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 -

Warren Consulting Ltd.
("Warren or employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE No.: 2000/418

DATE OF HEARING: November 10, 2000

DATE OF DECISION: December 19, 2000

DECISION

APPEARANCES:

Alan Warren, for Warren Consulting Ltd., by telephone

Jeff Anderson

OVERVIEW

This is an appeal of a Determination, dated May 25, 2000 by the employer, Warren Consulting Ltd ("Warren"). Warren employed Jeff Anderson as a timber cruiser. As a result of a dispute between the parties concerning the delivery of "cruise documents", the employer refused to pay its employee for work performed on the cruise. The Delegate determined that wages and overtime wages were due and owing to Anderson. The employer obtained, ultimately, a judgement against the employee in the provincial court, for damages incurred in replacing the work performed by the employee. On an examination of the facts, it was apparent that the employee performed work, and was entitled to payment for work performed, as well as payment for overtime wages. The evidence led before the Tribunal, and the court was different with regard to the delivery of the cruise documents. It was apparent that the employee tendered the cruise documents, but the employer refused to accept delivery of the documents. Although some of the facts at issue in this proceeding were determined by the provincial court prior to the hearing of this appeal, the doctrine of issue estoppel did not apply where the provincial court judgement was not "final".

ISSUES TO BE DECIDED

To what extent does the doctrine of issue estoppel apply in the context of these proceedings?

Did the Delegate err in investigating the claim of the employee for wages?

Did the Delegate err in finding that Mr. Anderson was entitled to overtime pay?

FACTS

Jeff Anderson was employed as a timber cruiser for Warren Consulting Ltd. during the summer of 1999 for a 6 week period. The employment relationship came to an end on or about August 26, 1999 when Warren fired Mr. Anderson. Mr. Anderson was terminated when he refused, on his own time and without pay, to correct errors in his work. The error correction involved further field work, and office work of about 3 to 4 hours.

After the termination, in a subsequent telephone call, Mr. Warren asked Mr. Anderson to complete the work, and indicated that he would pay him to complete the work, if when he examined the documentation it was without error. Mr. Anderson refused to re-enter the

employment of Mr. Warren and Mr. Warren hung up the telephone on Mr. Anderson. Mr. Anderson completed the fieldwork on August 27th, and did not tell Mr. Warren that he completed the fieldwork, or that he was correcting paperwork.

The employer demanded return of the cruise reports on August 28th, and when it did not receive the reports the employer filed a complaint with the RCMP alleging a theft of the cruise documents. When Anderson phoned Warren on August 28th, Warren told him he was to contact the RCMP, and Warren hung up the phone.

Mr. Anderson filed a complaint with the Director of Employment Standards on August 30, 1999.

In the written complaint Mr. Anderson notes,

> "I am unsure whether Al is going to give me my paycheque or not. I do have in my possession some documents (which belong to the Ministry of Forests) that I was working on. Mostly to ensure that my paycheck is in full. Which in itself should be ~ 123.5 or so hours. I am worried there will deductions or something in which I do not deserve. I will attached a list of items signed back to Al showing no need for deductions."

A Determination was issued in favour of the employee on May 25, 2000. The Determination provided that Warren Consulting was to pay Mr. Anderson wages including overtime wages in the amount of $2,973.28 plus interest of $143.08, for a total of $3,116.36.Warren filed an appeal on the basis that

(a) he was withholding payment until a court determined Anderson's liability for damages for withholding documents,

(b) the Delegate erred in determining that Anderson was entitled to overtime wages;

(c) that Anderson had filed a reply in small claims court claiming wages, and should be required to chose one claim over the other.

A significant dispute in this appeal is whether the employee deprived the employer of his work product by failing to return project documentation. The employer claims that he withheld pay because the employee withheld the documentation, and the employer proceeded to small claims courts to have damages assessed against Mr. Anderson for wrongfully withholding the project documentation.

In a letter dated November 3, 1999 the employer demanded the sum of $5,320.00 as damages for the non-delivery of original cruise documents. Upon receipt of that Warren promised to pay the last wages and issue the T4. When Anderson did not pay the demanded sum, Warren Consulting sued Mr. Anderson in small claims court. Anderson filed a reply and counter-claim for his wages. Anderson abandoned his counter claim against the employer on July 10, 2000 electing to proceed with his complaint under the *Act*.

As a result of the complaint made on August 30, 1999, the Delegate rendered a Determination on May 25th, 2000 which found that Mr. Anderson was entitled to wages in the amount of

$2,973.28, together with interest of $132.08 for a total amount of $3,116.36. The Delegate was invited by Warren to refuse to investigate Anderson's complaint because the complaint was not made in good faith. The Delegate determined that it would be inappropriate for Anderson to be denied his remedy under the *Act* while the employer litigated his claim for compensation through the courts. The Delegate noted that it was a matter for the discretion of the Director or delegate to refuse to investigate under s. 76(2)(c) of the *Act*. This Determination remains unpaid.

The employer argued at this appeal that Mr. Anderson was not entitled to wages because he stole or withheld the cruise documents. Because the employer raised this issue, I am obliged to determine the factual basis for his assertion. The employer also argues that the facts on this point were determined by the provincial court judge. Warren appears to have filed an appeal, in part, as an attempt to delay the enforcement of the obligation to pay wages, before his right to damages was determined by the court.

Issue Estoppel:

The employer filed an appeal of the Determination on June 14, 2000. The notice of hearing set this appeal for a hearing on November 10, 2000. In the meantime, the Provincial Court issued a decision on October 13, 2000 awarding damages to the employer in the sum of $4,023.13, for the wrongful withholding of cruise information by Mr. Anderson.

There is a judgement of the provincial court dated October 13, 2000, where Judge Low determined that Anderson was required to pay Warren Consulting Ltd. as damages for the wrongful withholding of cruise documents.

There is no evidence before me that either party drew to the attention of the trial judge that a Determination had been made. From my reading of the trial judge's reasons, the trial judge was under the impression that the Director of Employment Standards had not yet determined a wage entitlement. The appeal period had not expired from the decision of the provincial court at the time that I heard this appeal. The decision of the provincial court is not therefore a final judgement.

This case raises an interesting issue, which was not adequately argued by the unrepresented parties before me. Throughout the course of this hearing, Mr. Warren repeatedly referred to findings of credibility adverse to Mr. Anderson, in the trial in provincial court. Mr. Warren repeatedly referred to the small claims case as deciding most of the matters in issue. Many of the matters leading to the termination of Mr. Anderson by the employer were canvassed by the provincial court judge in *Warren Consulting Limited and Jeffrey Anderson, unreported October 13, 2000, Smithers Registry (Low, P.C.J.).* A copy of this decision was provided to me by Warren.

In the judgement, the court found at page 5 of the judgement:

1. Mr. Anderson wrongfully withheld the cruise reports.

2. Mr. Anderson knew the reports belonged to Warren Consulting Limited.

3. Mr. Anderson knew that the loss of the reports meant that Warren Consulting Limited would have to do the cruise work again.

4. Mr. Anderson knew that Warren Consulting Limited required the reports to complete its contractual obligations to its customer, Northwood Sawmill.

5. Mr. Anderson had a lawful obligation to surrender the cruise reports to Warren Consulting Limited upon demand.

The court found that Warren Consulting suffered damages in the amount of $4,023.13, inclusive of interest and costs.

At page 6 of the Small Claims judgement the court stated as follows:

> I note that I have not allowed as part of the claim, wages paid to Mr. Anderson for the seven day period prior to August the 26th, 1999. I am satisfied that if these wages had been paid, I would have included them in the judgement since I accept that Warren Consulting Limited would have passed this cost on to their customer, Northwood Sawmills. I also note that originally, Mr. Anderson counterclaimed for these wages, but withdrew this counterclaim on the basis that he had taken the matter up with the Director of Employment Standards. I of course, do not know what the decision of the Director of Employment Standards is at this time in that regard because that – the hearing of that matter is still outstanding.
>
> In any event there will be an order that Warren Consulting Limited may apply to review this judgement in the event they are ordered to pay Mr. Anderson wages .... for the period of seven days prior to August the 26th, 1999 for any work done on the project which is the subject matter of these proceedings.

Both parties spent considerable time on the issue of whether Anderson delivered original documents, and whether Warren refused to accept delivery of original documents. As an adjudicator I am obliged to determine facts, which are material to my disposition of the appeal. In my view the employer's obligation to pay wages does not rest on the delivery of documents, but rather on the fact that the employee performed work for the employer. The court has determined that Anderson failed to deliver the originals. I am not bound by the court's determination on this point, as the judgement was not a "final judgement" at the time of this appeal. The appeal period has not yet expired.

On the basis of the evidence before me, Mr. Anderson attempted to deliver originals but delivery was refused by Warren. I accept the cogent evidence of Ms. Amanda Arwen, the girl friend of Anderson. Ms. Arwen placed the original cruise documents into a courier pouch and had these delivered to the employer on August 30th, 1999. She did this because Anderson was going off to a forestry camp associated with his school. Warren directed his employees not to open the

courier pouch, because he believed, from hearing a telephone message left by Anderson, that Anderson intended to deliver photocopies. The trial judge did not have the benefit of Ms. Arwen's helpful and believable evidence, and chose to premise his finding of non-delivery based on the recollections of the parties concerning the contents of a telephone call, and credibility. Apparently the trial was scheduled on short notice to the parties (7 days), and the trial judge did not admit into evidence Ms. Arwen's evidence in the affidavit form tendered at trial.

The employer was deprived of the work product of Mr. Anderson because of its failure to open the package. As a result of its non-acceptance of the courier package, the employer did not have the original cruise documents, and it engaged another party to replace the cruise documents by performing work which had been performed by Mr. Anderson.

At this hearing, Mr. Warren raised a claim for damages based on the non-return of property by Mr. Anderson. I note that this claim was dismissed by the trial judge, and I am, in any event, without jurisdiction to consider this matter.

ANALYSIS

In this case the employer, as appellant, bears the burden, to establish an error such that I should vary or cancel the Determination. At this hearing the employer argued that the Delegate erred because:

1. Mr. Anderson stole all the documentation for the project, and he should not have to pay him for the time on the project, that he had to hire someone else to replace.

2. The Delegate found that the employer was obliged to pay overtime.

The employer did not direct any argument at this hearing as to whether the Delegate erred in exercising his discretion to investigate the complaint. Given that no argument was advanced on this point at the hearing, this grounds of appeal appears to have been abandoned by the employer.

Wages for the Northwood Project:

Mr. Warren did not dispute that Anderson worked the time. He did dispute whether Mr. Anderson was entitled to overtime, and he says that as a result of the court judgement in this matter, Mr. Anderson is not entitled to wages for the period August 16th to 26th, 1999. In my view at the time that the provincial court judge assessed damages, the Delegate had determined that Mr. Anderson was entitled to wages. In the Determination, the Delegate was aware that the employer initiated the small claims process. For some reason, unknown to me, the trial judge does not appear to have been made aware of the Determination in this matter.

The evidence before me is that the additional work which Mr. Anderson performed in order to complete the slope calculations and the cruise reports involved some field work and some paper work. It was in the range of 3 to 4 hours of work. This is work which should have been performed by Anderson at the time of the initial fieldwork. Anderson says he was not aware of the contract specification with regard to measuring slopes, that the employer would not pay him to read the contract specifications between Warren and Northwood and Ministry of Forests

cruise requirements. Warren says he hired an experienced cruiser who should have been aware of the work involved as a timber cruiser.

It is my view, while the slope calculations were fundamental to the work Warren was performing for Northwood, the employee's errors in this regard do not give rise to any right on the employer's part to withhold pay. The employer has a very limited right to withhold wages, and this limited right is set out in s. 21(1) of the *Act*.

> 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 requirement 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 regulation.

While the *Act* provides for withholding of pay in the case of a written assignment by the employee, the *Act* does not give the employer the right to withhold pay because of errors, fundamental or otherwise, in the employee's work.

This Tribunal has dealt in the past with situations where the employer has sought to make deductions from pay for alleged work defects:

Re Gustavson, [BCEST #D101/96 (Eden),

Re Marcil, BCEST #D 415/98 (Suhr),

Re New Style Exteriors Inc, BCEST #D 416/98 (Suhr)

and the Tribunal has held consistently that such a deduction is a violation of s. 21(1) of the *Act*.

In an appropriate case, "employee error", or substandard performance "may" give cause for dismissal. It is my view that "pay" for "work" is a fundamental exchange between the parties in an employment relationship, which is protected by the *Act*. The failure to pay, or the attaching of conditions to payment of wages not provided for in the *Act*, is a violation of the *Act*. If an employer can sue an employee for damages, for failing to perform work properly or failing to deliver the work product the employer, this is an issue which is outside of the *Act*, and I have no jurisdiction with regard to that claim. In a proceeding under the *Act*, the employer has no right to set off another claim arising out of the employment relationship, against wages earned by the employee.

Anderson was an employee and is entitled to be paid for his work. It is clear that Anderson performed work for Warren up to the date of termination. In the *Act*, work is defined as meaning "labour or services an employee performs for an employer ..." . Both parties appear to agree that the work contained errors and required further work to correct errors. While that work was not "error free", an employer may not insist that an employee correct errors in their work, "on their own time". Error correction requires labour or services, and it is therefore work for which an employer must pay.

It is my view that Anderson was terminated by Warren, and that this termination was "wrongful" in the sense that the employer did not have just cause to terminate Anderson because he refused to work without the employer's reciprocal promise to pay for work. Certainly if Anderson had refused to correct the errors, while he was an employee, and at the expense of the employer, this would be insubordinate conduct, for which Anderson could be terminated. Warren offered to reinstate Anderson to correct the work after the date of termination, but by that point in time the employment contract between the parties was at an end.

A second breach of the *Act*, appears to be when Warren linked payment of Anderson to the production of error free documents. An employer who terminates an employee is obliged to pay all wages owing to an employee within 48 hours after the employer terminates the employment (s. 18(1)). In the context of this case the wages were to be paid by August 28th. The wages owing included wages for the work performed prior to termination, as well as any overtime wages. An employer, who terminates, has no right under the *Act*, to insist on pre-conditions to the payment of wages owing at the time of termination.

The entitlement to wages arises from work performed. The fact that work was not performed correctly does not disentitle the employee to be paid for the time spent working. It is unfortunate that a dispute arose concerning delivery of the original cruise documents. The provincial court judgement deals with damages arising from a non-delivery found by the trial judge. On the evidence tendered before me it is apparent that Mr. Anderson did attempt to deliver original cruise data, but that Warren's staff refused to accept delivery of the courier package containing the data, believing the package to contain photocopies rather than originals. In my view, however, the employer's obligation to pay wages to Mr. Anderson is not "cancelled" by "non-delivery" or "refusal" of cruise documents. There was some work performed. I have no jurisdiction to "set off" any claims for damage from wages that Warren is obliged to pay damages. The provincial court judge, has reserved jurisdiction to deal with the issue of set-off of wages.

For the above reasons, Mr. Anderson is entitled to his wages for the work performed prior to the termination of his employment by Warren.

Overtime:

Warren's assertion that the parties agreed to a day rate, is not contradicted by Mr. Anderson. The parties did not expressly discuss overtime at the time of the hiring interview. Anderson did not raise the issue until after he was terminated. Even if the contract did include overtime, it is a contract which has no effect by virtue of s. 4 of the *Act*. In my view the Delegate correctly applied the definition of regular wage set out in s. 1 of the *Act*. Regular wage means

> (b) if the employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period are divided by the employee's total hours of work during that pay period.

Applying this definition it is clear that the employer did not pay an hourly rate for an 8 hour day, with overtime for hours worked in excess of 8 hours per day. On dates when the employee worked less than 10 hours the wage was reduced by the employer to the equivalent of $16.00 per hour.

Mr. Warren was not aware of s. s 1(b) of the *Act*, and claims that he has altered his practice, and now pays his cruisers an hourly rate.

I am not satisfied that Warren has established any error on the part of the Delegate in the assessment of overtime wages owing.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination dated May 25, 2000.

Paul E. Love

Paul E. Love
Adjudicator
Employment Standards Tribunal