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 -

Jerzy Rudowski
("Rudowski")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/316

DATE OF HEARING: July 28, 2000

DATE OF DECISION: August 30, 2000

DECISION

OVERVIEW

This appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and by Jerzy Rudowski ("Rudowski", also, "the appellant"). Rudowski appeals a Determination by a delegate of the Director of Employment Standards (the "Director") dated April 27, 2000. The Determination is that Rudowski is not owed wages under the *Act*.

Underlying the Determination is a decision that Rudowski's former employer, Timote's Trucking Ltd. ("Timote"), did not misrepresent the employment that it offered Rudowski, contrary to section 8 of the *Act*. Rudowski, on appeal, claims that he was in fact duped into taking the job. He claims that he was promised or, at least, led to expect that he would be kept busy with work and earn wages equal to, if not greater than, what he was making with his former employer.

APPEARANCES:

Jerzy Rudowski	On his own behalf
Timote and Barbara Tukutau	On behalf of Timote
Ken Marshall	Witness
Darcy Marshall	Witness
Rebecca Cuthbert	Witness

PRELIMINARY ISSUE

I conducted a hearing on the appeal on July 28, 2000. After the hearing, Rudowski filed a further written submission, the "Appellant's Final Argument". The Tribunal's Registrar has told me, on advising me of the submission, that Rudowski's reason for filing the submission is that he was not invited to make a closing statement, contrary to the Tribunal's "Guide to the Process" (the "Guide"). What I must decide is whether to accept or not accept the submission.

FACTS AND ANALYSIS

The Guide is a brochure which is designed to give people an idea of what may happen on appeal. It refers to a form of hearing in which opening statements are followed by the presentation of evidence, the cross-examination of witnesses included, and finally closing statements and argument of the case. But the Guide is just that, a guide. It is not binding on Adjudicators.

Hearings must, of course, be fair. They are also to be efficient. Purposes of the *Act* are promotion of "*the fair treatment of employees and employers*" and the provision of "*fair and efficient procedures for resolving disputes over the application and interpretation of this Act*" [section 2(b) and 2(d) of the *Act*]. The Tribunal may, however, "*conduct an appeal or other*

proceeding in the manner it considers necessary and is not required to hold an oral hearing" (section 107).

In this case, both parties had chosen to represent themselves. And I assumed, correctly as it turned out, that the parties were not at all familiar with hearings and the ways of courts and tribunals. I therefore chose to conduct an informal hearing as suits parties that are unfamiliar with hearings and tribunals. I heard from Rudowski, then Timote and Timote's witnesses, with Rudowski being given an opportunity to cross-examine each of those witnesses. I then turned to Rudowski once again and heard his reply. As Rudowski raised new matters on reply, Timote was given a chance to respond and Rudowski was allowed to reply.

As each of the parties went about presenting matters to me, they argued their case as they went about presenting evidence. In other words, everything arrived as a package. And once I had heard the last of Rudowski's replies, it appeared clear to me that I had heard all of what he, and Timote for that matter, had to say in regard to the appeal. As such, I moved to bringing the hearing to a close. I began by stating that it seemed to me that all of what the parties had to say had been said, and I then went on to explain that I was reserving judgement and that the parties would in due course be receiving a written decision on the appeal. There being no objections, I adjourned the hearing.

I believe that if Rudowski does have more to say on the appeal it is as an afterthought. I am satisfied that Rudowski was given a full opportunity to present his case and that he had nothing more to present to me on the 28th. When I adjourned that day, I had heard all of his arguments. He had told me what he thought my decision should be and why. I have therefore decided that I will not accept his submission but will consider only the information which is now before me.

OTHER ISSUES TO DECIDE

At issue is the matter of whether Timote did or did not misrepresent terms of employment on offering Rudowski work. What I must ultimately decide is whether the employee has or has not shown that the Determination ought to be varied or referred back to the Director for reason of an error or errors in fact or law.

FACTS and ANALYSIS

Timote and Barbara Tukutau own a truck. Timote Tukutau, under the name of Timote's Trucking Ltd. ("Timote"), provides trucking services as an owner/operator to R & G Trucking Co. Ltd. ("R&G") under a collective agreement between R&G and the International Brotherhood of Teamsters, Local Union No. 31 (the "Teamsters"). What Timote and R&G do is deliver containers for CP Rail.

The number of containers that CP Rail has to deliver varies day to day. In the winter, poor weather and slides can slow rail transport, or even bring it to a complete standstill, with the result that there is little or no work for the truckers.

Timote and Barbara Tukutau had arranged for a vacation, from January 28, 2000, to February 28, 2000. Rudowski was hired as a driver for the length of the vacation.

Rudowski took the job on the expectation that he would receive lots of work, as much as 7 days of work a week and 15 hours of work a day. To his horror, he received only four days of work, the 31st of January and the 7th, 8th, and 14th of February. He earned only $500.03 in all. Had he known that he stood to make so little, he would not have quit his job with Power Enterprises. That job paid $750 a week.

Rudowski is not claiming that he is owed wages for work performed for Timote. He is asking to be paid the difference between what his old job paid and the amount earned in working for Timote.

Rudowski was not paid a salary and he knew that Timote was not offering a set number of hours of work per week. The delegate has concluded, correctly in my view, that if there is anything to Rudowski's claim it is for reason of section 8 of the *Employment Standards Act*. That section of the *Act* is as follows:

> ***8*** *An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:*
>
> *(a) the availability of a position;*
>
> *(b) the type of work;*
>
> *(c) the wages;*
>
> *(d) the conditions of employment.*

The delegate has found that if the employment was misrepresented, it could only be because the availability of the position was misrepresented. I agree with that. Rudowski's claim is in essence that he was promised a full time position but given a part time job. He says that he was led to believe that the job was a full time job with lots of overtime when, in fact, he stood no chance of receiving very much work at all given the way work was assigned and his status as a junior driver. He argues, no one in their right mind would leave a job that paid $3,000 a month for a part-time job which paid only about $500 a month.

But was the job misrepresented? I find that Rudowski knew that work was assigned to the truckers on the basis of seniority. Timote Tukutau, Ken Marshall, Darcy Marshall and Rebecca Cuthbert all say that he was made aware of the fact that seniority governs. And Rudowski admits to knowing that work would be assigned on the basis of seniority. As he has said, "I was convinced that it was the truck that determines seniority" (page 2 of the Complaint). In other words, he was told that work was assigned on the basis of seniority, it is just that it was his understanding that the seniority was truck specific, not driver specific.

In that Rudowski knew that seniority governed, it follows that there was not misrepresentation of the employment unless the employer actually led him to believe that the seniority was truck

specific. What I find is that there is neither evidence which shows that, nor evidence which leads me to believe that that is what happened. Indeed, I am led to accept that matters are likely just as Timote Tukutau describes, namely, that he told Rudowski that work would be assigned according to seniority and that is all that he told him. I am given no reason to disbelieve Timote Tukutau, Ken Marshall or any of Timote's other witnesses. Each of the witnesses appears forthright and convincing. Their statements are, moreover, found to be reasonable and consistent with one another. Timote's version of matters is consistent with the governing collective agreement, of which Tukutau is well aware, and it is consistent with what people usually mean when they speak of "seniority", namely, a worker's length of service. Seniority almost always rests with the worker. The only exception of which I am aware is that it will sometimes rest with a crew or group of workers, and I have been reading collective agreements for thirty years and twice conducted, for the provincial Ministry of Labour, detailed studies of all collective agreements 200 employees or more. I have never heard of such a thing as truck specific seniority.

I doubt, as it is so very unlikely, that a man of Rudowski's experience would not know what is meant by "seniority". But if it is the case that he did not know what it is, that he genuinely thought that work would be assigned on the basis of truck specific seniority, I am satisfied that he was not led to that conclusion by the employer but that it is something that he decided on his own. In other words, Rudowski misunderstood the employment, it was not misrepresented.

I realize, and fully accept, that Rudowski would never have taken the job that he did if he had known that he would earn only slightly more than $500. But, as matters are presented to me, I am led to believe that he took the job because he could potentially earn as much if not more than his old job paid and the job offered two additional advantages. He could stay in Vancouver and it meant that he did not have to drive Oregon's and California's high mountain passes in winter. As things turned out, it was the wrong decision, taking the job, as he received little work and earned only $500. But the risk was always that CP Rail would have few containers for delivery and as such he would receive little work as a junior driver. And while it is clear that he suffered financial hardship, the *Act* does not require Timote to make up for his shortfall in earnings.

The foregoing deals with what is Rudowski's main argument but he has two other claims. He claims that he should not even have been hired given the collective agreement. But while he alleges that, he does not show me that is true of the collective agreement. On that he relies on what Ernie Nial had to say to the delegate but R&G leads me to believe that Nial is either wrong or misquoted.

Rudowski goes on to argue, rather perversely I find, that the fact that he was hired, even though he should not have been, shows that section 8 has been violated. That argument fails for reason of the above. But even if it is that Rudowski should not have been hired, he is still not owed compensation for reason of some contravention of the *Act*. The employee in that circumstance suffers no disadvantage.

The delegate has found that the employer did not misrepresent the employment, contrary to section 8 of the *Act*. I agree with that decision. Rudowski is not owed moneys under the *Act* from what I can see. I am confirming the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 27, 2000, be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal