**BC EST #D459/99**

**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 -

Athwal Transportation Co. Ltd.
("Athwal")

- of a Determination issued by -

The Director Of Employment Standards
(The "Director")

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| **ADJUDICATOR:** | Richard S. Longpre |
| **FILE NO.:** | 1999/421 |
| **DATE OF HEARING:** | September 15, 1999 |
| **DATE OF DECISION:** | November 03, 1999 |

## DECISION

### APPEARANCES

| | |
|---|---|
| Jack Athwal | on behalf of Athwal Transportation Co. Ltd. |
| Donovan Lonquist | on behalf of himself |
| Shirley Kay | on behalf of the Director |

### OVERVIEW

This is an appeal by Athwal Transportation Co. Ltd. pursuant to Section 112 of the *Employment Standards Act* seeking review of a Determination, dated June 15, 1999 (ER# 015-649). In February 1998, Athwal provided Donovan Lonquist, a driver with the Company, with a cellular phone. Each month, Athwal deducted cellular phone charges from Lonquist's wages without his written authorization. Some of the calls he made were personal. Most of the calls were business related. Lonquist terminated his employment with Athwal in December 1998. The delegate found that the deduction of the cellular phone costs from Lonquist's wages each month was a breach of Section 21 of the *Act* and directed Athwal to compensate Lonquist $1,548.45 in lost wages and interest.

Athwal argued that the fact the agreement to deduct the cost of the cellular phone was not in writing should not affect Lonquist's obligation to pay the cost of the cellular phone.

### ISSUE TO BE DECIDED

Is Athwal entitled to any relief under the *Act*?

### FACTS

Athwal's argument was based on certain allegations of fact. Athwal provided the Company's foreman with a cellular phone. No other driver had a cellular phone paid for by the Company. The drivers did not need a cellular phone. Each of the company's trucks has a radio phone. Lonquist asked Athwal for assistance in purchasing a cellular phone. Athwal agreed to purchase the cellular phone on Lonquist's behalf and for his personal use. He did this because he got along with Lonquist. Athwal argued that each month Lonquist was shown the bill for his cellular phone and agreed to the deduction from his pay cheque. Athwal argued that Lonquist's complaint to be compensated for the cost of the cellular phone was "not justified" in these circumstances.

The delegate considered the evidence before him and made one finding of fact: "on the balance of probabilities, the Complainant did not provide written authorization for the deduction or withholding of cellular phone charges from his wages"(p.2). The Determination noted the evidentiary dispute between Athwal and Lonquist as to whether the phone was purchased by Athwal on Lonquist's behalf and for personal reasons. The delegate found that whether the cellular phone charges were for business or personal use, however, was not relevant. The deductions from Lonquist's pay cheque each month were a breach of Section 21(1) of the *Act:*

Counsel for the Director attended the hearing. She argued that the language of the *Act* is clear. Section 21 of the *Act* reads:

> **Deductions**
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> **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 costs except as permitted by the regulations.

Section 21(2) prevents an employer from requiring an employee to pay any of the employer's business costs.

Section 22(4) reads:

> **Assignments**
>
> **22** (4) An employer may honour an employee's written assignment of wages to meet a credit

The Counsel's written submission reads:

> Although section 22 of the *Act* allows an employee to execute a written assignment of wages for specific purposes, there is no provision in the *Act* for a verbal assignment for any purpose.

Counsel pointed out that Section 4 of the *Act* did not allow Athwal and Lonquist to contract out of the *Act.* From the Tribunal's decision in *Thornhill Motors Ltd*. BC EST #D007/96, Counsel drew two specific points:

- Any verbal agreement between the complainant and the employer was not relevant to the appeal.
- It was not necessary to decide the contractual rights and obligations between the complainant and the employer arising from any verbal agreement as section 4 of the *Act* prohibited the contracting out of the *Act.*

Counsel referred to *Coquihalla Towing Co. Ltd.* BC EST #D295/96. In that case, the employer had deducted the cost of a cellular phone used for business purposes from the complainant's wages. The Tribunal found the complainant was an employee and not an independent contractor. The Tribunal went on to find that the deduction of the cost of the cellular phone for business purposes was a breach of the *Act:*

> Section 21(2) states that an employer must not require an employee to pay any of the employer's business costs (except as permitted by regulation). Section 22 of the *Act* provided that an employer must honour an employee's written assignment of wages for certain purposes, none of which is relevant here.

Counsel argued that Athwal did not have Lonquist's written assignment and that regardless, the deductions of the cellular phone costs for business purposes were in breach of the *Act.* Counsel noted that Athwal could pursue its claim against Lonquist in small claims court.

**ANALYSIS**

As Counsel for the Director argued, Athwal's deduction of the cost of the cellular phone from Lonquist's wages was a breach of the *Act*. Athwal may have had Lonquist's agreement each month to deduct certain costs from his wages. Athwal, however, did not have Lonquist's written agreement. In any event, the cellular phone, at least in part, was used for business purposes. It was a breach of Section 22(2) to deduct these costs from Lonquist's wages. Further, Section 4 of the *Act* did not allow Athwal and Lonquist to agree to waive the terms of the *Act.*

The Determination, however, did not consider the basis on which Athwal provided the cellular phone and whether, each month, Lonquist agreed to pay for the phone. The issue is whether the delegate after considering all the evidence, could have exercised any discretion after finding that the deductions for the cellular phone from Lonquist's wages were a breach of the *Act*. Stated differently, is there a distinction in the *Act* between a breach of the *Act* and the Director's authority and responsibility to remedy a contravention of the *Act*?

I agree with counsel that Tribunal decisions have closed the door to the Director exercising any discretion where a breach of the *Act* has been found. The rationale for this interpretation of the *Act* was well summarized in *G.A. Fletcher Music Company* BC EST #D213/97. In that case, the delegate found that the employer owed four former employees a total of $16,872 for length of service, vacation pay and interest. The employer appealed the determination. One of the grounds for appeal was that the verbal notice given to one of the employee's should have been accepted as valid notice under Section 63 of the *Act.*

Section 63 sets out the severance payment an employee is entitled to receive. Section 63(3)(a) states that the employer's liability is discharged if the employee is given written notice of termination. Length of notice is based on years of service. There was no dispute

that the employee had been given verbal notice in excess of notice required under Section 63. The employer argued that in the circumstances, verbal notice satisfied its obligation to give written notice.

At the time of that hearing, the Director supported the employer's appeal. The Tribunal's decision quoted from the Director's submission:

> …the Director's legal counsel, in a written submission to the Tribunal dated April 4, 1997, relying on the Director's authority to refuse to investigate a complaint that has not been made in "good faith' (see Section 76 of the *Act*), submits that:
>
> > "if an employee has received a greater period of oral notice than they would have otherwise received under the *Act*, how can a complaint asking for further notice be made in good faith?"
>
> and continues
>
> > "the position adopted in [*Fanaken v. Bell, Temple* (1984) 9 D.L.R. (4th) 637]…is…appropriate given the general purpose of the *Employment Standards Act* as a remedial statute, and the requirements that the equities between the parties be given regard to so that disputes between employers and employees be resolved in a fair and efficient manner.
> >
> > The concept of notice is defined in order that employees know exactly when their jobs are to end so that they are able to make plans for the future. There are cases in which on the facts an oral notice may have more than fully satisfied this requirement. There is no equitable reason why these circumstances should be negated by a rigid and literal application of the *Act*." (p.5)

The Tribunal's decision rejected this argument:

> …the Tribunal should not embark on an exercise in legislative re-drafting, using the "good faith' requirement found in section 76(1)(c) of the *Act* as a springboard. Under section 63 of the *Act*, an employee's entitlement to compensation for length of service is, in effect, a form of deferred contingent compensation. An employee's entitlement accrues during the course of his or her employment tenure to a maximum of eight weeks' wages. The Employer's obligation to pay compensation for length of service can only be avoided in a few circumstances including the giving of appropriate amount of *written* notice.
>
> The requirement for written notice, quite apart from the statutory mandate, creates certainty by side-stepping the sort of arguments that might arise if verbal notice was deemed to be sufficient (such as whether the notice was given at all; or, if

> given, when the notice was to take effect). The Tribunal has consistently held that the requirement for written notice cannot be satisfied by an equivalent amount of verbal notice and I see no reason to depart from that line of authorities (see e.g., *Workgroup Messaging*, BC EST #D025/97; *Dr. Robert Wright Inc.*, BC EST #D060/96; *Frans Markets*, BC EST #D309/96; *Sun Wah Supermarkets Ltd.*, BC EST #D324/96). (p.6)

I accept the panel's finding in *G.A. Fletcher Music Company* that on the facts in that case, Section 76 did not establish the Director's discretion. Section 76 deals with the Director deciding not to investigate a complaint or stopping the investigation of the complaint. In *G.A. Fletcher Music Company*, the investigation was made and a determination was issued.

Notably however, Section 76 sets out clear guidelines as to when the Director can exercise her discretion in deciding whether to issue a determination. It reads, in part:

> **Investigation after or without a complaint**
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> **76** (1) Subject to subsection (2), the director must investigate a complaint made under section 74.
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> (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if
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> …..
>
> (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
>
> (d) there is not enough evidence to prove the complaint,
>
> ….

Under subsection (2)(d), the Director may decline to issue a determination if the evidence does not establish the case. The Director's discretion not to issue a determination, however, is not limited only to where a contravention of the *Act* is not found. Subsection (2)(c) applies to other circumstances. The Director has the discretion not to issue a determination, where there has been a breach the *Act* but the complaint is "frivolous, vexatious or trivial or is not made in good faith".

Returning to instant case, I note that *G.A. Fletcher Music* did not address Section 79 of the *Act.* Section 79 gives the Director discretion to issue a determination and discretion as to whether to remedy a contravention of the *Act.* Section 79 reads:

> **Determination**
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> **79** (1) On completing an investigation, the director *may* make a determination under this section.
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> (2) If satisfied that the requirements of this *Act* and the regulations have not been contravened, the director *must* dismiss a complaint.

> (3) If satisfied that a person has contravened a requirement of this *Act* or the regulations, the director *may* do one or more of the following:
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> (a) require the person to comply with the requirement;
>
> (b) require the person to remedy or cease doing an *Act*;
>
> (c) impose a penalty on the person under section 98. (*emphasis added*)

The contrast between subsection 79(2) and subsection 79(3) demonstrates the fettered and unfettered discretion of the Director. Under subsection (2), the *Act* gives the Director no discretion. If the *Act* has not been contravened, "the director must dismiss a complaint". Under subsection (3), when a person is found to have contravened the *Act*, the Director "may …require the person to remedy" the contravention. Such different language in the statute results in a different interpretation. The use of the word "may" gives the Director at least some discretion in deciding whether to issue a determination and whether to require the person to remedy the contravention of the *Act.*

The statute's use of the words "may" and "must" were compared in *Judy L. Goudreau et al* BC EST #D160/98. In that case, two employees appealed the delegate's refusal to grant a variance to the overtime standards in Section 40 of the *Act.* Section 73 gives the Director the discretion to make such a variance: Sections 73(1) and (2) read:

> **Power to grant variance**
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> **73** (1) The director *may* vary a time period or requirement specified in an application under section 72 if the director is satisfied that
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> (a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and
>
> (b) the variance is consistent with the intent of this *Act.*
>
> (2) In addition, if the application is for a variance of a time period or a requirement of section 64 the director *must* be satisfied that the variation will facilitate
>
> (a) the preservation of the employer's operations,
>
> (b) an orderly reduction or closure of the employer's operations, or
>
> (c) the short term employment of employees for special projects.
>
> (*emphasis added*)

The panel in *Judy L. Goudreau* concluded that the word "may" in subsection (1) had to be given a different statutory interpretation than the word "must" in subsection (2):

> Subsection [73(1)] must be read to say that even where an application is approved by a majority of informed employees and is consistent with the intent of the *Act*, the Director is not compelled to grant it and retains a discretion to deny it. That conclusion is reached because the word "may" appears in subsection [73(1)], as opposed, for example, to the word "must", which is used in subsection [73(2)]. As a matter of statutory interpretation, the former is to be construed as permissive and empowering while the latter is to be construed as imperative." (p.4).

The Director's discretion in the instant case is also governed by Section 2 of the *Act*, which reads, in part:

> **Purposes of this *Act***
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> **2** The purposes of this *Act* are as follows:
>
> **…**
>
> (b) to promote the fair treatment of employees and employers;
>
> …

The elimination of the Director's ability to assess "fair treatment" to both the employee and the employer eliminates one of the expressed purposes of the *Act.*

The Director should exercise her discretion consistent with the *Act.* Most contraventi ons of the *Act* are clear and unequivocal. Consistent application of the *Act* is important to its successful application in this province. Further, employers bear the responsibility to know their obligations under the *Act.* Accordingly, the Director may seldom decide to exercise her discretion and not grant a full remedy to a breach of the *Act.* A total fettering of the Director's discretion, however, fails to differentiate between a breach of the *Act* and the clear discretion given to the Director in deciding whether a person should be required to remedy his/her breach of the *Act*. A failure to recognize the Director' discretion, misapplies the *Act.*

I also note that in law, the Director's discretion should be given certain deference. In *Joda M. Takarabe et. al*. BC EST #D160/98 and *Jasta Holdings Ltd. et. al*. BC EST #D085/99 the Tribunal reviewed when the Tribunal would interfere with the Director's exercise of discretion. *Takarabe* reads:

> In *Boulis v. Ministry of Manpower and Immigration* [(1972, 26 D.L.R. (3rd) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her discretion on irrelevant considerations" (p.15)

This quote was adopted in *Jasta Holdings.* The *Boulis* decision makes these points. However, the *Boulis* decision points out the deference the Courts should have for a tribunal exercising its discretion. Abbott, J. endorsing Laskin, J., states:

> As to those principles, Lord Macmillan speaking for the Judicial Committee, said in *D.R. Fraser & Co. Ltd. v. M.N.R.*, [1948] 4 D.L.R. 776 at pp 783-4, [1949] A.C. 24, [1948] 2 W.W.R. 1119:
>
> > The criteria by which the exercise of statutory discretion must be judged have been authorized in many cases, and it is well settled that if the discretion had been exercised *bona fide*, uninfluenced by irrelevant

> considerations and not arbitrary or illegal, no Court is entitled to interfere even if the Court, had the discretion been theirs, might have exercised it otherwise".

The deference the Court exercises to tribunals should be exercised by the Tribunal in our review of discretion exercised by the Director.

I return to Athwal's appeal of the delegate's Determination. The Determination sets out evidence as to whether Lonquist requested the cellular phone, agreed to have the deduction made from his wages each month and whether he used the cellular phone, at least in part, for personal use. The only finding of fact made in the Determination, however, was that Lonquist did not provide Athwal with a written agreement to have the cost of the cellular phone deducted from his wages deducted.

Section 79 applies to Athwal's appeal. He was entitled to call evidence and make arguments as to why a remedy, in whole or in part, should not be imposed in the circumstances. Athwal's evidence may fall short of supporting his argument that the Director should exercise discretion and not grant Lonquist a remedy. However, Athwal's evidence and, if necessary, Lonquist's response should be heard and considered before deciding the appropriate remedy to Athwal's breach of Section 21 of the *Act*.

**ORDER**

The delegate's conclusion that Athwal Transportation Co. Ltd. breached the *Act* is upheld. Pursuant to Section 115(1)(a) of the *Act*, the delegate's Determination is referred back to the Director. The Director should consider all the evidence before deciding whether, pursuant to Section 79(3)(b), to remedy the breach of the *Act*.

**Richard S. Longpre**
**Adjudicator**
**Employment Standards Tribunal**