

An appeal

- by -

Above the World Transport Ltd.
("AWT")

- 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: April D. Katz

FILE No.: 2002/466

DATE OF DECISION: December 10, 2002

DECISION

OVERVIEW

Four complaints were filed against Above the World Transport Ltd. (“AWT”). The parties agreed to meet to resolve the dispute. All four claims were settled and terms of payment arranged. AWT paid all the settlements plus the initial \$500 payment to Nelson Ruano (“Ruano”). Ruano contacted the Director when his \$5000 June 2002 payment was not received. The Director issued a Determination for \$6,633.72 based on the agreed amount that was owed to Ruano in the settlement agreement.

AWT has appealed the Determination to this Tribunal. AWT wishes to have a full investigation of the facts based on AWT's delivery records. AWT is proposing to give estimates of time worked to dispute the overtime claim of \$7454.89 made on the records kept by Ruano. AWT suggests Ruano's records are unreliable.

AWT did not keep payroll records.

Ruano's claim included \$4,795.50 for length of service and \$725.09 for statutory holiday pay.

This appeal proceeded by written submissions.

ISSUE

Was the complaint resolved and therefore no further investigation is necessary?

ARGUMENT

In the appeal AWT argues there was an error on the facts. AWT argues that they can produce evidence that Ruano's time records are not accurate and that less overtime is owed. AWT says it has ‘trip records’ from which estimates of time worked can be made in the absence of payroll records. AWT argues the Determination is based on misinterpretation of informal documents and that further investigation is needed.

The Director's Delegate argued that the information AWT is offering is not new and was available in April 2001 when the Delegate met with AWT. AWT indicated at that time that estimating the time worked from the trip manifests would be difficult. The Delegate provided AWT with a calculation of the amount owed to Ruano for overtime, statutory holiday pay and length of service which totaled \$12,275.47 and AWT asked for a settlement meeting which the Delegate arranged.

The parties negotiated in Spanish without the Delegate and reached a settlement for \$7100, which was reduced to writing and signed by the Delegate and the parties on December 3, 2001. The last sentence of the agreement stated that, if any of the agreed settlement was not paid, the parties agreed that a determination would be issued for \$7100 less any amount paid towards the settlement.

FACTS

Ruano complained to the Director that he had not been paid overtime wages, statutory holiday pay and length of service compensation. The Director found the amount owing to be \$12,275.47. The parties agreed to try and work out a settlement and the Director's Delegate arranged a meeting pursuant to the Director's mandate in section 78(1) (a) of the *Employment Standards Act* ("Act") "to assist in settling a complaint or a matter investigated under section 76".

The parties both knew the amount the Delegate had found to be owing. The parties negotiated in Spanish for their mutual convenience. The parties agreed to settle for \$7100. AWT made the first payment of \$500 in December 2001.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. AWT is seeking a new investigation of the overtime hours. The overtime hours are only part of the claim. The Delegate found in her investigation that without the overtime hours AWT still owed Ruano over \$5000.

The Delegate had found in the preliminary investigation that AWT owed Ruano for length of service, overtime wages and statutory holiday pay. The parties had agreed on a settlement that was less than 60% of Ruano's claim. The Delegate decided to rely on the amount in the settlement agreement as the basis for the Determination. There is nothing prohibiting the Director from relying on the settlement as part of the investigation process.

Section 2 of the *Act* states as follows.

2. The purposes of this Act are as follows: . . .
 - (b) to promote the fair treatment of employees and employers;
 - (c) to encourage open communication between employers and employees;
 - (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

Consistent with the purpose of facilitating open communication and resolving disputes the Delegate arranged a settlement meeting after AWT requested it. The parties met, discussed the issues in Spanish in the absence of the Delegate and came to an agreement. The Delegate assisted in reducing Ruano's and AWT's agreement to writing.

AWT had previously disputed some of Ruano's hours and had offered some payroll records to the Delegate. This information did not change the amount the Delegate had arrived at in her letter to AWT before the settlement meeting. The Delegate had considered these issues before the settlement meeting.

Section 78 of the *Act* states as follows.

Settlements

78 (1) The director may do one or more of the following:

- (a) assist in settling a complaint or a matter investigated under section 76;

...

- (3) If a person fails to comply with the terms of a settlement, the settlement is void and the director may
 - (a) determine the amount the person would have been required to pay under section 79 had the settlement not been made, and
 - (b) require the person to pay that amount.

AWT failed to comply with the settlement in failing to make the second payment. Section 78(3) states that the settlement is void if the payments are not made.

The section goes on to state that the Director 'may' determine the amount owed as if no settlement had been reached. The Director may require the person to pay that amount found to be owed.. The use of 'may' in the section allows the Director to exercise discretion in whether to make a determination. The section does not prohibit the Delegate from considering the settlement but relieves the Director from a requirement to consider or rely on the settlement. The determination is to be based on the results of the investigation.

In this instance the Delegate knew that AWT disputed some of Ruano's figures and decided to respect the settlement amount agreed to by the parties in making her Determination. This is consistent with purpose of the *Act* and section 78(1).

AWT has not provided any new evidence that would not have been available during the investigation stage of this complaint and not considered in the Determination.

I find that AWT and Ruano acted in good faith during the settlement process and AWT did try to meet its obligations. The amount in the Determination appears fair for both parties and there is no evidence that a new investigation is necessary.

CONCLUSION

Based on the evidence provided there is no evidence to support the appeal. The Determination is therefore confirmed.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated August 13, 2002 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal