

An appeal

- by -

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

- 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: Lorne D. Collingwood

FILE No.: 2003A/197

DATE OF HEARING: October 21, 2003

DATE OF DECISION: December 10, 2003

DECISION

OVERVIEW

Inter-Urban Delivery Service Ltd. (I will use “Inter-Urban” and the “Appellant” in this decision.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 28, 2003. Inter-Urban is by that Determination ordered to pay Hardip Cheema \$8,597.26 in wages, interest included.

The Determination is that Mr. Cheema is entitled to overtime wages, vacation pay, statutory holiday pay and minimum daily pay but not compensation for length of service. Inter-Urban is also ordered to reimburse Mr. Cheema for payments made to the Workers’ Compensation Board (the “WCB”). The Director’s delegate has decided that the WCB payments are contrary to section 21(2) of the *Act*.

The Appeal is that the Determination should be cancelled for reason of errors in law and a failure to observe principles of natural justice. The Appellant, in filing the appeal, also claimed that it has new important evidence to produce, evidence which was not available at the time that the Determination was made.

I have in this decision decided that there is no reason to cancel the Determination, at least at this point, but that there is reason to refer two matters back to the Director.

Inter-Urban has many complaints with the Determination. Most have no merit whatsoever. That might also be true of what remains of the appeal, a claim that the Director does not have jurisdiction over Inter-Urban because it is an interprovincial and international carrier, and a claim that Mr. Cheema was not its employee but worked as an independent contractor and is not, therefore, covered by the *Act*. The Determination does not explain, however, why it is decided that Mr. Cheema is an employee even though the issue was raised at the investigative stage. The issue is therefore referred back to the Director with an order to provide reasons for this most important of the Determination’s decisions. The Determination does not explain, moreover, why it is decided that Inter-Urban falls within the jurisdiction of the *Act* and there is no explanation for that. The Director has had nothing to say on the matter, the Tribunal has not been provided with a copy the record that was before her delegate at the time that the Determination was made but only part of the record, and the Appellant tells me that this jurisdictional question was also raised at the investigative stage. If it was and, certainly, I have no reason to disbelieve Inter-Urban, then fairness demands that the Director provide the reasons for that decision as well.

An oral hearing was held in this case. Mr. Cheema was provided with an interpreter.

APPEARANCES

D. MacDonald	on behalf of Inter-Urban
H. Cheema	on his own behalf

SUBMISSIONS

D. MacDonald	on behalf of Inter-Urban
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ISSUES

The Appellant claims that the Director does not have jurisdiction, Inter-Urban being an interprovincial and international carrier.

The Appellant claims that Mr. Cheema is not an employee but an independent contractor and that he is not, therefore, covered by the *Act*.

The Appellant claims the Director's delegate has erred in law and failed to observe principles of natural justice in that the above two issues were not investigated and the Determination fails to address either issue.

The Appellant claims that Cheema's complaint is not within the time limit for filing a complaint.

The Appellant claims that the Director committed an error in law and/or failed to observe principles of natural justice in that it was not allowed it to submit evidence that is important to its case. Inter-Urban also claims that evidence is available which was not available at the time the Determination was made.

The Appellant claims that the Director failed to observe principles of natural justice in that her delegate did not provide it with "any documentation from the complainant". The Appellant claims an error in law and/or failure to observe principles of natural justice in that there was no hearing and the delegate's investigation is unsatisfactory. According to Inter-Urban, that lack of documentation, the failure to hold a hearing and the lack of a proper investigation hampered its ability to put forward its case.

The facts are at issue, the nature of the agreement on pay in particular. The Appellant claims to have offered Cheema a daily rate of pay which is all inclusive. The delegate has decided that the regular wage is the total amount of pay divided by total hours worked, with overtime pay, vacation pay and statutory holiday pay being over and above the regular wage. The Appellant claims that this method of calculating wages is an error in law and that the Director "acts on a view of the facts ... which (cannot) be reasonably entertained". It also claims that the Director's discretion has been exercised in a manner which is wrong in principle and it suggests that the Determination, in effect, imposes a contract on Inter-Urban, one which neither it, nor Mr. Cheema, have agreed to.

The Appellant claims that the Director misinterprets and misapplies law and commits an error in law in that the evidence before the delegate was incomplete.

FACTS AND ANALYSIS

The Appellant suggests that there is much that is wrong with the Determination but the appeal is unconvincing for the most part. All but three of its complaints have no merit whatsoever.

The Matter of Whether the Complaint is or is not Out of Time

Inter-Urban argues that Mr. Cheema's complaint was filed after the period for filing a complaint had expired. It notes that his last day of work was October 12, 2001 and that the complaint was filed on the 15th of May, 2002, almost 7 months after the last day of work.

The *Act* provides that an employee has six months from the last day of employment in which to file a complaint against his or her employer.

- 74 (1) An employee, former employee or other person may complain to the director that a person has contravened
- (a) a requirement of Parts 2 to 8 of this Act, or
 - (b) a requirement of the regulations specified under section 127 (2) (1).
- (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
- (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

The matter of whether Mr. Cheema can or cannot be considered to be an employee is an important issue in this case. However, if it is that Mr. Cheema is an employee under the *Act*, the key to deciding whether the complaint is or is not in time is deciding when the employment was severed.

In most cases, the last day of employment and the last day of work are the same but that is not true of this case. Mr. Cheema did not resign on the 12th of October, nor did Inter-Urban act to terminate Cheema at that point. Mr. Cheema had a traffic accident while making a delivery for the Appellant and he could not work for medical reasons. If it is that Mr. Cheema was employed, the employment was not terminated until such time as Mr. Cheema was again able to work. He was at that point offered alternative employment by Inter-Urban but he chose not to accept that offer and the employment was terminated. That was in January of 2002. The last day of the employment is a day in January, 2002.

Mr. Cheema filed his complaint on the 15th of May, 2002. That is well within the six month period for filing a complaint.

Failure to Consider Evidence

Inter-Urban claims the Director's delegate did not allow it to submit evidence. And in filing its appeal, Inter-Urban goes on to claim that it has new evidence to submit, evidence which was not available at the time the Determination was made. These two claims are utter nonsense.

What is this new evidence? What is the evidence which Inter-Urban was not allowed to submit? I find that the Appellant is referring to nothing more than evidence which is merely alleged to exist, and by it alone, a contract that is said to have been signed by Mr. Cheema.

Inter-Urban has in fact never had any additional evidence to submit. The Appellant has not produced the contract and it tells me, moreover, that it no longer hopes to produce the contract. As matters have been presented to me, there is also no evidence of the contract. While the Appellant claims that Mr. Cheema has admitted to signing the contract, it is the testimony of Mr. Cheema that there is no written contract between the parties.

It is not that the delegate acted to prevent Inter-Urban from submitting evidence. This is also not a case where evidence has become available which was not available at the time the Determination was made.

The Investigation

Purposes of the *Act* are the fair treatment of employees and employers and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act* (section 2 of the *Act*). Investigations are to be conducted with that in mind.

If an investigation is conducted, the case here, the person or company under investigation must be given a reasonable chance to respond.

- 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

The Appellant claims that the Director failed to observe principles of natural justice in that her delegate did not provide it with “any documentation from the complainant”. The Appellant goes on to claim that Director’s delegate has erred in law and/or failed to observe principles of natural justice in that he did not hold a hearing and conducted a less than satisfactory investigation. According to Inter-Urban, that hampered its ability to put forward its case.

I have not been shown that Inter-Urban was given an inadequate opportunity to respond.

The Director’s delegate did not hold an oral hearing. The Director is not, however, required to hold a hearing. It is sufficient that an investigation was conducted.

I am not shown that the delegate withheld any information. And it cannot be said that the delegate did not provide it with any of Cheema’s documents. Letters written by Inter-Urban on December 13, 2002 and March 7, 2003 confirm that it received both the complaint and Mr. Cheema’s major submission on the issues, a letter dated January 5, 2003.

If it is that Inter-Urban, in its reference to “documentation”, is only complaining that Mr. Cheema failed to provide any “support for what was claimed”, that too is no reason to interfere with the Determination. There is an initial burden on employees who file complaints and that is to produce convincing evidence of a failure to pay wages. Should the Director decide that there is a failure to pay wages, and that is the case here, the Director may decide that an investigation is in order. And should the Director decide on an investigation, the burden of proof then shifts to the employer, or the alleged employer, should it be that the very nature of the work relationship is in question. Employers must produce records to show that they have been complying with the *Act*. The onus on an alleged employer is to produce convincing evidence that they are not the complainant’s employer.

The Appellant goes on to claim that the investigation which the Director’s delegate conducted is inadequate. It has, however, not provided any support for that claim. I note that the Appellant, in making this particular complaint, goes on to say that the Director was told about the contract (This is the contract that Inter-Urban cannot produce.) That suggests that the Appellant may be labouring under a misconception, that fairness demands that the delegate search for documents that employers and alleged employers are unable to find.

I am not shown that the delegate did anything to hamper Inter-Urban’s response to the complaint. Inter-Urban knew the issues. It was given an adequate opportunity to respond to the issues. I see no unfairness here.

The Facts, etc.

As noted above, facts are in dispute, the nature of the agreement on pay in particular. The Appellant claims to have offered Cheema a daily rate of pay which is all inclusive. The delegate has decided that the regular wage is the total amount of pay divided by total hours worked, with overtime pay, vacation pay and statutory holiday pay being over and above the regular wage. The Appellant claims that this method of calculating wages is an error in law and that the Director “acts on a view of the facts ... which (cannot) be reasonably entertained”. It also claims that the Director’s discretion has been exercised in a manner which is wrong in principle and it suggests that the Determination, in effect, imposes a contract on Inter-Urban, one which neither it, nor Mr. Cheema, have agreed to.

The issue is the wage rate. The Appellant has made no attempt to explain how it is that discretionary powers of the Director were inappropriately exercised, or how it is that the Director has acted to impose a contract on Inter-Urban. I find that the Determination is nothing more than an attempt at enforcing the law.

The delegate has decided that the agreement on pay was a flat rate of \$132 a day, regardless of how many hours were worked. The delegate also accepts that Inter-Urban later agreed to pay Cheema \$140 a day.

The delegate found that there is nothing to show how Mr. Cheema was paid and so he has calculated the regular wage as the *Act* requires.

“regular wage” means

- (a) if an employee is paid by the hour, the hourly wage,
- (b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee’s wages in a pay period divided by the employee’s total hours of work during that pay period,

Inter-Urban on appeal argues that it was fully explained to Mr. Cheema, before he was hired, that the daily rate included 8 hours of pay at a regular wage of \$9.80 an hour plus 3 hours of overtime pay, 3.8 percent statutory holiday pay and 4 percent vacation pay. According to the Appellant, Cheema was then given a raise and his basic wage went to \$10.41 an hour and so he was paid \$140 a day. I find this very hard to believe. Inter-Urban had no reason to discuss an hourly rate of pay and hours of work, vacation pay and statutory holiday pay if, as Inter-Urban claims, Mr. Cheema was engaged as independent contractor. Discussions would focus on matters like the amount to be charged and his ability to do the job.

Adding greatly to my doubt that Inter-Urban told Mr. Cheema that he would be paid only \$9.80 an hour and, later, \$10.41 an hour, is the fact that Inter-Urban agreed to pay Cheema \$12.00 an hour just for washing its truck on weekends. It is unlikely that Cheema would be paid more than his truck driving.

The *Act* requires, moreover, that employees be paid overtime wages for all hours worked after 8 hours in a day and 40 hours in a week. If 4 hours of overtime were worked by an employee, then 4 hours of overtime pay is to be paid. The employee cannot accept less, even by agreement.

- 4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

Sections 43, 49, 61 and 69 have no application in this case.

Given an absence of proof that it was explained to Mr. Cheema that he was only going to be paid \$9.80 an hour and, later, \$10.41 an hour, I can see no reason to interfere with the delegate's calculation of the amount owed.

Misapplication of the law, incomplete information

It is said that the Director's delegate has misinterpreted law and misapplied the *Act* and an error in law has been committed in that a decision is made even though the evidence before the delegate was incomplete.

I find that if there has been a failure to apply the law or properly interpret any law, the *Act* included, that could only be in respect to the matter of whether the Director does or does not have jurisdiction and/or the matter of whether it is or is not reasonable to view Mr. Cheema as an employee. I have more to say on this below.

On the second point I find that it does not matter whether or not the Determination is based on incomplete knowledge. That is hardly reason to cancel the Determination. The Director like the Tribunal is to decide matters on the balance of probability and decisions are to be based on whatever relevant evidence is presented by the parties and/or discovered by a delegate as he or she conducts an efficient investigation. Perfect knowledge is not required. If it were, little or nothing would ever be decided by courts and tribunals.

The Important Issues

While the appeal is for the most part unfounded, I am satisfied that there are grounds to send two issues back to the Director. I am here referring to the matter of whether the Director does or does not have jurisdiction, Inter-Urban being an interprovincial and international carrier, and the matter of whether it is or is not reasonable to view Mr. Cheema as an employee, Inter-Urban claiming as it does that he worked as an independent contractor and that he is not, therefore, covered by the *Act*.

The Determination does not explain why it is decided that Mr. Cheema is an employee. Yet I find that this most important of issues was raised at the investigative stage, in a letter dated May 23, 2003, if not before that point. (The letter refers to past discussion of the matter of whether Mr. Cheema worked as an independent contractor.) This issue is referred back to the Director with an order to provide reasons.

The Determination does also not explain why it is decided that Inter-Urban falls within the jurisdiction of the *Act* and there is no explanation for that. The Director has offered no explanation for that lack of reasons while the Appellant tells me that this issue was also raised at the investigative stage. If it was and, certainly, I have no reason to disbelieve Inter-Urban, then fairness alone demands that the Director provide reasons for that decision as well. If it is that the Director does not have jurisdiction, then the delegate has made an error in law which is fatal to the Determination.

I have one last point to make and that is to remind the Director that subsection 5 of section 112 of the *Act* calls for the production of any document considered by a delegate.

112 (5) On receiving a copy of the request under subsection (2) (b) or amended request under subsection (4) (b), the director must provide the tribunal with the record that was before the

director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.

My handling of this case has been hampered to some extent by the fact that the Director did not provide the Tribunal with a copy of the record in this case but only part of the record. Both the Determination and Cheema's major submission on the issues refer to a letter from Inter-Urban dated December 13, 2002. Although I was able to obtain a copy of that letter from Inter-Urban, that letter was obviously considered by the Director's delegate and it should have been turned over to the Tribunal. It is also part of the record that was before the Director at the time that the Determination was made.

A second letter, a December 12, 2002 letter from Inter-Urban to the delegate refers to a covering letter of some sort. That letter was not provided to the Tribunal. Yet it too is part of the record which was before the Director at the time that the Determination was made. The fact that I have neither of these letters has left me wondering what else is missing.

In summary, I find that the appeal, for the most part, lacks merit but I am satisfied that there are grounds to send two issues back the Director. Inter-Urban is entitled to know the reasons why it is decided that Mr. Cheema is an employee. The Determination also does not explain why it is decided that Inter-Urban falls within the jurisdiction of the *Act* and there is no explanation for that. The Director has had nothing to say on the matter, the Tribunal has not been provided with a copy the record that was before her delegate at the time that the Determination was made but only part of the record, and the Appellant tells me that this jurisdictional question was also raised at the investigative stage. If it was and I have no reason to disbelieve the Appellant, then fairness demands that the Director provide the reasons for that decision as well.

The Determination is referred back to the Director so that she may provide reasons for the decision that Mr. Cheema is an employee and either reasons for the decision that Inter-Urban is covered by the *Act* or explanation of the failure to provide any reasons.

ORDER

I order, pursuant to section 115 (1) (b) of the *Act*, that the Determination dated May 28, 2003 be referred back so that she can provide reasons as set out in the decision.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal