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 -

Pacific Ocean Rover Limited
("POR")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/501

DATE OF HEARING: November 8, 2000

DATE OF DECISION: January 2, 2001

DECISION

OVERVIEW

Pacific Ocean Rover Limited (which I will henceforth refer to as "POR", "the appellant" and, also, "the employer") filed an appeal pursuant to section 112 of the *Employment Standards Act* ("the *Act*"). The employer appeals a Determination issued by a delegate of the Director of Employment Standards ("the Director") on June 23, 2000. In that Determination, POR is ordered to pay Eugene Konart $5,572.59 in wages, interest included.

The appeal is an unsupported claim that Konart is not owed $5,572.59. The Tribunal set a date for a hearing in the appeal. The appellant then asked for postponement of the hearing and did not attend the hearing even though no postponement was granted.

APPEARANCES

Eugene Konart — On his own behalf

ISSUE TO BE DECIDED

What I must decide is whether it is or is not appropriate for the Tribunal to proceed further in this appeal.

FACTS

According to the Determination, Eugene Konart worked for POR from April 1, 1998 to September 30, 1999. The rate of pay is $2,669.00 a month. The employer issued a post-dated cheque in March, 2000 for $3,657.88, what is said to be $5,320, less what is required in the way of statutory deductions. However, when the employee attempted to cash the cheque, it was returned NSF. I accept all of this as fact as none of it is disputed by the employer.

The employer's claim, on appeal, is that Konart is not owed $5,320 but only $73.38. According to the employer, it has discovered that Konart was paid $5,246.62 more than was once thought; $2,696.62 through cheques numbered 66, 77, 85 and 176 ($1,000, $500, $598.31 and $598.31, respectively); $2,000 in that he received a colour TV, a VCR and an Aiwa music centre; and another $550 in that, on a trip to Montreal, he used POR's corporate VISA to pay for that amount of personal expenses.

The Tribunal set a date for a hearing. By notice of hearing, dated October 12, 2000, the parties were advised that the hearing would be at Library Square, on the 8th Floor, 360 West Georgia Street in Vancouver, and start at 9:00 a.m. on November 8, 2000. Through that notice, the parties were advised that, if they required the assistance of an interpreter, they should notify the Tribunal.

On October 23, 2000, Nikolai Sinitchnikov, the President of POR, purchased airline tickets for flights which would take him from Vancouver to Frankfurt via Toronto on the 1st of November, 2000, to Minsk the next day, and, eventually, back to Vancouver. The return flight to Vancouver is in March of 2001.

On October 25, 2000, Sinitchnikov telephoned the Tribunal and said that he would require an interpreter for his hearing. The Tribunal went ahead and arranged for an interpreter to be present at the hearing on the 8th.

On November 1, 2000, the Tribunal received a letter from Sinitchnikov. In that letter, dated October 31, 2000, Sinitchnikov requests postponement of the appeal hearing. He states that his wife and son have been involved in a tragic accident and that he has had to leave, suddenly, for Russia. He goes on to indicate that he expects to be away for 2 to 3 months, if not longer. And he asks that the hearing be postponed until such time as he returns to Canada.

On receiving Sinitchnikov's letter, the Tribunal immediately acted to contact him but found that his telephone and his fax had been disconnected. The Tribunal then sent the employer a letter, dated November 3, 2000, and advised the employer that it was not prepared to postpone the hearing unless the employer provided clearer reasons why the postponement was necessary.

There was no response from the employer. The hearing went ahead as scheduled. When I arrived for the purpose of holding the hearing set in the appeal, I found Eugene Konart, and the interpreter which had been arranged for Sinitchnikov, but no one representing the appellant. Nothing has been heard from Sinitchnikov or the employer since the day of the hearing.

ANALYSIS

The appeal is clearly without merit in two respects. It cannot succeed in respect to the claim that Konart was paid $2,000 in the form of a TV, a VCR and Aiwa music centre. The appeal also has no prospect of succeeding in respect to the claim that POR is entitled to withhold $550 because of what is said to be Konart's use of the corporate VISA for paying his own personal expenses.

Konart denies that he has a TV, a VCR and an Aiwa music centre as the employer alleges but, even if he did receive the goods, and they are in fact worth $2,000, that is not to pay him wages. Goods and services do not represent wages. The *Act*, section 20, requires that wages be paid in Canadian currency.

> **20** An employer must pay all wages
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> (a) in Canadian currency,
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> (b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or
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> (c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.

It is not shown that Konart paid for any personal expense with POR's corporate VISA, never mind personal expenses totalling $550. Konart denies that POR paid for his personal expenses. But even if it is that POR has paid for some of Konart's own personal expenses, and it should not have, it does not follow that the employer is then entitled to withhold an equal amount of wages.

> **21** (1) 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 require payment** of all or part of an employee's wages **for any purpose**.
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> (my emphasis)

The collection of a credit obligation is permitted by section 22 of the *Act* but the employer may not withhold moneys for reason of a debt except where the employee provides the employer with a written assignment of wages. None was provided in this case. If Konart does owe POR a sum of money for reason of goods received and/or because he paid for personal expenses with his employer's VISA, POR may recover that amount through use of the courts but it is not entitled to withhold an equal amount of wages.

If there is any basis for varying the Determination, it could only be for reason of the employer's third claim, that the cheque for $3,657.88 was issued in error and that Konart is in fact owed less than $5,320 given what he was paid in August, September and October of 1999, the cheques numbered 66, 77, 85 and 176. While it is unclear to me whether this is an issue which POR may properly raise at the appeal stage [for reasons set out in the decisions, *Tri-West Tractor Ltd.*, BCEST No. D268/96, and *Kaiser Stables Ltd.*, BCEST No. D058/97], it is clear to me that the appeal cannot possibly succeed unless it is shown that something less that $5,320 is owed. Beyond that, POR would still have to show that modification of the Determination is in order. [In *Mykonos Taverna operating as the Achillion Restaurant*, BCEST No. D576/98, and other decisions, the Tribunal has said that it will overlook errors(s) which appear to be due to a failure to keep proper records. I believe that is the case here.]

Is the delegate wrong on the amount owed? That is something which is easily established. It requires nothing more than calculation of the amount earned and proof of the amount paid. And there is nothing complex about the calculations. The employment lasted only 6 months and Konart received a salary, $2,669 a month.

I have already found that POR is not entitled to deduct $2,550. All that remains to be decided is whether Konart was paid $2,696.62 more than was once thought, through cheques numbered 66, 77, 85 and 176. And I find that the employer neither submits proof that Konart was paid the $2,696.62, nor submits evidence that establishes that Konart is owed less than $5,320. I find that there is in fact no evidence which establishes that the Determination is in any way wrong.

Section 114 (1)(c) of the *Act* allows the Tribunal to dismiss an appeal which is frivolous, vexatious, trivial or not in good faith.

> **114** (1) The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that
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> (c) the appeal is frivolous, vexatious or trivial or is not brought in good faith.

I am satisfied that the appeal at hand may be dismissed pursuant to section 114 (1)(c) of the *Act* on the basis that it is frivolous in the legal sense of the word. It is a frivolous appeal that fails to challenge a Determination in any important respect. And POR's appeal does not challenge the Determination in a material way. The appeal is without merit in two respects in that what is argued is plainly contrary to the *Act*. And what remains of the appeal, the claim that the Determination is wrong for reason of moneys paid in August, September and October, is without any support at all.

The Fact of the Hearing and the Appellant's Failure to Appear

Though the appeal could have been dismissed without a hearing of any kind, the Tribunal decided that it would hold a hearing on November 8, 2000 and hear from POR. The appeal is, however, no less frivolous because the Tribunal decided to hold a hearing. The Tribunal can dismiss an appeal which is frivolous after, or even though, it has set a date for a hearing.

It is also Tribunal policy to dismiss the appeal if the appellant fails to attend its hearing and then fails to provide a reasonable explanation for the failure to attend. In this case, the appellant asked for postponement of the appeal hearing but no postponement was granted. The appellant then failed to attend the hearing. I assume that is because of what is said to have been Sinitchnikov's sudden need to fly to Russia in view of an accident involving members of his family.

The Tribunal does not grant postponements unless satisfied that it is for a legitimate reason. It cannot if it is to provide fair and efficient procedures for resolving disputes, a purpose of the *Act* (section 2), and promote the fair treatment of employees and employers, also a purpose of the *Act*. In this case, the Tribunal was unsatisfied with Sinitchnikov's explanation of why postponement of the appeal hearing was required and so no postponement was granted. I too find that the employer did not advance what is clear reason for postponement the appeal hearing.

According to the appellant, it could not attend the appeal hearing because of a tragic accident involving members of Sinitchnikov's family, and cannot for 2 to 3 months if not longer. Obviously, such an event can prevent a person's attendance at a hearing and it must be rescheduled in the interest of fairness. But it has not been made clear that Sinitchnikov is the only person that can handle the appeal, nor is it clear that Sinitchnikov could not attend the appeal hearing, if not through making other flight arrangements, then by telephone conference call. And it is not at all clear that Sinitchnikov must be away for 2 to 3 months if not longer. Sinitchnikov's return ticket to Vancouver is for March of next year. That leads me to believe that he is planning to attend to more than an accident involving family members and that the appeal hearing is merely inconvenient.

Most troubling is the open-ended nature of Sinitchnikov's request for a postponement and what Sinitchnikov has said and done.

The Tribunal will not grant postponements for an indefinite period as it cannot. If it were to do so, appeals would drift on for years. It cannot allow an appeal to drag on any longer than is absolutely necessary if it is to be fair and efficient, purposes of the *Act* (section 2). That is especially true where the appeal is frivolous, the case here.

According to Sinitchnikov, he had a sudden need to fly to Russia because family members were involved in a tragic accident. But I find that there is much about his explanation which is odd and inconsistent. Indeed, I find that it is too odd and too inconsistent to be believed. The flight to Minsk is not a last minute booking but was booked on 23rd of October. Sinitchnikov was at that point not planning to attend the appeal hearing. His plan was to leave for Russia on the 1st of November. Yet on the 25th of October, Sinitchnikov telephoned the Tribunal and asked that the Tribunal arrange for an interpreter. It is not until the 31st that Sinitchnikov claims an urgent need to fly to Russia. And in requesting that the Tribunal postpone the appeal hearing, Sinitchnikov does that by letter, rather than telephoning the Tribunal as he did in asking for an interpreter, knowing full well, I believe, that the letter would not reach the Tribunal until after he has left Vancouver.

I am satisfied that the appeal may be dismissed for several reasons. The appellant asked for postponement of the hearing but no postponement was granted, nor should one have been granted, and the appellant failed to attend the appeal hearing. The appellant has not produced what is a reasonable explanation for its failure to appear at the appeal hearing. The appeal itself is without merit. Indeed, it does not challenge the Determination in any important way and is therefore frivolous and one to dismiss pursuant to section 114 (1)(c) of the *Act*.

ORDER

The appeal is dismissed. I order, pursuant to section 115 of the *Act*, that the Determination dated June 23, 2000, be confirmed in the amount of $5,572.59 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

LORNE D. COLLINGWOOD

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal