

**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 -

Rodney Webber, Director/Officer of R&K Logging Ltd.  
("Webber")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 97/382

**DATE OF HEARING:** September 19, 1997

**DATE OF DECISION:** October 15, 1997

DECISION

APPEARANCES

for the appellant:	James Patterson, Esq. Rodney Webber
for Duncan H. Day	Duncan H. Day Barbara Day
for Duncan Curtis Day	Duncan Curtis Day

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Rodney Webber, Director/Officer of R&K Logging Ltd. (“Webber”) from a Determination of a delegate of the Director of Employment Standards (the “Director”) dated April 22, 1997. On April 16, 1997 a Determination was issued against R&K Logging Ltd., a corporation for which Webber is an officer and director. R&K Logging Ltd. had filed an assignment in bankruptcy on December 13, 1996 and the liability of that corporation was extended to its officers and directors pursuant to subsection 96(1) of the *Act* to the extent allowed by that subsection. The Determination concluded the officers and directors of R&K Logging Ltd. had contravened Sections 18(1) and (2), 21(1), (2) and (3), 35, 45, 46(1), (2) and (4), 47, 57 and 58(1)(a) and (3) of the *Act* in respect of the employment of four persons: Duncan H. Day, Duncan Curtis Day, David Cass and Robert Thon. Webber, jointly with another director/officer of the corporation, has appealed the Determination.

The hearing was originally scheduled to take place August 29, 1997. It was adjourned at the request of the other director/officer of R&K Logging Ltd., Kelly Day, and rescheduled for September 5, 1997. On September 5, 1997, Webber appeared. Kelly Day did not. The absence of Kelly Day from the hearing surprised and concerned Webber, as Kelly Day, and his wife Michele Day, were the two people responsible for the day to day operation of the corporation and supposedly had all the information related to the factual issues in dispute. Webber sought a further adjournment for the purpose of attempting to compel the attendance of either or both Kelly and Michele Day. While this request was being considered, Webber resolved any claims Duncan H. Day and Duncan Curtis Day may have had against him personally by reason of his position as director and officer of the corporation and by operation of subsection 96(1). Webber agreed to pay to each of the two persons the sum of \$5000.00 in return for a full and final release of any further liability related to their employment with R&K Logging Ltd. I advised Webber the Determination, as it applied to him, would be ordered to be varied to reflect the

settlement by cancelling the claims of Duncan H. Day and Duncan Curtis Day against him. The hearing was adjourned and rescheduled for September 19, 1997. On that date Webber attended. He advised he was unable to compel the attendance of either Kelly or Michele Day and in their absence had no evidence to call.

### **ISSUES TO BE DECIDED**

As a result of a settlement between Webber and Duncan H. Day and Duncan Curtis Day, the only remaining issues relate to the claims of David Cass and Robert Thon. The issue in respect of the former is whether he was ever an employee of R&K Logging Ltd. The issue in respect of the latter is whether he worked all of the hours claimed.

### **FACTS**

According to the material on file, Mr. Cass worked for R&K Logging Ltd. for two days in October, 1996, October 2 and 3. No objective record of his employment with R&K Logging was found during the investigative process. The conclusion he was employed by R&K Logging Ltd. for 15 hours on those two days was based upon information he provided to the delegate.

Mr. Thon was employed by R&K Logging Ltd. from July 24, 1995 to October 31, 1995. According to records maintained by that corporation, Mr. Thon was not paid overtime as required by the *Act* for hours worked in excess of 8 hours in a day and 40 hours in a week., although he was paid straight time for those hours. Also the records showed the corporation had made unauthorized deductions from his wages.

Webber says he has no knowledge of Mr. Cass ever being employed by R&K Logging Ltd. He says that in the absence of some objective record of employment the delegate was wrong to conclude Mr. Cass was employed by or performed work for R&K Logging Ltd. He also says he has no information respecting the record of hours of Mr. Thon than what was kept by the corporation. No submission was made on the issue of the unauthorized deductions.

### **ANALYSIS**

It is firmly established that in an appeal pursuant to Section 112 of the *Act* the burden of proof is on the appellant to show on a balance of probabilities that the Determination under appeal is wrong and ought to be varied or canceled. Where the essence of an appeal is a dispute about the factual conclusions reached or accepted by the delegate during their investigation, the Tribunal may grant an oral hearing. In such circumstances,

the oral hearing is intended to provide the appellant with the opportunity to present evidence on those areas where the appellant says the Determination is wrong or flawed.

This appeal is based exclusively on a dispute relating to the factual underpinnings of the Determination. Webber did not call any evidence in support of his assertion that the factual conclusions in the Determination were wrong. He has not met the burden of proof placed on an appellant under Section 112 of the *Act* and his appeal is dismissed.

That is not to say I do not sympathize with Webber and perhaps it is cold comfort to say that I do, but my authority is delineated by the *Act* and my function is to consider this matter as an appeal, not as a re-assessment or re-examination of the validity of the claims of Mr. Cass and Mr. Thon.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated April 22, 1997 be varied to cancel the claims of Duncan H. Day and Duncan Curtis Day against Webber personally in his capacity as director/officer of R&K Logging Ltd. It is confirmed in respect of the claims of Cass and Thon.

**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**