, as not

credible. I further note that Ms. Giddings evidence on the two employer theory was not supported by her bookkeeper. If Ms. Giddings directed her accountants to allocate the expense of Ms. French's wages to two separate employers, and there was no credible evidence of this before me, this book entry can have no effect on the reality that Ms. French put in long hours, at one workplace, believing that she was working for one employer. As the hours found by the Delegate are not in dispute, I find that the Delegate determined correctly the amounts owing to Mrs. French for overtime.

In my view 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) 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) 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 Mrs. French. This was clearly a self help approach by the employer which is forbidden by the *Act*.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated December 5, 2000 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal