Employment Standards TRIBUNAL

An appeal

- by -

Marcella Baillie operating as M&N Coast to Coast Traffic Control
("Baillie")

- 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: Lorne D. Collingwood

FILE No.: 2001/532 and 2001/533

DATE OF HEARING: October 10, 2001

DATE OF DECISION: October 22, 2001

DECISION

OVERVIEW

Marcella Baillie operating as M&N Coast to Coast Traffic Control (also referred to as "the employer" and "the Appellant" in this decision), pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), has appealed a determination issued on June 25, 2001 by a delegate of the Director of Employment Standards ("the Director"). In that determination ("the CDET Determination"), Baillie is ordered to pay Randi Dusenbury $2,087.11 in wages, vacation pay and interest included.

Baillie also appeals, pursuant to section 112 of the *Act*, a second determination issued on June 25, 2001 by a delegate of the Director. In that determination ("the Penalty Determination"), Baillie is fined $500 for a failure to produce records required by the *Act*.

In this decision, the CDET Determination is varied. The Penalty Determination is confirmed.

An oral hearing was held in this case.

APPEARANCES:

Marcella Baillie	On her own behalf
Randi Dusenbury	On her own behalf

ISSUES TO BE DECIDED

The issue insofar as the CDET Determination is concerned is the amount of wages owed. Underlying that issue are questions regarding the rate of pay and the number of hours worked. According the employer, the rate of pay, $8.50 an hour, includes vacation pay.

The amount paid is an issue. According the CDET Determination, Dusenbury was paid only $400 for her work.

The employer is seeking to produce new evidence. The delegate objects to that and, as such, there is a need to consider whether this is a case in which to accept new evidence.

The matter of whether the Director is or is not entitled to impose a fine of $500 on Baillie for a failure to produce records is at issue. Baillie claims that she co-operated with the delegate's investigation and that it is not that she does not have records, it is that the delegate refused to accept her information.

The Appellant asks that I consider her ability to pay.

What I must ultimately decide is whether the Appellant has or has not shown that either or both of the determinations ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS AND ANALYSIS

Randi Dusenbury performed road flagging for Baillie. She began that work in March of 2000. Her last day of work was December 14, 2000.

The delegate understood Dusenbury to say "that for her entire period of employment, she was paid $400". The CDET Determination reflects that. It is that Dusenbury earned $2,318.20, that she is entitled to 4 percent vacation pay on top of that (for a total of $2,410.92) and that she was paid only $400, leaving $2,087.11 still to be paid. It appears, however, that the delegate may have been misled by Dusenbury for her testimony before the Tribunal is that she was paid quite a bit more than $400, $400 is just the amount that she was paid in cash.

It does not necessarily follow from the above that the CDET Determination must be cancelled. Dusenbury is still claiming that she is owed wages. The question is, What, if anything, is Dusenbury owed?

The above question cannot be answered except through accepting new evidence from the employer. I would in any event be willing to accept such evidence in this case. This case is not like *Tri-West Tractor Ltd.*, BCEST No. D268/96, or *Kaiser Stables Ltd.*, BCEST No. D058/97, cases in which employers chose not cooperate with investigations by delegates. In this case, I am satisfied the failure to produce records stems from a genuinely held although ultimately mistaken belief that the employer was not in any position to produce her records because they were in her former accountant's possession and the accountant was refusing to return the records to the employer for reason of a dispute over a bill.

I realise that Baillie, in a letter dated May 14, 2001, told the delegate that she did not have "proof that I paid Miss Dusenbury". As matters are presented to me, however, it is clear that she did. That leads me to believe that the employer was only trying to say that she was unable to produce documents which would show the amount paid because she did not have the documents, the accountant did.

The employer, on appeal, produces evidence which clearly shows that Dusenbury received pay cheques totalling $1,908.82 (several cancelled pay cheques). When that is added to what Dusenbury accepts is the amount paid in cash, one reaches a total of $2,308.82. In other words, the amount paid is very nearly the amount which the delegate has accepted as being the amount earned, namely, $2,318.20. The difference is only $9.38. As matters are presented to me, however, I find that it is not $2,318.20 that Dusenbury earned at all. That figure fails to account for work which was after the 30th of October.

Dusenbury claims that she worked continuously in the period October 31 to December 5 and again on the 12th, 13th, and 14th of December and, as she is able to recall matters, she worked 8 hour days except for November 24 when she worked only 4. Baillie accepts that Dusenbury worked December 12, 13 and 14. She produces a time card which shows 5 hours of work on the 12th of December, 4 ½ hours on the 13th and 8 hours on the 14th. The employer does not accept that Dusenbury worked as claimed in the period October 31, 2000 to December 5, 2000 but she does accept that Dusenbury performed some work in the period. There is no record of that work, no time cards, but even Baillie tells me "it does not seem right" that there are no time cards whatsoever.

I will accept that Dusenbury worked continuously from October 31 to December 5, 2000 as it is likely that she would remember whether the work was full time or intermittent. That is to find that there were 20 days of work by the employee in the period October 31 to December 5.

I am not prepared to accept that Dusenbury worked an 8 hour day on each of those days. Dusenbury herself recognises that she worked only 4 hours on a day in November. I find, moreover, that she accepts that the employer's time card for mid-December is accurate and, as such, that she worked only 5 hours on December 12 and only 4 ½ hours on December 13. I find also find that, where there are time sheets, which is to say June to October 24 and the 3 days in December, they show that Dusenbury worked only 7.38 hours a day on average (288 hours worked divided by 39 days).

Absent any reason to believe that Dusenbury worked much longer days, on average, in the period October 31 to December 5, than she did in the periods for which there are records, I conclude that in the period October 31 to December 5 Dusenbury worked 147.6 hours (20 days times 7.38). There were 17.5 hours of work on December 12, 13 and 14. The total number of hours worked in the period October 31 to and including December 14 is therefore 165.1 hours (17.5 plus 147.6).

There is no clear evidence of any wage payments outside of the $2,308.82 noted above.

I find that the employee's regular wage rate is $8.50 an hour. The employer claims that the wage rate included vacation pay but I find that the employer, in practice, paid $8.50 an hour with vacation pay being paid over and above that. The employer's own wage statements show that.

It follows from the above that there is a reasonable basis upon which to conclude that Dusenbury is owed at least $1,403.35 (165.1 x $8.50) in regular wages.

There are wage statements to show that the employee received a certain amount of vacation pay but it is impossible to tell whether she received all of her vacation pay because the employer records are incomplete.

I have found that Dusenbury is not owed moneys as set out in the CDET Determination, namely, $2,087.11 plus vacation pay and interest. I am satisfied, however, that there is a reasonable basis

upon which to conclude that Dusenbury is owed $1,403.35 for work from October 31 to and including December 14, 2000. As I see it, the total amount earned is $3,721.55 ($2,318.20 plus $1,403.35) and the total amount paid is $2,308.82 ($1,908.82 + 400). It follows that the CDET Determination must be varied. I am satisfied that Dusenbury is at least entitled to $1,412.73 ($3,721.55 minus 2,308.82) plus 4 percent vacation pay ($56.51) plus interest.

The employer asks that the amount of the CDET Determination be reduced because of an inability to pay. It is not within my power to do so. The *Act* does not bestow on the Tribunal the discretion to reduce the amount awarded for reason of an inability to pay. The *Act* requires that employers pay all wages.

> **18** (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
>
> (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

The Penalty Determination

In respect to the matter of whether the employer did or did not produce records as required by the *Act*, I find that the delegate issued a demand for payroll records. That order to produce records is dated March 23, 2001 and it ordered the production of the following:

1. all records relating to wages, hours of work and conditions of employment;
2. all records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, section 46 and 47 of the *Employment Standards Regulation*;
3. records of all hours worked each day by the employee; and
4. records of all wages paid to the employee.

The demand for employer records which was sent to the employer is clear in meaning and broad in scope.

Section 28 of the *Act* requires that employers keep detailed records for every individual's employment.

> **28** (1) For each employee, an employer must keep records of the following information:
> (a) the employee's name, date of birth, occupation, telephone number and residential address;
> (b) the date employment began;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
(e) the benefits paid to the employee by the employer;
(f) the employee's gross and net wages for each pay period;
(g) each deduction made from the employee's wages and the reason for it;
(h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
(i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
(j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

(2) Payroll records must
(a) be in English,
(b) be kept at the employer's principal place of business in British Columbia, and
(c) be retained by the employer for 7 years after the employment terminates.

The employer would have me cancel the Penalty Determination and in that regard she asks that I consider that she made every effort to co-operate with the delegate, that her accountant prevented her from producing records, and that the delegate refused to accept records. I am not inclined to believe the employer on the latter point. The question is, however, Did the employer fail to produce the records which were demanded of her? In that regard, I find that, even as the employer submits records on appeal, it is clear that her records are both inadequate and incomplete. The employer has not kept a record of the number of hours worked on each day, earnings and pay. There are gaping holes in what is produced. It is clear and obvious that the employer has failed to comply with section 28 of the *Act* and that she has not produced, as she cannot produce, records as the *Act* requires.

Section 28 of the *Employment Standards Regulation* ("the *Regulation*") is as follows:

28 The penalty for contravening any of the following provisions is $500 for each contravention:
(a) **section** 25 (2) (c), 27, **28**, 29, 37 (5) or 48 (3) **of the Act**;
(b) section 3, 13, 37.6 (2), 37.9 (2) (b) (ii), 38.1 (i) to (k) or 46 of this regulation.

(my emphasis)

The Penalty Determination is consistent with section 28 of the *Regulation* and what is an obvious failure to keep records required by the *Act*. It is therefore confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the CDET Determination dated June 25, 2001 be varied. Marcella Baillie operating as M&N Coast to Coast Traffic Control is ordered to pay Randi Dusenbury $1,469.24 plus interest pursuant to section 88 of the *Act*.

I order, pursuant to section 115 of the *Act*, that the Penalty Determination which is dated June 25, 2001, and against Marcella Baillie operating as M&N Coast to Coast Traffic Control, be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal