

An appeal

- by -

Burnaby Distribution Centres Inc.
("Burnaby Distribution")

- 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: Ib S. Petersen

FILE No.: 2001/489

DATE OF HEARING: September 24, 2001

DATE OF DECISION: September 28, 2001

DECISION

SUBMISSIONS:

Mr. Chris Loosley	on behalf of the Employer
Mr. Gerald Warne	on behalf of himself

OVERVIEW

This is an appeal by Burnaby Distribution pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director issued on June 4, 2001. The Determination concluded that Warne was owed \$1,167.41 by Burnaby Distribution on account of compensation for length of service.

FACTS AND ANALYSIS

Burnaby Distribution appeals the determination and says that it is wrong: Triangle Transportation and Warehousing Systems Ltd. (“Triangle”) is the employer, not Burnaby Distribution. As the appellant, Burnaby Distribution has the burden to persuade me that the Determination is wrong.

Warne commenced employment with Triangle in November 1996. He was employed as a mechanic--though there was some dispute over what kind of mechanic--from November 2, 1996 to September 15, 1997 at the rate of \$22.50 per hour. In late August, he went off on workers’ compensation. He was not recalled to work within the time provided for in the *Act*. The Delegate concluded that Burnaby Distribution was the employer and ordered it to pay the compensation for length of service owing. In making that finding the Delegate relied, among others, on the Record of Employment, a T-4 slip (for 1997) and pay stubs issued by Burnaby Distribution.

Geoff Edwards, the former president of Triangle, Dale Owens, the operations manager for Burnaby Distribution, and Chris Loosley, the president of Burnaby Distribution, testified, the latter two by tele-conference. Warne appeared in person and testified.

Triangle and Burnaby Distribution were related companies. Burnaby Distribution was a division of Triangle. It appears that Triangle had substantial financial difficulties. On or about March 1, 1997, the “re-load” assets of Triangle were sold to Burnaby Distribution, now a separate corporate entity. The connection between the two companies after that date was through the parent company, Triangle Industries Ltd. In June or July, 1997, a Rex D’Souza became the operations manager for Triangle and, eventually, became the owner of that company and its successor, another limited company which apparently also had “Triangle” in its name.

Burnaby Distribution's position is that D'souza ran Triangle and that Warne reported to him. It says that Warne mostly performed work on Triangle's equipment, though he may occasionally have performed work on Burnaby Distribution's cranes and forklifts. It was Edward's "understanding" that Warne "primarily" serviced Triangle's equipment. Owens was asked if he gave explicit instructions to Warne and he responded that "on daily work he was instructed by Triangle" and that it was his "understanding that it was all done though Triangle." Owens was less sure who actually owned the equipment serviced by Warne--that, he explained, was "above" his level.

Both before and after the separation of Triangle and Burnaby Distribution into separate corporate entities, the demarcation between the two was less than clear. Edwards explained that "money flowed back and forth." Because of the role of Isabel Owens, Owens' mother, who was involved in Triangle's management, the "habit grew of using the "re-load" division [Burnaby Distribution] as a secure bank account. Burnaby Distribution was frequently called upon to make payments for Triangle. Edwards also explained that Burnaby Distribution used Triangle as a contractor, being reimbursed for work performed. However, the witnesses for Burnaby Distribution also testified that the companies were physically separated, located at different lots, paid rent to different landlords, and had different employees. Owens also states that the "shop would be combined." However, in his direct testimony Owens also states that when Warne returned from workers' compensation in mid-September, "everything was up in the air."

Warne agrees that he commenced his employment with Triangle. However, he testified that he transferred from Triangle to Burnaby Distribution and was paid by that company. He says that he approached Loosley, Edwards and Owens with a request for a transfer effective when the two companies became separate. He says that this was a condition of him continuing to work. The Employer's witnesses disagreed that there was such an agreement. It is clear from the general tenor of the evidence that "everybody" were concerned about their pay cheques. Burnaby Distribution's position is that it never agreed to hire Warne. The evidence, however, is less unequivocal. Edwards was questioned by Warne as to why Burnaby Distribution agreed to put him on its payroll and he responded that as far as he could recall it had to do with the "security of payments" and that it was only covered a few pay periods. In the circumstances, I accept that there was an agreement that Warne transferred from Triangle to Burnaby Distribution.

Warne says that he continued to perform his duties when D'Souza took over Triangle in July. It was his understanding that D'Souza did so with the authority of the board of directors of Triangle.

In late August 1997, Warne explained to D'Souza that he was going for surgery and was told that was "no problem." On September 4, he indicated that he was willing to return to light duties and that the Workers' Compensation Board would pay for a helper for a period. D'souza told him that was not acceptable and Warne told him that he would return when he was fit. At that time, Warne also spoke with Owens who told him that he had no authority to make a decision. As well, Warne also says that he observed other employees apparently doing his work. When

Warne sought to return to work in September, he was confronted by D'Souza who asked him "what are you doing here." When Warne replied that he was "returning to work," D'souza told him that "you no longer have a job here, you've been replaced." Afterwards, he approached Owens who told him "sorry, they make their decisions."

Warne also testifies that while Triangle was sold to D'souza around this time, people continued to work in Triangle's office for several months into 1998. Burnaby Distribution take issue with that. They say that the operation ceased to exist "shortly into 1998."

Some of the evidence, including the conversations between Owens and Warne and between D'Souza and Warne in early September, to the effect that D'Souza would not accept a return to light duties, and in mid-September, that Warne was told that he no longer had a job there, could support a finding that Triangle, and not Burnaby Distribution, was the employer at the material time.

On the other hand, considering all of the evidence before me, including Burnaby Distribution's own evidence that "everything was up in the air" when Warne sought to return to work, I am not persuaded that the Delegate erred in her Determination. In my view, the following point toward Burnaby Distribution as the employer and that there was an agreement that Warne transferred to that company.

First, the Record of Employment states that Burnaby Distribution is the employer. The ROE notes that the first day worked was November 11, 1996 and the final pay period ending date as September 15, 1997. It indicates the hours worked by Warne and the total insurable earnings. The ROE states as the reason for the issuance the code "K," recurrence of an old WCB injury, and states the return date as "unknown." The ROE is signed by Owens, Burnaby Distribution's operations manager. The ROE lists Owens as the person to contact for further information. It is a serious offence under federal employment insurance legislation to make false statements on ROEs. I find it difficult to accept that Owens would have signed this document unless it was true. I do not, therefore, accept the explanation offered by Owens at the hearing, namely that he issued the ROE because he felt sorry for Warne and wanted to help him out because he could not get employment insurance without a ROE. It is clear, that, at the time the ROE was issued, Triangle, was still "there" until "shortly into 1998." If Warne was in need of a ROE, and he was an employee of Triangle, common sense indicates that he would simply have been referred to that company.

Second, the T-4 for 1997 indicates that Burnaby Distribution is the employer.

Third, three pay stubs for the period August 9 to September 15, 1997, indicates to me that Burnaby Distribution was the employer. I do not accept the explanation that it was simply covering Triangle's wages. If that were the case, it could have been done by issuing a cheque with a notation to that effect. There was no need to put him on the payroll of the company. The pay stubs indicate regular pay, vacation pay accrual, overtime, total earnings for the year to date, CPP contributions, EI contributions, federal income tax and other matters. In my view, the

documents indicate that Warne was on the payroll of Burnaby Distribution. These are records an employer is required to keep under the *Act* (see Sections 27 and 28). The pay stubs support the conclusion that Warne was an employee of Burnaby Distribution.

On that note, Burnaby Distribution says that it covered Warne's pay on only a few occasions. However, in response to a question, Warne stated that there were others, including from April and on. In response to a question from Warne, in cross-examination, Owens was not able to provide the date when it started paying him. He said he would have to "go onto the computer." I would have thought, in light of the evidence clearly in issue between the parties, that this information would have been readily available and part of Burnaby Distribution's case.

In short, I not persuaded that the delegate erred in her conclusions. I accept that Warne was laid off and never recalled. He is entitled to compensation for length of service. The Employer has not discharged the burden on the appeal and it is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 4, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal