Employment Standards TRIBUNAL

An appeal

- by -

Tumbleweed Transport Ltd.
(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: Ib S. Petersen

FILE No.: 2000/771

DATE OF HEARING: February 27 and March 30, 2001

DATE OF DECISION: June 11, 2001

DECISION

APPEARANCES:

Mr. Paul Devine	on behalf of the Employer
Mr. Richard Neilson	on behalf of himself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on November 6, 2000. The Determination concluded that the Employee, Neilson, was owed $10,675.56 on account of vacation pay and statutory holiday pay by the Employer.

The findings and conclusions in the Determination may be summarized as follows:

1. Neilson was employed as a low bed driver from July 25, 1996 to May 18, 2000.

2. The Employer, whose principal is Al McMartin, is in the trucking business.

3. Neilson was remunerated by a 25 or 30% commission on hauling.

4. Before the delegate the Employer took the position that Neilson was an independent contractor.

5. Based on the common law tests, the delegate rejected the Employer's argument that Neilson was independent contractor and not an employee for the purposes of the *Act*. The delegate's findings of fact include:

    1. The truck driven by Neilson was owned by Tumbleweed. So was the cell phone. Tumbleweed paid for the fuel and the truck maintenance.
    2. He only worked for Tumbleweed.
    3. Customers paid Tumbleweed and it paid Neilson a commission, including vacation pay.
    4. Neilson never received a wage statement.
    5. According to the records, Neilson never took a vacation and was never paid statutory holiday pay.
    6. The payroll records did not include hours worked.

7. Revenue Canada determined that Neilson was an employee and income tax, EI and CPP was deducted starting January 2000. Revenue Canada required Tumbleweed to pay Neilson's EI and CPP benefits back to January 1, 1998.
8. The delegate also rejected the Employer's assertion that certain clients paid Neilson in cash and that Neilson did not pay these funds over to the Employer. The delegate stated that Neilson's log books were detailed, listing client names, dates, times and amounts paid. From the delegate's standpoint, McMartin provided no evidence to support his allegations.
9. The delegate was of the view that vacation pay cannot be included in commissions. He awarded vacation pay from July 1996.
10. As well, the delegate found, based on the payroll records that Neilson did not receive statutory holiday pay during his employment. The delegate awarded statutory holiday pay from May 1998.

ISSUES

The Employer's appeal is based on the following:

1. The delegate erred when she concluded that Neilson was an employee of Tumbleweed. Neilson was an independent contractor for at least part of the time of his relationship with Tumbleweed.

2. The delegate erred in calculating the amount of vacation pay owing. She awarded vacation pay from 1996.

3. The delegate also erred when she accepted Neilson's claims that he had handed over cash payments to the Employer. The Employer largely denies receiving the cash payments in question and says that it should be able to offset these amounts.

4. The Employer also says that it should be able to offset the payments made on Neilson's behalf to Revenue Canada on account of income taxes and other statutory deductions.

FACTS AND ANALYSIS

The appellant, in this case the Employer, has the burden to show that the Determination is wrong. In the main, I agree with the delegate's conclusions. However, I am of the opinion, that money paid by the Employer on account of income tax and other statutory deductions ought to be referred back to the Director for further investigation.

1. Independent Contractor Status

I turn first to the issue of Neilson's status for the purposes of the *Act*. For the reasons set out below, I largely agree with the delegate's determination that Neilson was an employee.

The *Act* defines an "employee" broadly (Section 1).

> "employees" includes
>
> (a) a 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,
>
> An "employer" includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere;

It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides (in part):

> 2. The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

As noted an a relatively recent decision of the Tribunal (*Knight Piesold Ltd.*, BCEST #D093/99):

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.)

> and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

It is clear from the Determination that the delegate considered these tests in making his determination that Nielson was an employee. The delegate's findings of fact, set out above, support this conclusion. Even if I accept that Neilson began to dispatch himself in early 1999, had some role in the invoicing of clients (including involvement in setting rates), and was perceived by some of those clients as being a partner in the business, I am not convinced that this, in the circumstances, fundamentally alters the factual or legal basis for the delegate's conclusions. On all of the evidence, the business was Tumbleweed's. In short, in my view, the delegate did not err.

The Employer argues that Neilson should not now be able to take advantage of the statute because he fraudulently set up the relationship on the basis that he was an independent contractor (*Cock v. Labour Relations Board* [1960] 33 W.W.R. 430 (B.C.C.A.); *Lazarus Estates Ltd. v. Beasley* [1956] 1 Q.B. 702 (C.A.). I do not accept this argument. The point, in my view, is whether or not the relationship is one that in all of the circumstances fall within those relationships that are protected by the *Act*, namely employer-employee relationships. I do not, in any event, accept that there is any convincing evidence to show that Neilson "set up" the employer so he could later take advantage of the statute. Even if I accepted that Neilson, as suggested by the Employer's evidence, wanted to be an independent contractor and the parties entered into the relationship on that basis, the statute ultimately governs the relationship. An employee and an employer are not capable of contracting out of the statute. Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect. I do not find that there was, in any event, convincing evidence that Neilson intended at the commencement of the relationship to "set up" the Employer as argued. Fraud connotes some intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender some legal right (*Black's Law Dictionary* (5th), West: St. Paul's, Minnesota, 1979). I do not accept that there was fraud on Neilson's part in that regard.

In *England, Christie et al., above,* at 15.21-22) the learned authors consider the test for "just cause" in the context of dishonest conduct:

> "When the employer alleges theft or some other fraudulent conduct as the reason for dismissal, the greater stigma attached to such conduct has resulted in most courts imposing on the employer a more exacting standard of proof than the regular civil law "balance of probabilities" but one which nonetheless falls short of the criminal law test of "beyond a reasonable doubt". Collective agreement

> arbitrators have adopted a similar "intermediate" standard. Various linguistic formulations have been articulated in an attempt to clarify the nature of this standard, but none has attained a particularly edifying degree of exactitude. Ultimately it appears to boil down simply to whether or not the court is *satisfied* that the worker committed the acts in question. ... It follows that an employee can be dismissed for "just cause" on the basis of the employer suspecting that he or she acted dishonestly, provided the facts existing at the date of the dismissal confirm, on the balance of probabilities, that the employee probably committed the wrongful acts, even though the employee is subsequently shown in a criminal trial not to have done so. ... [T]here must be evidence, on the balance of probabilities, that at the date of the dismissal the employee actually committed the wrongdoing in order to confirm the employer's suspicions. In other words, the employer's suspicions cannot be merely speculative or otherwise unsubstantiated by evidence. ... The critical point is that if an employer "suspects"--in the layperson's commonly understood sense of that word--that an employee has committed theft or fraud, and the facts at the date of dismissal confirm that the employee likely did the acts in question on the evidentiary balance of probabilities, summary dismissal will be ruled for "just cause". ..."

In my view, there must be clear and cogent evidence to support an allegation of fraud. The evidentiary burden on the Employer with respect to this argument is a heavy burden to discharge.

Generally, the Employer argues that it was Neilson's idea that he was to become an independent contractor. Even if I agree with that assertion, and there is disagreement on the facts between the parties in that regard, I am not persuaded that this is a material factor in the circumstances of the instant case. Assuming I accept that the parties had intended the relationship to be an independent contractor relationship, in *Straume v. Point Grey Holdings Ltd.*, [1990] B.C.J. No. 365 (B.C.S.C.), the court noted, at page 3, that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature". While the parties' intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor.

As noted in *England, Christie et al., above*, at page 2.1-2.2 with respect to the common law tests of "employee" status:

> "In each of these contexts the purpose of characterizing a relationship as employment is quite different from the purpose of the characterization in the action for wrongful dismissal, the traditional common law action in which the two-party relationship that is the subject of this service is elaborated, to say nothing of the purpose of particular statutes in which the term may appear. ... It follows that precedents arising under common law or under a particular statute

> can be legitimately rejected or modified when the question of "employee" status is asked for a different purpose."

It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not. As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

2. Vacation Pay

I now turn to the Employer's argument that the delegate erred in calculating vacation pay owing. There does not seem to be a dispute with respect to the delegate's findings that Neilson was never given vacation time or was paid vacation pay. As well, there does not seem to be a dispute that the correct rate is 4%. The Employer's issue with the award is that the delegate awarded vacation pay from July 1996 when, it is common ground, Neilson started working with Tumbleweed. This, the Employer says contravenes Section 80 of the Act which provides for a two year limitation period.

Section 80 reads (in part):

> 80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
>
> (a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and
>
> (b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination,
>
> plus interest on those wages.

In the case at hand, employment came to an end on May 18, 2000, *i.e.*, the situation falls under Section 80.(1)(a). In other words, the vacation pay owing is that which "became payable" 24 months before the termination of the employment (see *Khalsa Diwan Society*, BCEST #D114/96, upheld on reconsideration BCEST #D199/96). The operative date for the purpose of the limitation period in Section 80 is May 18, 2000. Clearly, therefore, Neilson is entitled to vacation pay at the rate of 4% accrued in the period May 18, 1998 to May 18, 2000. However, I do not agree with the Employer's argument that Neilson is limited to the vacation pay for those two years. Under the *Act*, vacation pay entitlement is accrued the year before it becomes payable (Sections 57 and 58). In other words, the basis for calculating entitlement to vacation pay is the previous year of employment.

Sections 57 and 58 read (in part):

57. (1) An employer must give an employee an annual vacation of

(a) at least two weeks, after 12 consecutive months of employment, or

(b) at least three weeks, after 5 consecutive years of employment.

(2) An employer must ensure that an employee takes the annual vacation within 12 months after completing the year of employment entitling the employee to the vacation.

58. (1) An employer must pay an employee the following amount of vacation pay:

(a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;

(b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay;

(2) Vacation pay must be paid to an employee

(a) at least 7 days before the beginning of the employee's annual vacation, or

(b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.

The question raised by the Employer, is whether the delegate can--in effect--go back four years, or, to put it more precisely, 48 months less a day. The delegate assessed vacation pay from July 1996. The delegate's analysis of the *Act* states:

> "...The maximum vacation pay entitlement depends on the date of hire and the date of termination, and *could be up to 48 months less a day*. The vacation pay earned from July 25, 1996 to July 24, became payable in the year July 25, 1997 to July 25, 1998, which is within the 24 months of the termination of employment." [emphasis added]

I agree that the two dates that are important for the present purposes are the anniversary date and the termination date. Neilson started his employment on July 25, 1996 and earned vacation pay for the year July 25, 1996-July 25, 1997. Under the *Act*, the vacation must be taken "within 12 months after completing the year of employment entitling the employee to the vacation." In other words, the employer has 12 months before he must give the employee the vacation he is entitled to, *i.e.*, on or before July 25, 1998. Under Section 58(2), the payment of vacation pay is

tied to the time the vacation is taken or--by agreement--to the regular pay days. Therefore, in my view, the vacation pay for the first year of employment became payable within 12 months of July 25, 1997, *i.e.*, on or before July 25, 1998. The vacation pay earned or accrued for the year July 25, 1997-July 25, 1998, had to be taken within 12 months, that is, on or before July 25, 1999 and, therefore, did not become payable until that time. The vacation pay earned or accrued for the year July 25, 1998-July 25, 1999, similarly had to be taken within 12 months, that is, on or before July 25, 2000 and, therefore, did not--except for the operation of Sections 18 and 58(3)--become payable until that time. The vacation pay for the final period, July 25, 1999 to May 18, 2000, the termination date, became payable within 48 hours of the termination (Sections 18 and 58(3)). Going back two years from the termination date, May 18, 2000, takes me to May 18, 1998 as the cutoff date. The vacation pay for Nielson's first year of employment did not become payable until July 25, 1998, after the cutoff date of May 18, 1998. In short, I agree with the delegate that it is proper to go back to July 1996 for the purposes of calculating vacation pay entitlement.

3. Deductions for Cash Payments and Gas Card

One of the main disputes between the parties is whether or not Neilson received money, cash, from the Employer's customers and failed to pay those money over to the Employer. I now turn to that issue.

Nielson's records are essentially the notations in his day timer kept by him during his employment with the Tumbleweed. In cross examination, Neilson confirmed that he had told the delegate that he had accounted for all cash moves. From the Determination is clear that the delegate accepted that Nielson had recorded and accounted for all cash moves and, therefore, was unlikely to have kept the money for himself. The Employer argues that the evidence demonstrates that was not the case.

The Determination reads:

> "McMartin stated that certain clients paid Neilson in cash and that he did not receive the monies for the work. Neilson's logbooks are very detailed, listing the client names, date, times and amounts paid. Neilson's logbooks show that he did work for the clients that McMartin claimed that he did not receive the money for. McMartin provided no evidence to support his allegations and one would wonder why if Neilson was keeping the cash payments from McMartin why he would keep such a detailed record of the jobs and the amounts billed to the customers."

Doug Brandt testified for the Employer. He is the principal of Trees Unlimited. He testified that he used Tumbleweed's services 2-3 times a week until "recently." He dealt with Neilson, who performed the services, and testified that he was under the presumption that Neilson and McMartin were partners in the business. He stated that he had "no dealings with McMartin. Brandt explained that he paid Neilson. His testimony boils down to this. He paid for most moves in cash. He rarely paid by cheque. At the end of the day, however, his testimony was not

as unequivocal as the foregoing might lead one to believe. In cross examination, he admitted that McMartin did "a few moves." He also did not recall how many moves McMartin did for his firm and that he "hadn't called Tumbleweed for years since he [now] used another firm." The Employer introduced four invoices though Brandt, who testified that he got them from Neilson. Three of these did not have a number. There was some question of exactly when these moves were, in fact, performed. At least in one case, the invoice dated December 24, 1999, Brandt admitted that the move was not done on that date. He also admitted that he--Brandt--likely signed made up the driver's signature, *i.e.*, falsified the record. There is, in my view, considerable doubt as to these invoices and Brandt's testimony generally.

McMartin also testified for the Employer. He explained that Tumbleeed had been in business for some 14 years with two trucks (with low-bed), three low-bed trailers and one truck running in a quarry (in or from 1999). He explained that Neilson worked with the company since 1996 and that--in his view--the relationship commenced as an independent contractor relationship at Nielson's instance. From his point of view, there was no great benefit to the Employer to agree to this arrangement. Neilson, however, had some business debts and wanted to be a "sub-contractor."

McMartin testified that cash moves are not common in the industry. He was decidedly of the view that the delegate erred in his determination that all cash moves had been accounted for. He explained that the issue of cash payments initially came to his attention after Neilson had left Tumbleweed. McMartin received a telephone call from a customer who asked him if he "got the cash." When he spoke with Neilson about it, Neilson explained that it was no more than $3-400. Neilson explained that the funds had been used for repair on the truck that he had undertaken (Neilson is a heavy duty mechanic) and McMartin wanted receipts for the amount. He never received those receipts.

With respect to cash payments, McMartin explained that he only received cash from Neilson on two occasions in 1999, one payment of $40.00 and another of $60.00. The latter payment was apparently related to work done for Trees Unlimited. McMartin "totally disagreed" that all cash moves had been paid to him. He also disagreed that he did most of the cash moves--his "truck wasn't licensed [in 1999]." McMartin also testified that the invoices produced though Brandt were unlike those used by Tumbleweed which have numbers, in sequences of 25. He said that Tumbleweed had no record of the invoices for Trees Unlimited.

In any event, it is McMartin's testimony that there are many entries in Neilson's daytimer for which there is no corresponding invoice, or some other irregularity, including the following:

- January 27, 1999;
- January 28, 1999--McMartin says that he has "no knowledge" of receiving cash;
- February 17, 1999;
- February 18, 1999;
- February 20, 1999;

- February 23, 1999;
- April 10, 1999--McMartin does "not recall receiving cash" for these steady customers and says that they never had cash and paid by cheque;
- April 16, 1999--McMartin says the customer name "doesn't ring a bell," has "no recollection of receiving cash," and that there is no notation that the customer paid in cash;
- April 23, 1999;
- April 27, 1999--McMartin says that the company records show that the amount invoiced Trees Unlimited was never deposited or invoiced. There is a notation in the daytimer showing a payment of $374.83 and an indication that the amount was paid by cheque;
- April 30, 1999--McMartin says that he does not know the customer in question and there is "no reference to cash receipts;"
- May 6, 1999--there is a reference to money paid by cheque, some $231.39;
- May 7, 1999--there is reference to a payment in cash, $180.00. McMartin says that he may well have received $60.00 but that Neilson's share would be $60.00 and that he--McMartin did not receive the $120.00;
- May 20, 1999--McMartin says that he does not know the customer and did not receive cash;
- August 15, 1999;
- September 8, 1999;
- September 30, 1999;
- October 18, 1999;
- December 24, 1999--Trees Unlimited--McMartin says that he "didn't receive any money for this move;"
- February 2, 2000;
- February 9, 2000;
- February 18, 2000--no invoice for a customer;
- February 28, 2000--McMartin says that there is no notation regarding cash for a customer and he has "no recall of a cash payment;"
- March 6 and 7, 2000;

McMartin testified that he was not aware of these other moves until June 2000. He also indicated that he had spoken with quite a few customers who told him that Neilson had a deal whereby they would pay by leaving $100 in the ash tray. In the circumstances, I do not find this particular testimony reliable and do not place any weight on it. It is hearsay evidence going to a material factual point in dispute. McMartin estimated that some $4,350 had been collected by Neilson in cash that he--McMartin--had no knowledge of. Trees Unlimited would account for almost $2000 alone.

Neilson explained that he worked for Tumbleweed at least an average of 7.5 hours per day. He estimated that he worked some 10,129 hours between August 1996 and the time he quit. He says he worked "night and day" for McMartin's company and that there were "days when he didn't go home to sleep." He "missed family functions" and worked many Saturdays and Sundays. In his own words, Neilson "placed customers first." He explained that there was never an issue in

his mind that he had an employer-employee relationship with Tumbleweed, though he "never really pressed the matter." When he started working for Tumbleweed, he sold his truck and cancelled his workers compensation coverage. He did request pay stubs and T-4s from time to time but did not get them. Neilson testified that he took McMartin at his word that "the accountant has it all." He thought he and McMartin were friends--he had known him for almost 15 years--and trusted him. He even gave him the key to his shop so McMartin could use it if anything broke down. Neilson also said that over the years he worked for Tumbleweed he did repair work on the trucks that at a regular shop would be worth over $20,000.

Neilson did not generally take issue with the fact that some moves were made on a cash basis. He explained that he always gave the cash in envelopes to McMartin. He explained that there was one exception to this. On one occasion, he put an alternator into the truck owned by Tumbleweed and kept an amount--$150--that he had received from a customer as compensation for the repair job and parts (the alternator). As well, Neilson testified that there were other moves than the ones referred to above that were made without an invoice being issued. Neilson mentioned that services were performed, for example, for Randy McCauley, recorded in the daytimer, without any invoices. Neilson also explained that McMartin moved for other customers for cash.

As noted above, there must be clear and cogent evidence to support an allegation of dishonesty. In the instant case, it is clear that there are two conflicting version of the events: Neilson's who says that he turned over the cash payments to the Employer, and the Employer's who says he did not. On the question of the credibility, I adopt the words of the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

On that test, considering all of the evidence, I prefer Neilson's evidence over McMartin's. While Neilson was vigorously cross-examined, and imperfections in his testimony exposed, and I consider them no more than that--imperfections, overall I find him a credible witness. I observed his demeanour closely during his testimony. I believe his testimony that he was a hard-working, dedicated and loyal employee. I also believe that he was honest in his dealings with his Employer. It follows that I do not generally accept the charge or allegation that he converted the Employer's money for himself, or stole money, or took "unauthorized" advances.

I would like to add that I have some sympathy for the Employer's position that an employee ought not to be able to be able to take advantage of the statute to claim wages where the employee has dishonestly, if that could in fact be proven, taken money from the employer. However, even if I agreed with the Employer's argument that Neilson, to put it politely, took "unauthorized" advances--and I do not, the Employer's remedy is through the criminal or civil courts for restitution if the actual amounts can be established. It is not open for the Employer to

refuse to pay wages earned (see, for example, *Park Hotel (Edmonton) Ltd.*, BCEST #257/99, reconsideration of BCEST #D539/98 and 557/98).

McMartin also testified that Neilson had abused his company fuel card. Between January 1998 and May 2000, McMartin testified that Neilson had spent some $5,400 on the fuel card to purchase fuel and regular gasoline. McMartin testified that there was an "arrangement that for parts, work etc. [Neilson could] feel free to top up if he used his personal vehicle." McMartin did not intend Neilson to use this privilege to the extent that he did. McMartin explained that he "didn't scrutinize the fuel bills." I do not accept that the Employer should be allowed to take the amount of the fuel and gasoline purchases into account for the purposes of determining the amounts owed to Neilson for vacation pay and statutory holiday pay (Section 21).

In any event, I am reluctant to accept the Employer's argument that Neilson abused the company fuel card. First, it appears, even on the Employer's testimony that there was an agreement that Neilson could use the company fuel card for his personal vehicle. Neilson's evidence was that he thought that there was an agreement. Second, it would appear that the arrangement was in place over several years. The Employer received the fuel bills and did not take issue with the amounts spent by Neilson. If the employer failed to clarify the arrangement and police the use of the card during Neilson's employment, it seems to me a little late to raise that now.

Section 21(1) of the *Act* proscribes unauthorized deductions from wages and reads (in part):

> 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 the employee 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.

In the circumstances, I largely agree with the delegate's reasons and conclusions. I do not agree that there is no evidence, as suggested by the delegate, because there is--namely McMartin's statements that he did not receive the cash. The delegate must consider the all of the evidence fairly and arrive at a reasoned conclusion as to which facts to accept, the Employer's or Neilson's. On the other hand, if, as alleged by the Employer, Neilson withheld--or to put it bluntly, in fact, stole--the Employer's money, why would he make the detailed entries in his daytimer. In my view, this does not make sense. I also note that Neilson does not deny receiving cash payments from certain customers. He says that he handed the money over to the Employer. I believe that he did.

4. Income Tax and Statutory Deductions

With respect to the issue of payments of income tax paid and remitted on behalf of the employee, I am of the view that the Employer may properly deduct any such amount from wages owed

under the *Act* (see Sections 20 and 21). I can see no reason why such amounts should not be taken into account. In fact, amounts awarded under the *Act* are usually subject to income tax. I understood that the Employer had to pay some amount on behalf of Neilson for income tax, the amount, if any, was unfortunately not clear to me. Insofar as that is the case, that amount may be taken into account and deducted.

As well, McMartin testified at the hearing that he paid some $4,302.80 on account of Neilson's share of CPP and EI and that this amount has not been repaid. This amount may or may not, depending on the circumstances, be taken into account. It was not clear to me if the amount testified to by McMartin included penalties, interest and other amounts that would not be properly deductible. I refer the question of whether or not these amounts are, in fact, recoverable and deductible back to the Director. In short, I refer the question of what amounts were, in fact, paid, and for what purpose, back to the Director for investigation and determination.

In brief, therefore, the appeal succeeds in part.

ORDER

Pursuant to Section 115 of the Act, except with respect to statutory deductions paid by the Employer, I order that Determination in this matter, dated November 6, 2000, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal