Employment Standards TRIBUNAL

An appeal

- by -

Selkirk Botrokoff and Marlene Botrokoff operating as The Cleaning Lady
("The Cleaning Lady")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/432

DATE OF DECISION: October 25, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Selkirk Botrokoff and Marlene Botrokoff operating as The Cleaning Lady ("The Cleaning Lady") of a Determination that was issued on July 23, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that The Cleaning Lady had contravened Part 4, Section 34(2) of the *Act* in respect of the employment of Lusillia Starr ("Starr") and ordered The Cleaning Lady to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of $1,549.25.

The Cleaning Lady says the Determination is wrong for two reasons: first, because they had an agreement with Starr that she would work only one hour a day; and second, because the amounts found owing should have been calculated on the requirements in Section 34(2) as they stood following the amendments to that section which came into force on May 3, 2002. Additionally, and in any event, The Cleaning Lady says there was an error in the calculation concerning 6 hours for which she was paid, but performed no work.

ISSUE

The issues in this appeal are whether the Director ought to have given effect to the agreement or, alternatively, applied the amended provisions of Section 34 of the *Act* to the claim made by Starr and whether, in any event, the Determination ought to be varied.

FACTS

The Cleaning Lady is a janitorial business operating in Kitimat, BC. Starr worked for The Cleaning Lady from August 1, 2001 to February 28, 2002 as a janitor at the rate of $8.00 an hour. Starr claimed that on several days during her period of employment, she had worked less than four hours in a day and was not paid the minimum daily hours required by the *Act*.

Following investigation, the Director concluded The Cleaning Lady had not paid the minimum daily wage, contrary to Section 34 of the *Act*. That finding is not in issue. The Director decided that Starr was entitled to receive 4 hours minimum daily wage at her regular wage, $8.00 an hour, for those days on which she was paid less than four hours - a total of 183.5 hours. On the issue of whether the amended version of Section 34 should apply, the Director stated:

> At the time Starr filed her complaint her entitlement under *Section 34(2)(a) of the Act* was four hours minimum daily pay. The amendment of the *Act* came into effect on May 31, 2002; there was no amendment to the *Act* that made this change retroactive to the period of Starr's period of employment.

The Determination also addressed, and rejected, an argument by The Cleaning Lady that they were entitled to make an agreement with Starr for her to be paid less than minimum daily wage, concluding such an agreement was prohibited by Section 4 of the *Act*.

The Determination considered and decided two other issues that arose during the investigation: whether Starr was an employee for the purposes of the *Act*, or an independent contractor, and whether Starr's rate of pay was $8.00 an hour or $12.50 an hour. The conclusions in the Determination reached on those issues have not been appealed.

ARGUMENT AND ANALYSIS

The Cleaning Lady says the Determination ought to be varied to reflect the amendments to Section 34 of the *Act* which came into effect on May 31, 2002. They argue the claim by Starr, and any other claim pending when the amendments became law, should be 'judged' according to the terms of the provisions that were in force when the Determination was issued.

In reply, the Director reiterates the position set out in the Determination - that the amendments to the *Act*, and specifically to Section 34, are not retroactive. The Director's argument points to provisions of the *Interpretation Act* and to principles of statutory interpretation which have been adopted and applied by the Courts. I agree with the arguments of the Director.

As well, the Tribunal, in the context of the amendments to Section 96 of the *Act*, has already addressed the issue of the retroactivity of the amendments to the *Act*. In *Stanley D. Ginsburg, a Director or Officer of Express Punching Service Inc. operating as Gold Label Garments*, the Tribunal decided the amendments to Section 96 of the *Act* did not affect employee rights that had crystallized before May 30, 2002 the date those amendments came into force:

> The amended Act does not contain any transitional provisions that would warrant this by the Tribunal. The meaning of section 96(2) as suggested by the Appellant, would interfere with a right that was already vested as of the date that the amendments came into force. The right was vested in the Employee because a Determination was issued.
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> I note that the issue of the affect of new legislative amendments was dealt with recently by the Tribunal in *Oakcreek Golf and Turf Inc.*, BC EST # RD366/02. This case involved an application for reconsideration on the basis of the new amendments, and the change in the Employer's liability for wages from two years in the former act, to six months in the recent amendments.
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> > I cannot agree that this raises a significant issue for tribunal jurisprudence warranting reconsideration. First, with respect to any retroactive application of the Amendment Act, I note that the complaint, the Determination, and the Decision were all completed within the time frame of the Act prior to Royal Assent to the Amendment Act. In deciding that the Amendment Act has no application in this matter, I am guided by Driedger on the Construction of Statutes (3d ed., Butterworths, 1994):
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> > > "When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of persons for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good generally are presumed to be intended and are regarded as part of the legislative purpose. Consequences judged to be unjust or unreasonable are regarded as absurd and are presumed to have been unintended. Where it appears that the consequences of adopting an interpretation would be absurd, the courts are

> entitled to reject it in favour of a plausible alternative that avoids the absurdity." (p. 79).
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> In my view it would be absurd for the legislature to have intended to invite applications for reconsideration of all decisions made between proclamation of the Act establishing the 2-year time limit in 1995 and Royal Assent of the Amendment Act in 2002. This remains an act, a purpose of which, as articulated in Section 2 is "To provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act." I find that it would produce an absurd result were I to agree with Oakcreek that the time limit for collecting on wages owed in the new Amendment Act should be a factor in deciding whether to reconsider a claim made under the former time limit.

I note that legislation often alters the rights that existed up until the date of the amendment. Here we are talking about rights that existed, and were crystallized in a Determination or an enforceable order before the legislative amendment came into effect. In my view, this legislative amendment is not clear enough to take away these rights of the Employees that existed and were determined on May 27, 2002.

I note that Driedger gives a good definition of a "retroactive statute" in Construction of Statutes (2d edition) at p 186:

> A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative with respect to past transactions as of a past time, as, for example, the Act of Indemnity considered in Phillips v. Eyre. A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment.

There is a strong presumption in the interpretation of statutes against giving an enactment a retroactive effect. A legislature can bring into force retroactive legislation, but the intention to give a statute a retroactive effect must be clearly ascertainable from the statutory language. In my view, section 96(2) of the *Act* cannot be given a retroactive effect, because this would require clearer language such as set out above in Driedger.

The same reasoning applies to the argument concerning Section 34. Notwithstanding no Determination had been issued, Starr had a right, the right to be paid four hours daily minimum, which was vested at the time the amendments came into force. There is no transitional language in the amendments that indicate it was the intention of the legislature to interfere with rights which had vested prior to the coming into force of the amendments. In the absence of such language, the presumption against retroactivity applies and the claim is to be 'judged' according to the law as it was when the right arose.

On the issue of whether effect should be given to the agreement between Starr and her employer, once again I find myself in agreement with the conclusion reached in the Determination. Section 4 of the *Act* does not allow an employer and employee to enter into an agreement that provides less than the minimum requirements set out in the *Act*

4. 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.

Finally, on the issue of whether the Determination should be varied to deduct 6 hours, which The Cleaning Lady alleges Starr was paid on a day where she did not perform any work. The burden on this point is on The Cleaning Lady to show an error in the Determination. There is nothing in the material which would allow me to conclude the Determination was wrong on this point. As correctly noted in the Director's submission, an appeal to the Tribunal is not a re-investigation of the complaint.

The appeal is dismissed.

I will address one other matter. In the appeal, The Cleaning Lady asked, regardless of the outcome, that the Tribunal allow them to pay any liability under the *Act* in installments. The remedial jurisdiction of the Tribunal on an appeal is limited to those matters set out in Section 115 of the *Act*. The Tribunal's authority does not include the authority to do what The Cleaning Lady has requested.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 23, 2002 be confirmed in the amount of $1,549.25, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal