EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Bandaid Solutions Ltd.
("BSL")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/289

DATE OF HEARING: August 6, 1999

DATE OF DECISION: August 18, 1999

DECISION

APPEARANCES

Doug Smith	on behalf of Bandaid Solutions Ltd.
Kenda Stempien	on behalf of Bandaid Solutions Ltd.
Robert Joyce	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Bandaid Solutions Ltd. ("BSL") under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination dated April 21, 1999 issued by a delegate of the Director of Employment Standards (the "Director"). BSL alleges that the delegate of the Director erred in the Determination by concluding that the complainant Luc Chretien ("Chretien") was entitled to regular wages and compensation for length of service in the amount of $1,792.18 (includes interest).

BSL further alleges that the investigation by the delegate of the Director was not undertaken in an impartial manner.

BSL finally alleges that Chretien was actually "overpaid" during his employment and that should be taken into consideration in this appeal.

The delegate of the Director maintains that certain documents and information submitted by BSL on this appeal should not be considered by the panel as those documents were not provided by BSL to the delegate during the investigation prior to the Determination being issued.

ISSUES

The issues to be decided in this appeal are:

1. Did the delegate of the Director conduct the investigation in a fair and appropriate manner ?
2. Is BSL entitled to submit documents on appeal that were not provided to the delegate of the Director during the investigation ?

3. Is BSL entitled to withhold Chretien's last 2 weeks wages to offset payments previously made to Chretien for time not worked ?

4. Is Chretien entitled to compensation for length of service as calculated by the delegate of the Director ?

FACTS

The following facts are not in dispute:

- Chretien was employed by BSL commencing August 1, 1997 till July 3, 1998;
- Chretien was initially employed as an "on-call" basis;
- Chretien signed an Employment Agreement with BSL dated March 19, 1998;
- the Employment Agreement stipulated that as well as performing certain duties for BSL, Chretien was "*providing instruction both in the field and as a contract instructor for Bandaid Solution Safety Training Inc.*"
- Bandaid Solution Safety Training Inc. ("BSST") is a "sister" Company to BSL;
- Chretien was paid $1166.00 semi-monthly by BSL;
- Chretien's employment was terminated July 3, 1998 and he was provided with a letter stating in part:

  "*While many factors have influenced the decision to terminate your services, following are the most serious concerns:*

  1. *Overcharging on invoices for courses taught. Even though this matter has been discussed with you in February, then again in March, you continue to overcharge on your invoices to this company......*

  2. *Your attendance at work has been deplorable. Even though your poor attendance has been discussed with you and you have promised to improve, your absences continue.........*

  3. *Your performance at work on a day to day basis is also unacceptable.......*

- BSL filed civil actions against Chretien for the recovery of the overcharges and for violation of the Employment Agreement non-competition provisions;
- BSL advised the delegate of the Director that both civil actions had been resolved in favour of BSL, however, BSL did not send copies of those resolutions to the delegate of the Director;
- BSL taped the July 3, 1998 termination meeting with Chretien and sent a copy of that tape and invoices which allegedly indicated the overcharging to the delegate of the Director. For whatever reason, the delegate of the Director did not receive the material submitted by BSL and BSL chose not to resubmit the material;

- the delegate of the Director, in letters dated December 1, 1998, December 24, 1998, February 3, 1999, February 22, 1999, March 8, 1999 and March 11, 1999 requested BSL to submit any further information for consideration prior to issuing a Determination;
- BSL did not submit copies of the civil action resolutions or copies of the termination tape to the delegate of the Director;

Doug Smith ("Smith") testified that:

- he operates 2 companies, Bandaid Solutions Ltd. ("BSL") and Bandaid Solutions Safety Training Inc. ("BSST");
- he lacked confidence in the delegates' investigation of the complaint after receiving the delegates' December 1, 1998 letter which stated, in part "*I have further reviewed all information pertaining to this file with the exception of that which you were going to forward after our Oct 23rd meeting. As per our discussion, that information you were to supply, may assist in establishing just cause for termination but would not give cause to refuse payment of the employees last two weeks work.......*";
- he did not want to submit any further information while the civil actions were pending as he felt that the delegate would provide that information to Chretien;
- after Chretien stated to the judge in the civil proceedings that the delegate of the Director was "giving him legal advice", Smith felt it would not be any use to provide any further information to the delegate;
- he did not feel that it was necessary to provide any documents from the civil proceedings as he did not consider them to be a part of Chretien's complaint;
- Chretien never worked a complete week during his period of employment;
- Chretien always found a reason to take time off, although all time off was approved by Smith in advance;
- he had a verbal agreement with Chretien that Chretien could take time off with pay when it was slow and then work for it later as it got busy;
- Chretien was terminated before he was able to perform the work for the time off he had already been paid for;
- Chretien was inadvertently overpaid ($1166.00 semi-monthly) as his rate of pay as per the Employment Agreement was to be $26,000 annually to be paid in 24 pays or $26,000 ÷ 24 = $1,083.00 semi-monthly;
- he kept notes of the March 31, 1998 meeting with Chretien at which time Chretien was advised of a number of shortcomings in his work performance as well as the problem of overcharging was raised at that time;
- he did not give a copy of those notes to the delegate of the Director although he did verbally provide the information in regard to the March 31, 1998 meeting;
- the overcharging of invoices by Chretien constitutes just cause for his termination.

Kenda Stempien ("Stempien") testified that:

- she is an employee of BSL and was employed during the period that Chretien worked there;

- she also provides contract instructional services to BSST;
- the procedure for invoicing the instructional services separately to BSST is still the same as it was when Chretien was employed;

Robert Joyce, delegate of the Director testified that:

- he never gave Chretien any "legal advice" with regard to the civil actions filed by BSL;
- he has no idea of what Chretien may have said during the civil proceedings;
- he investigated Chretien's complaint in a fair and impartial manner;
- he recalls advising BSL that they had the option of civil action to recover the alleged overcharges etc., but he was not aware of when BSL filed the actions nor was he aware of any of the details of those actions until he received BSL's letter dated March 10, 1999;
- he sent numerous letters to BSL both before and after the civil action requesting that they supply further information;
- he calculated Chretien's wage rate based on the employment contract and the pay slips provided;
- the Determination was made based on the information available at that time;

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, BSL.

BSL maintains that the first 2 issues in this particular case are inter-related, I will therefore consider the evidence in that context.

The burden in this matter is on BSL to show some reason why the Tribunal should allow them to challenge the conclusions reached in the Determination with information they failed or refused to provide during the investigation by the delegate of the Director.

BSL's only argument is that they lost confidence in the ability of the delegate of the Director to impartially investigate the complaint therefore they did not submit all of the information available at that time.

The allegation of bias was raised by BSL in their appeal to the Determination. BSL states in their appeal that they believe the delegate went outside of his role as an investigator and provided "legal advice" to Chretien in regard to the civil actions filed by BSL. This belief is based on unsworn statements made by Chretien during the settlement conference with regard to the civil action. It is interesting that BSL chose to rely upon those statements made by Chretien with respect to the delegate of the Director while at the same time elsewhere in their appeal, BSL states " *...the Labour Standards Branch has now issued a determination favourable to an admitted thief.....*" and later "*.....Chretien will continue with the lies he has related to Mr. Joyce.....*"

With regard to bias, the Court of Appeal stated in *Adams v. Worker's Compensation Board,* B.C.C.A., (1989) 42 B.C.L.R. 228, at 231-232

> An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

During the hearing and the examination of the documents provided, BSL did not present one piece of evidence to support the allegation of bias. Mere disagreement with the weight given to evidence presented or the extent to which an investigation was conducted does not lead to a conclusion of bias. A reasonable apprehension of bias would rest on conclusions that the delegate failed to accept evidence proffered by one party or deliberately misstated it in a determination.

Smith's evidence was that the day the delegates letter of December 1, 1998 was received by BSL was "not a good day" and he became quite angry about the delegates' statement that "*....the information you were to supply, may assist in establishing just cause for termination but would not give cause to refuse payment of the employees last two weeks work...*". As a result of that letter, Smith states that BSL decided to not resubmit copies of the tape and invoices or the civil action documents to the delegate of the Director.

The evidence is that the delegate of the Director sent *no less than 6 letters* to BSL requesting that they provide information prior to the Determination being made. For their own reasons, BSL chose not to do so.

For all of the above reasons, I conclude that there is no evidence to support the allegation of bias made by BSL. I further conclude that the delegate of the Director went beyond the norm in providing BSL numerous opportunities to provide additional information prior to issuing the Determination.

With respect to the second issue, that is whether BSL is entitled to submit evidence on appeal it failed or refused to provide during the investigation, based on the evidence before me, there are no facts and/or circumstances that would justify the Tribunal relaxing its approach in cases such as this, where an appellant seeks to challenge conclusions of fact in the Determination with material that it failed or refused to produce during the investigation.

That approach is stated in several cases that have come to the Tribunal, including *Tri-West Tractor Ltd.* BCEST No. D268/96 and *Kaiser Stables Ltd.* BCEST No. D058/97. There

are sound policy reasons for limiting the material before the Tribunal in an appeal to what has been disclosed during the investigation, unless there is a valid reason shown for allowing the additional material to be submitted Those reasons are grounded in the purposes and objects of the *Act*. Section 2 of the *Act* states, in part:

> *2. The purposes of this Act are to:*
>
> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*

An approach that, in effect, treats appeals to the Tribunal as a trial *de novo* , where the parties are free to ignore the statutory requirements to disclose information during an investigation and add any material to the appeal is not consistent with the above stated purpose.

Additionally, the Tribunal is not intended to be the decision maker of first instance under the *Act* and it is not the function of the Tribunal to investigate complaints. That authority is given by the *Act* exclusively to the Director under Part 10. As this case clearly demonstrates, the investigative role of the Director is frequently adversarial. One of the primary objectives of the *Act* is to establish and maintain the Tribunal as an adjudicative body independent of the Branch and of the authority, duties and responsibilities of the Director outlined in Parts 10 and 11 of the *Act*. An approach that avoids compromising the statutory function of the Tribunal and its impartiality as an adjudicative body is consistent with that objective.

For all of the above reasons, I conclude that BSL is not entitled to present evidence before this panel that they failed or refused to provide during the investigation by the delegate of the Director.

I now turn to the next issue to be decided in this appeal, that is, is Chretien entitled to the regular wages for his last 2 weeks work as calculated by the delegate of the Director ?

There is no dispute that Chretien worked during the period in question, rather the issue is whether BSL can withhold the wages for this period and apply those wages to time Chretien had earlier not worked yet been paid for.

Section 17 of the *Act* provides that:

> *Section 17, Paydays*
>
> *(1) At least semimonthly and within 8 days after the end of the pay period, an employer* ***must pay*** *to an employee* ***all wages earned*** *by the employee* ***in a pay period****.*

(2) Subsection (1) does not apply to

(a) overtime wages credited to an employee's time bank,
(b) statutory holiday pay credited to an employee's time bank, or
(c) vacation pay.
(emphasis added)

The ability of an employer to make deductions from an employee's wages is set forth in Section 21 of the *Act* which provides:

Section 21, Deductions

*(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.***

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
(emphasis added)

In summary therefore, wages earned in a pay period, other than the exceptions permitted, **must** be paid to the employee and the employer is **not permitted** to withhold, deduct or require payment of those wages for any purpose save those as set forth in Section 21.

There is nothing in the *Act* which restrains an employer from paying any employee for time not yet worked, however, should the employer embark upon this course of action, the employer does so at its own peril and potentially, to its own detriment.

The verbal agreement between BSL and Chretien wherein Chretien was given paid time off in advance of earning it clearly leaves BSL exposed to the possibility of being unable to recover those payments when, as is the case here, the employment of Chretien terminates before the reciprocal portion of this agreement can be fulfilled.

Verbal agreements made in an employment relationship must be viewed in the context of Section 4 of the *Act* which provides:

Section 4, Requirements of this Act cannot be waived

> *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.*

The verbal agreement which BSL is attempting to rely upon would, in any event in my view, be a violation of Sections 17 and 21 of the *Act,* and therefore, pursuant to Section 4, *of no effect.*

With respect to BSL's argument that Chretien was inadvertently paid a higher rate than agreed to for a period of five months, this argument was first made on appeal, even though the information was clearly available to BSL prior to the Determination being issued. BSL's argument that it only discovered the error while preparing for the appeal is, in my view, more of a reflection of its business practices and not a valid reason for failing to provide this information for consideration prior to the Determination being issued.

The evidence is that the calculations with respect to rate of pay were based on the pay slips issued to Chretien by BSL.

For the same reasons as set forth in response to issue No. 2, I conclude that BSL is not entitled to enter evidence with respect to the rate of pay.

Based on the evidence provided and for all of the above reasons, I conclude that BSL is not entitled to withhold Chretien's last 2 weeks wages to offset payments previously made for time not worked..

I now turn to the last issue, that is, is Chretien entitled to compensation for length of service?

The liability of an employer to pay compensation for length of service is set out in Section 63 of the *Act* which provides:

> *Section 63, Liability resulting from length of service*
>
> *(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of service increases as follows:*
>
> *(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
> *(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:
(i) one week's notice after 3 consecutive months of employment;
(ii) 2 weeks' notice after 12 consecutive months of employment;
(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
(b) dividing the total by 8, and
(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

BSL alleges that it had just cause for the termination of Chretien's employment, pursuant to Section 63 (3) (c). BSL relies upon the results of the civil action against Chretien and as well a transcript of the July 3, 1998 termination meeting with Chretien, both of which, despite repeated requests from the delegate of the Director, were not supplied by BSL prior to the Determination being issued.

The onus on establishing that just cause existed for the termination of Chretien rests with BSL. The statements alleging misconduct worthy of termination referred to in the termination letter must be supported by evidence provided to the delegate of the Director **prior to the Determination being issued**. BSL chose to not provide supporting evidence prior to the Determination being issued.

For all of the above reasons, I conclude that at the time the Determination was issued, BSL had not provided evidence to the delegate of the Director to establish just cause for the

termination of Chretien. Chretien is therefore entitled to compensation for length of service.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 21, 1999 be confirmed in the amount of **$1792.18** together with whatever further interest may have accrued pursuant to Section 88 of the *Act* since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal