

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 -

Ralph's Inexpensive Tree Works Inc.
("Ralph's Inexpensive")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/289

DATE OF HEARING: September 24, 1998

DATE OF DECISION: November 10, 1998

DECISION

APPEARANCES

Wallie. G. Taylor	For Ralph's Inexpensive
Gordon Maxwell	Witness
Darrel Taylor	Witness
Don Seykens	Witness
Gordon Grant	Complainant

OVERVIEW

Ralph's Inexpensive Tree Works Inc. ("Ralph's Inexpensive"), appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination by a delegate of the Director of Employment Standards dated April 29, 1998. The Determination is that Ralph's Inexpensive has contravened sections 17, 18, 20, 22, 34, 40 and 58 of the *Act* and owes \$1,024 in wages, vacation pay and interest to Gordon Grant, its former employee. The Determination also imposes, pursuant to the *Act* and the *Employment Standards Regulation*, a penalty of \$0.00.

ISSUES TO BE DECIDED

At issue is the Determination's reliance on the employee's record of hours worked. Wallie Taylor, owner of Ralph's Inexpensive, claims that his record of work is the only accurate record of work.

At issue is the amount of wages owed. Taylor argues that Grant has been paid in full. In the Determination, it is decided that Grant has been paid \$370 and is owed \$976.80 in wages and vacation pay. On appeal, the delegate advises me that the Determination is in error: That original complaint documents indicate that Grant was paid \$622 in wages, not \$370. Moreover, the Delegate, on seeing a submission from Don Seykens, namely, one confirming that he was paid \$150 by Taylor for Grant's accommodation, is ready to allow the payment as an assignment of wages pursuant to section 22(2) of the *Act*. That all considered, the delegate revises her calculations. Ralph's Inexpensive is said to owe only \$574.80 in wages and vacation pay, plus interest, a grand total of \$602.93.

The delegate goes on to explain that during the course of her investigation, she was unable to confirm whether Taylor paid additional rent moneys on behalf of Grant. In the month of May, Grant lived with Gordon Maxwell. The delegate indicates that, pursuant to section

22(2) of the *Act*, she is also prepared to authorize a further assignment of wages to the extent that rent payments to Maxwell by Taylor on Grant's behalf are confirmed.

The penalty is at issue.

FACTS

Some years ago, Wallie Taylor and Gordon Grant worked together as loggers. Taylor later formed Ralph's Inexpensive. It is through that company that Taylor prunes and cuts down trees and shrubs. He often works alone but, for larger jobs, helpers are employed. Grant came to Vancouver looking for work and in April of 1997 he ran into Taylor. Taylor found him a place to stay and gave him work as a helper in the period April 28, 1997 to May 22, 1997.

In April, Grant stayed in the house of Don Seykens. Taylor paid Seykens \$150 towards Grant's room and board.

Grant rented a room from Gordon Maxwell. That was his residence in May of 1997. During the course of the investigation, Taylor claimed that he paid Maxwell \$450 as rent for Grant, \$200 in cash, and another \$250 by cheque. But Taylor failed to produce a cancelled cheque, and the delegate was unable to locate Maxwell or, in some other way, confirm whether rent was indeed paid as alleged. Taylor has finally managed to find his cancelled cheque and he shows it to me. Moreover, Maxwell confirms that, in addition to the cheque, Taylor paid him another \$200 in cash as rent for Grant.

There are competing records of hours worked. The two are not all that far apart. The Determination is based on the record of work which was kept by the employee. Taylor is convinced that his is the better record. It is, however, not a contemporaneous record. Taylor says that it reflects other records kept by him. I am shown various records, bidding records included, but find that they are haphazard and incomplete. They fall well short of establishing the accuracy of his record of work.

In explaining the penalty, a delegate advises the employer that a penalty is not imposed for every contravention of the *Act*. The delegate goes on to state, "The exercise of discretion is not arbitrary, rather it is predicated on an assessment of the corrective nature of a penalty on the behaviour and conduct of an employer." The penalty is then imposed, the delegate finding that, "In this instance, the Director is of the view that a penalty will create a disincentive against repeat of a contravention of Section 17, 18, 20, 22, 34, 40, and 58 and that such a disincentive is needed to promote compliance with the *Act*."

ANALYSIS

The delegate in this case has relied on the employee's record of hours worked, rather than that produced by the employer. I see nothing wrong with that. Where the employer's record is incomplete or inadequate, as is the case here, the Director or her delegate may rely on the employee's record of work where it is the best evidence available.

The Director's delegate finds that Grant was paid \$622 in wages, not \$370, and she wishes that the Determination be amended so that it reflects that. Section 86 of the *Act* allows the Director to vary or even cancel a Determination but, there being the appeal, it is efficient that the Determination be revised by the Tribunal. The Determination is varied so that it reflects the delegate's finding that \$622 has already been paid Grant.

An employer may not withhold wages or deduct wages except as permitted by the *Act*.

- 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 an employee's wages for any purpose.*
- (2) *An employer must not require an employee to pay any of the employer's business cost 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.* (my emphasis)

Permitted deductions are set out in section 22 of the *Act*. Deductions that are in the interest of the employee may be allowed by the Director.

- 22** (2) *The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit.*

Now that Seykens confirms that Taylor paid \$150 towards Grant's room and board, the delegate authorizes that payment as an assignment of wages and asks that the Determination be varied accordingly. The Determination is so varied.

The delegate was unable to contact Gordon Maxwell during the course of the investigation, and Taylor could not find his cancelled cheque, not because he was refusing to co-operate with the Director's delegate but simply because he just could not find it. The delegate concluded, correctly I should add, that Taylor's claim of additional rent payments was without support. However, as matters are presented to me, the cancelled cheque for Grant's rent is produced and Maxwell confirms that, altogether, Taylor paid him \$450 as rent for Grant, \$200 in cash and \$250 through the cheque. The delegate is prepared to authorize the payments as a further assignment of wages under section 22 (2) of the *Act*. That reduces the amount of the Determination by a further \$450.

Grant earned total wages and vacation pay of \$1,346.80 and he was paid \$622, not \$370. Taylor paid his rent, first \$150 to Seykens, then \$450 to Maxwell and the delegate is prepared to authorize those rent payments as she may do under section 22 of the *Act*. Taking the above into account, I find that Grant is owed \$124.80 [$1,346.80 - \{622 + (150 + \$450)\} = 124.80$]. It is that amount of wages and vacation pay which Ralph's Inexpensive must pay Gordon Grant. To that must be added interest.

A penalty is imposed. Section 98 (1) of the *Act* provides the Director with the power to impose a penalty in the event of a contravention of the *Act*. The power is discretionary.

98 (1) *If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director **may** impose a penalty on the person in accordance with the prescribed schedule of penalties.* (my emphasis)

Any decision by the director under section 98 of the *Act* is a "determination" as that term is defined by the *Act* (section 1). A determination must include the reasons for the decision. That is what section 81 (1)(a) of the *Act* requires. In assessing whether a delegate has complied with that section of the *Act*, the Tribunal has said that there must be an explanation of why the power to impose a penalty has been exercised under the specific circumstances (*Randy Chamberlin and Sandy Chamberlin*, BCEST No. D374/97). Is that provided in this case? All that is said in specific reference to the particular penalty is, in essence, that it is imposed as a deterrent and is needed for compliance. That is to explain the purpose of the penalty, not the circumstances of the decision to impose it. The delegate fails to provide reasons as are required by the *Act* as if expecting the Tribunal to rubber-stamp her decision.

It is said that the penalty is imposed as a deterrent and for the purpose of compliance. But of what real importance is the penalty. It is, after all, a \$Nil penalty, no moneys are exchanged. Moreover, the Director need not impose the penalty before imposing one of the greater penalties of section 29 of the *Employment Standards Regulation*. All that is required is that there be a previous contravention(s).

29 (1) *In this section, "**specified provision**" means a provision or requirement listed in Appendix 2.*

(2) *The penalty for contravening a specified provision of a Part of the act or of a Part of this regulation is the following amount:*

(a) *\$0, if the person contravening the provision has not previously contravened any specified provision of that Part;*

*(b) \$150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has **contravened a specified provision of that Part on one previous occasion;***

(c) \$250 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 2 previous occasions;

(d) \$500 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 3 or more previous occasions.

(my emphasis)

And, surely, it is the prospect of having to pay \$150 or more, possibly much more, that is the disincentive, and assists with compliance, not a \$Nil penalty. As I see it, \$Nil penalties consume the scarce resources of the Director and, on appeal, the Tribunal, but serve no useful purpose. What the delegate hopes to accomplish is achieved, most efficiently, through warning of the consequences of repeat contraventions.

Ralph's Inexpensive does not understand why it is penalized. Neither do I. I am for the above reasons cancelling the penalty.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 29, 1998 be varied in this way: Ralph's Inexpensive is ordered to pay Gordon Grant \$124.80 in wages and vacation pay , together with whatever interest is owed pursuant to Section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunals