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 -

Olympic Forest Products Ltd.
("Olympic")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John L. McConchie

FILE NO.: 98/374

DATE OF DECISION: January 6, 1999

DECISION

OVERVIEW

This is an appeal by Olympic Forest Products Ltd. ("Olympic" or the "employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination (File No. 028-587) dated May 25, 1998 by the Director of Employment Standards (the "Director").

The Determination found that Olympic had made an improper deduction of airfare from wages payable to Michael Hillman ("Hillman") contrary to Section 21 of the *Act*, and ordered Olympic to pay to Hillman the amount of $532.42.

Olympic has appealed this Determination on the grounds that Hillman was covered by the Collective Agreement in effect between Olympic and the Industrial, Wood & Allied Workers of Canada, Local 2171 (the "Union"), and that the deduction of airfare was authorized under this Collective Agreement.

ISSUES TO BE DECIDED

Has Olympic made an improper deduction from the wages of the complainant contrary to s.21 of the *Act*?

FACTS

The key facts giving rise to this proceeding are not in dispute. They are set out in the Determination as follows:

> Michael Hillman (Hillman) is a resident of Tsawwassen who was hired by Olympic Forest Products Ltd. (the employer) to work in the Queen Charlotte Islands as a heavy equipment operator in the logging industry. The employer paid for the airfare to transport Hillman to the work location and Hillman was housed in a logging camp. After 8 days of employment the employer found Hillman's skills lacking and his employment was terminated. The airfare to and from the work location was then deducted from Hillman's final pay.

Prior to beginning his employment, the complainant signed a document called the New Employee Information Form which, on his own written acknowledgement, contained "terms and conditions" of the his employment with Olympic. One of these terms, found in subsection 6 of Section III of the document, was entitled "Hiring Conditions" and consisted of the complainant's authorization to Olympic to

"deduct any advances, commissary, Rec. Club, tools and equipment, where applicable, from my wages."

As mentioned earlier, Olympic is certified to the Union. It has a Collective Agreement with the Union which at the material time provided for a probationary period for new employees. Article XV, Section 2 of the Collective Agreement provides for the reimbursement of certain transportation costs for new employees. It reads as follows:

> An employee, on entering the employment of the Company, and after having completed (30) days of work shall be reimbursed the cost of one-way transportation from point of residence.
>
> Payment of fare allowance under this Section shall not be greater than the cost of one-way transportation between the operation in question and Vancouver.

At the time the Determination was made, the Director's delegate had in evidence a letter from Ken Alton, a Business Agent for the Union, advising that the Collective Agreement between the Union and Olympic allowed for a 30 day probationary period during which new employees were considered as temporary workers not accruing seniority rights and without access to the grievance procedure. The Director's delegate relied on this letter in finding that the Collective Agreement did not apply to the complainant. With its appeal, Olympic has included a letter from Darrell Wong, President of the Union. Referring to the earlier correspondence from Mr. Alton, Mr. Wong has written:

> On Page 2 of this letter, it states that employees who have not completed their probationary period do not have access to the grievance procedure. Please be advised that employees do have access to all the provisions of the Collective Agreement, except for the accumulation of seniority, until the completion of their probationary period.

In essence, Mr. Wong has said that the new employees do fall within the terms of the Collective Agreement although they do not accumulate seniority until they have completed their probationary period. In its appeal, Olympic has also referred to a number of arbitration awards which have upheld the right of probationary employees to access the grievance procedure under the same or similar collective agreements.

The Determination also notes that the complainant stated that he had been told that the employer would arrange and pay for the flight to the work location, and that he had not agreed to pay for the airfare himself.

The Director found that Hillman, as a probationary employee, was not a member of the bargaining unit, and that Olympic could therefore not rely on the provisions of the Collective Agreement to justify the deduction from wages. Further, the Director held that the language of Subsection 6 the New Employee Information Form signed by the complainant did not support the employer's argument that payment of the airfare by the employer was an "advance". The Director held that "advances", in the context of the

language of the form, which lists other types of deductions quite specifically, had to be read to mean “money paid to the employee in advance of wages”. Therefore, the form was not effective in establishing Hillman’s consent to the deduction of airfare from his wages.

SUBMISSIONS

Olympic appeals the Determination on two bases. First, it submits that the Director's delegate proceeded on incorrect information (the Alton letter) when making his decision. Secondly, it submits that the Director's delegate made an error in law in deciding that the airfare was not a deductible "advance".

On the first issue, Olympic argues that the Collective Agreement clearly applies to the complainant. That being the case, the complainant is bound by the provisions of the collective agreement regarding entitlement to airfare. Article XV, Section 2, it says, clearly provides that it is the employee's responsibility to pay for air fare to the operation with the amount being reimbursed to the employee upon completion of 30 days work. Here, it says, the company has paid "in advance" for the airfare. The complainant did not compete his 30 days and, as such, Olympic was not required to pay for the airfare. "The Claimant should not be entitled to a benefit for which he had not fulfilled the negotiated conditional requirements", it says in its submission, "nor should Olympic be penalized for paying his airfare in advance (employer's emphasis)."

As to the second issue, Olympic submits that the complainant signed a binding agreement by which he agreed to permit the deduction of "advances" from his wages. The employer notes that the Director's delegate found that the authorization only applied to "money paid to the employee in advance of wages", and submits that the language of the authorization does not support this limitation. In addition, submits the employer, the language of the Collective Agreement sheds light on the nature of the advances to which the employee agreed deductions could apply. Since the complainant was not entitled to his transportation costs, the payment of those costs by Olympic was an "advance" of a benefit to which the complainant did not ultimately become entitled.

ANALYSIS

Sections 21 and 22 of the *Act* read as follows:

> Deductions
>
> 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.
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Assignments

22 (1) An employer must honour an employee's written assignment of wages
(a) to a trade union in accordance with the Labour Relations Code,
(b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the Income Tax Act (Canada),
(c) to a person to whom the employee is required under a maintenance order, as defined in the Family Maintenance Enforcement Act, to pay maintenance,
(d) to an insurance company for insurance or medical or dental coverage, and
(e) for a purpose authorized under subsection (2).

(2) The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit.

(3) An employer must honour an assignment of wages authorized by a collective agreement.

(4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

Sections 21 and 22 of the *Act* prohibit an employer from withholding wages from employees without their authorization for any reason, except for income tax, CPP, UIC and a court order to garnishee the employee's wages: see *John Zajc operating Norstar Int. Dev. Ltd.* BC EST #D011/96. Another exception is where the employer provides the employee with an advance on wages. Where this has been done, the employer is permitted to deduct that advance from later wages earned.

The onus in this proceeding rests with Olympic. It is my conclusion that Olympic has failed to meet its onus to show that the Director's delegate has made a reviewable error in making the Determination.

Dealing with the first issue, Olympic makes a persuasive argument that the Collective Agreement applies to the complainant's employment. However, the issue of whether the Collective Agreement applies to the complainant's employment is ultimately not directly relevant to a determination of the issues before this Tribunal, although the issue may be very relevant in other proceedings which could be taken by Olympic in connection with its payment of the complainant's airfare. This is because the Collective Agreement does not purport to contain an assignment of wages by the complainant to repay monies paid by

Olympic on account of transportation. Article XV, section 2 contemplates that the employee will be reimbursed airfare after completing the 30 day probationary period. It does not speak to the issue of repayment by the employee of airfare costs. It also does not purport to authorize a deduction by the employer of paid airfare costs from the employee's pay.

The second issue revolves around the complainant's written agreement to permit Olympic to "deduct any advances, commissary, Rec. Club, tools and equipment, where applicable, from my wages." The Director's delegate construed this provision as permitting the deduction of monies paid only where the advances were on account of "wages". It was his judgment that agreement lacked the necessary specificity that would permit him to conclude that the employee had agreed to have airfare deducted from his wages.

Were I to uphold Olympic's appeal in this case, this would amount to a simple substitution of my judgment for the judgment of the Director's delegate on the proper interpretation to be given to the precise words of the written assignment made by the complainant. While the facts of this case may tempt me to do that, this is not an appropriate use of the power of review under the *Act*. It is true that the Director's delegate has given a narrow construction to the term "advances", but such a construction is not clearly wrong. Indeed, it is in keeping with the cautious approach taken by the Tribunal to this date on issues involving the interpretation and application of s.22(4) of the *Act*. Without referring to the many decisions of the Tribunal on s.22(4), it is fair to say that while the term "credit obligation" has been held to embrace a wide variety of obligations, even those owed by the employee to the employer, the Tribunal has required that the written assignment must clearly authorize the specific deduction in question. Here, at a minimum, there is ambiguity in the written assignment. As the Director's delegate said, the assignment is specific with respect to certain types of credit obligations but is not specific with respect to any obligations relating to airfare. While it would not have been unreasonable for the Director's delegate to read the term "advances" to include payments on account of airfare, the language of the assignment did not compel such a conclusion. It is not the Tribunal's role on appeal to second-guess these kinds of judgments. I do not think that the issue with respect to the applicability of the collective agreement has any bearing on this issue, for the reasons mentioned earlier.

It is of course true that this decision does not speak to the right of Olympic to pursue its claim against the complainant in another forum.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination dated May 25, 1998 be confirmed.

John L. McConchie
Adjudicator
Employment Standards Tribunal

JLM/sm