

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 -

Online Curbing and Concrete Ltd.
("Online")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/851

DATE OF DECISION: December 19, 1997

DECISION

OVERVIEW OF FACTS

This is an appeal by Online Curbing and Concrete Ltd. (“Online”), under Section 112 of the *Employment Standards Act*, against Determinations which were issued on October 17, 1997 and October 29, 1997 by a delegate of the Director of Employment Standards. The Determination dated October 17, 1997 required Online to pay \$278.51 (including interest) to Mr. J. McAllister to ensure compliance with both the *Skill Development and Fair Wage Act* and the *Employment Standards Act*. The Director’s delegate determined that Online owed \$263.65 in wages plus \$13.56 in benefit entitlements.

One of the Determinations dated October 29, 1997 required Online to “cease and desist” from contravening Section 5 and Section 8 of the *Skills Development and Fair Wage Act* as well as Section 40 of the *Employment Standards Act*.

The other Determination dated October 29, 1997 imposed a penalty of \$0.00 for the contraventions described above and contained a warning that any further contraventions of these provisions will result in additional monetary penalties.

In its appeal, Online submits :

We do not dispute that time over 8 hours in a day was paid at straight time, (\$263.65 owing) but believed this would be allowable. We do dispute that a “benefit entitlement under the SDFWA” of \$13..56 was owing. We have paid in accordance with the Fair Wage Act.

Online made payment in full to Mr. McAllister on October 23, 1997. However, it submits that its appeal should be allowed “ ... because we had heard that the Director of Employment Standards was issuing variances from the strict Employment Standards to allow a form of flexible bi-weekly payroll of 80 hours straight time in a payroll period. We had not at the time gotten confirmation of this from the Director, but believed these were being issued.”

ANALYSIS

Section 8 of the *Skills Development and Fair Wage Act* provides that:

Collection of Fair Wages

Fair wages owing under this Act are deemed to be wages for the purpose of the *Employment Standards Act*, and the collection, review and appeal procedures of that Act apply for the purpose of this Act.

Section 5 of the *Skills Development and Fair Wage Act* sets out the requirement to pay fair wages in accordance with the *Regulations*.

Section 3 of the *Skills Development and Fair Wage Regulations* [B.C. Reg. 296/94] requires that “... the minimum fair wage must not be less than the rates set out in Schedule 1, Schedule 2, Schedule 3 and Schedule 3A. These schedules contain the minimum hourly compensation (wages and benefits) which must be paid to various trades, labourers and equipment operators.

Online does not dispute that overtime wages were not paid nor does it dispute that it failed to pay benefits according to the requirements of the *Regulation*.

Section 114(1)(c) of the *Act* allows the Tribunal to dismiss an appeal if it is “...frivolous, vexatious or trivial or is not brought in good faith.” *Black’s Law Dictionary* (6th edition) defines “frivolous” as:

A pleading (which) is clearly insufficient on its face and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purpose of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.

Similarly, a frivolous appeal is defined as “...one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.”

To have some prospect of meeting that onus the Employer must submit some evidence or argument which challenges the material point in a determination. When I review the Determinations, Online’s appeal and the parties’ submissions I find that this appeal is devoid of merit because the Online has not made any submission nor given any evidence to challenge or controvert the findings made by the Director’s delegate in the Determinations.

Having made that decision, I should also make some additional comments. First, Part 4 of the *Employment Standards Act* allows an employer to adopt a flexible work schedule for its employees under certain prescribed conditions (see: Sections 37, 38, 39, 40, 41, 42, 43 of the *Employment Standards Act*). There is no evidence to suggest that Online has sought to adopt a flexible work schedule.

Second, Part 9 of the *Employment Standards Act* sets out the process by which the Director of Employment Standards may grant a variance of certain hours of work provisions in the *Act*. Again, there is no evidence to suggest that Online has sought a variance under Part 9 of the *Employment Standards Act*.

Finally, I note that Online seeks a recommendation from the Tribunal that “ ... flexible bi-weeks be allowed by companies in our industry so that our employees can receive an equivalent wage to those working normal 8-hour days in normal types of employment.” (Sic) With respect, I believe that request misconstrues the Tribunal’s powers. Section 109(1)(a) of the *Employment Standards Act* gives the Tribunal the power to make recommendations to the Cabinet (Lieutenant Governor in Council) about “ ... the exclusion of classes of persons from all or part of this *Act* or the *Regulations*.” Any such recommendation would be made by the Tribunal only after it had received and considered submissions from employers, employees and other parties who would likely be affected by the recommendation. In short, the appeal procedures under Section 112 of the *Act* should not be confused with Tribunal’s power to make recommendations under Section 109 of the *Act*.

ORDER

I order, under Section 115 of the *Employment Standards Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr