Employment Standards TRIBUNAL

An appeal

- by -

#1 Low-Cost Moving & Hauling Ltd.
("Low-Cost")

- 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.: 2002/433

DATE OF DECISION: October 30, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by #1 Low-Cost Moving & Hauling Ltd. ("Low-Cost") of a Determination that was issued on July 18, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Low-Cost had contravened Part 3, Section 17(1) and 18(2) and Part 4, Section 40(1) of the *Act* in respect of the employment of Nicholas Kirschner ("Kirschner") and ordered Low-Cost to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of $990.74.

Low-Cost says the Determination is wrong, that Kirschner mis-stated his hours of work (and generally lied during the investigation) and the Director failed to give effect or proper consideration to the information provided by them.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue is whether Low-Cost has met the burden of showing the calculation of the hours worked by Kirschner was wrong.

FACTS

Low-Cost is a moving company operating in and around Kelowna, BC. Kirschner worked for Low-Cost from September 1, 2001 to December 27, 2001 as a Mover/Truck Driver at a rate of $10.00 an hour.

The Determination made the following findings of fact:

> The employer has asserted that no outstanding wages are owed to the complainant. The employer claims the complainant's daily records of hours worked are no accurate. However, despite being given several opportunities to provide payroll records to support this assertion, the employer has failed to produce any documentation in support of this position.
>
> The employer's [sic] provided copies of cheques payable to the complainant for wages for the time period under investigation in the amounts of:
>
> | | |
> |---|---|
> | November 13, 2001 | $435.00 |
> | November 22, 2001 | $185.00 |
> | December 4, 2001 | $570.00 |
> | December 20, 2001 | $395.00 |
> | Total | $1585.00 |
>
> Kirschner agreed that he received these wages. Furthermore, Kirschner agrees that he received wages for work performed on October 16, 2001 and, therefore, is only claiming wages owed for the week commencing October 21, 2001 to December 27, 2001, the date of termination.

The Determination relied substantially on the information provided by Kirschner.

The Determination also noted that Low-Cost had been notified that a Demand for Employer Records would be issued and sent to Low-Cost. The Demand was issued and delivered to Low-Cost, but no further information or payroll records were provided prior to the issuance of the Determination. On July 18, 2002, the day the Determination was issued, the Director received a communication from Low-Cost, which included a letter summarizing Kirschner's employment hours, attaching a copy of one page from the employer's dispatch book, which contained a hand written notation stating, "these are examples of how records of employee hours are kept", and a series of moving contracts "pertaining to work performed" by Kirschner.

ARGUMENT AND ANALYSIS

Low-Cost argues the calculations done by the Director are based on wrong information provided by Kirschner and says the information provided to the Director (after the Determination was issued) were not taken into consideration.

In reply, the Director notes the obvious - that the information provided by Low-Cost was not taken into consideration because it was filed after the Determination was issued - and says the Tribunal should disregard that information in the context of the appeal. In respect of this latter point, the Director refers to the Tribunal's decision in *Tri-West Tractors Ltd.*, BC EST #D268/96, in which the Tribunal stated:

> The Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of the decision already made for the purpose of determining whether the decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

In the alternative, the Director says the information provided by Low-Cost, when examined, is not conclusive of the hours worked by Kirschner. The Director points out that the information provided is incomplete, that the moving contracts do not indicate who performed the work and that the information in the contracts is inconsistent with the hours summarized in the accompanying letter, without any explanation for the discrepancies. A brief review of the documents submitted by Low-Cost in response to the Demand for Employer Records confirms the deficiencies identified by the Director. Additionally, the Director points out the documents confirm wages are owing for minimum daily hours and overtime.

The burden is on Low-Cost, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)).

There is merit in the argument of the Director that I should not accept information provided by Low-Cost that was not provided during the investigation, but even if I accepted that information, I am not satisfied

that it shows the Determination is wrong. I agree with the Director that simply providing information which shows how much a customer was charged for a particular service does not confirm either the hours worked by the individual or individuals who worked on that contract nor does it confirm that Kirschner worked on that contract. I also agree with the Director that there are discrepancies between the information shown on those contracts and the accompanying summary of hours worked without any explanation for those discrepancies. I am also puzzled, and concerned, that Low-Cost, after identifying the entries on the single page provided from the dispatch book as "examples of how records of employee hours are kept", has failed to provide all of the relevant pages from that book.

I can find no basis for concluding the Determination is wrong and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 18, 2002 be confirmed in the amount of $990.74, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal