Employment Standards TRIBUNAL

An appeal

- by -

Chieftain Auto Parts (1987) Inc.
(the "Appellant")

- 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: Wayne R. Carkner

FILE No.: 2001/247

DATE OF HEARING: September 11 and November 9, 2001

DATE OF DECISION: November 28, 2001

DECISION

APPEARANCES:

For the Appellant	Richard A. Foulston Esq., Counsel for the Appellant Peter Heinze Eilleen Heinze Jayne Kelly
For the Respondents	No Appearances
For the Director	No Appearances

OVERVIEW

This is an appeal by Chieftain Auto Parts (1987) Inc. pursuant to Section 112 of the *Employment Standards Act (*the "*Act")* of a Determination by the Director of Employment Standards (the "Director") dated March 12, 2001. The Determination concluded that the Appellant had contravened Sections 21, 40 and 58 of the *Act* and determined that the appropriate remedy was payment of $3789.81 to Nichole Ecker-McCaffrey and $4348.78 to Nadine Leamon (the Respondents). The remedies were assessed for non-payment of overtime, vacation pay, unauthorized deductions from the payroll and interest pursuant to Section 88 of the *Act* Counsel for the Appellant argues that the Determination should be struck down due to errors of fact, errors of conclusion of the facts, errors in law, errors in the calculations and a denial of natural justice. Two days of oral hearings were utilized to hear this issue as well as extensive written submissions from all the parties.

ISSUES

1. Did the Determination error by accepting the credibility of the Respondents records over the Appellant's records?

2. Did the Determination error concluding that unauthorized deductions were made?

3. Were there errors in the calculations contained in the Determination?

4. Was the Appellant denied natural justice during the investigation of the Respondents' complaints?

PRELIMINARY ISSUES

1. Should the Appellant be allowed to utilize the services of a Court Recorder during the Hearing?

2. Should the Appellant be granted an adjournment of the proceedings?

3. Should the provisions of Section 88 (interest accrual) be suspended during the period of adjournment?

PRELIMINARY ISSUES - CONCLUSIONS

Counsel for the Appellant requested the utilization of a Court Recorder for these proceedings and undertook to provide copies of the transcript to both of the Respondents, the Director, the Tribunal and myself at the expense of the Appellant. Based on this undertaking I granted permission for the proceedings to be recorded by the Court Recorder. However, the Appellant chose not too utilize the Court Recorder as neither the Respondents nor the Director called evidence or appeared at the hearing.

At the commencement of the first day of hearings a courier delivered a two-page document from the Respondents. The Respondents, in the document, requested that the contents of the document be read aloud at the hearing and that the respondents were not attending for medical reasons. Two attachments to the document were doctors' certificates from the Respondents' respective physicians outlining that they (the Respondents) should not attend at the hearing for medical reasons.

The document made references to a sexual harassment case filed with the Human Rights Commission by the respondents and Counsel for the Appellant was concerned that the document may prejudice his client's case and being cognizant of the Human Rights case asked that the hearing be adjourned. Counsel for the Appellant argued that there would be extensive evidence presented under oath that would contradict most of the evidence in the Determination. Counsel argued that due to the medical condition of the Respondents, and in fairness to the Respondents to give them an opportunity to rebut the Appellant's case, an adjournment was appropriate in these circumstances.

Counsel for the Appellant also argued that due to the circumstances that arose regarding the Respondents' medical condition, he was applying for a suspension of the application of Section 88 (accrued interest) during the period of adjournment. Counsel noted that the medical certificates were dated over a week prior to the hearing and had the Appellant been aware of the situation an application for adjournment would have been made prior to the commencement of the hearing saving expense to all parties.

Due to the circumstances of the medical condition of the Respondents, and to ensure the Respondents had an opportunity to rebut the Appellant's case, I granted an adjournment of the

proceedings until a date that the Respondents are cleared medically by their physicians to attend at the hearing. Normally an adjournment would not be granted at this late date but as it was the Appellant who was making the application and the Appellant was the only party that would be prejudiced by an adjournment I found that granting the application for an adjournment was appropriate in these circumstances.

The medical certificates were dated August 28 and August 30 respectively. The Respondents had ample opportunity to request an adjournment prior to September 11, 2001 and chose not to do so. Though I feel that this is an appropriate case to suspend the application of Section 88 regarding the accrual of interest on the remedies outlined in the Determination I am unable to do so. Section 88 contains mandatory language:

> "88 (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of"

This language leaves no discretion to the adjudicator to grant leave from the accrual of interest on remedies. Therefore the application to suspend the accrual of interest is denied.

Subsequent to the adjournment the Respondents were contacted by the Tribunal to establish their availability to set a date for the recommencement of the hearing. The Respondents informed the Tribunal that they had no interest in attending at the hearing. They were offered the opportunity to attend via telephone conference and they both declined to do so. Both Respondents were informed, by the Tribunal, both verbally and in writing, that if they failed to participate in the appeal hearing that they do so at their own risk.

FACTS AND ANALYSIS

At the recommencement of the hearing, Counsel for the Appellant acknowledged that there had been an error in Respondent McCaffrey's ("McCaffrey") vacation calculation. Jayne Kelly ("Kelly"), the Bookkeeper for the Appellant and an employee since 1981, testified that indeed an error was made in calculating McCaffrey's vacation entitlement. Kelly produced detailed calculations that showed that McCaffrey was entitled to a gross additional vacation payment of $865.46. Upon reviewing these calculations I concur with Kelly's calculations.

Kelly also provided extensive evidence on the credibility of the daily time sheets that are filled out by the employees of the Appellant. In the Determination the Delegate referred to evidence provided by the Respondents that they were instructed to put the actual hours worked on the daily time sheets if partial days were worked and a check mark if 8 or more hours were worked. Kelly testified that all employees put actual hours on the time sheets however many placed check marks for convenience. Some used check marks and hours. Kelly testified that this has been a practice that over the years was established by the employees. Kelly testified that no instructions had ever been given to the employees to use check marks if eight or more hours were worked or

indeed to use check marks at all. Kelly testified that the check marks were used to identify a regular eight-hour day for the purposes of producing the payroll. Kelly also testified that any employee working on a statutory holiday was paid overtime as were employees, with their supervisor's approval, who worked in excess of eight hours in a day or on rest days.

Counsel referred to the Delegate's preference of the hours provided by the Respondents from their own records. Counsel identified his request to the Delegate to see the original records kept by the Respondents to test the credibility of the record keeping. Counsel produced the records that the Delegate had provided to him. These records consisted of photostat copies of monthly wall calendars with blacked out parts on them showing a digit in one corner of each box that was a workday. Counsel identified that he wanted to have the originals produced to allow him to check the writing, the colour of the ink, etc. to test the credibility of the records. At the date of the hearing the Appellant has not as yet been provided access to view the original documents. Counsel submits that this constitutes a denial of natural justice in that he has had no opportunity to test the evidence against the Appellant.

Eileen Heinze ("Heinze"), Secretary Treasurer and co-owner of the Appellant business, identified a document, dated September 17, 1997, that was issued to all employees. This document identified the implementation of a new weekly time card effective October 1, 1997. This card consisted of two parts, one copy for the Appellant and one copy for the employee. This is the time card system that is still in place today. I note as an aside that the Delegate, in the Determination, never referred to the Respondents' time card copies being produced during the investigation. Heinze testified that the Respondents were never instructed to use check marks or not to put overtime hours on the time cards. Heinz further provided extensive evidence regarding the calculations provided by the Delegate and I am satisfied that the Appellants calculations are correct though this is not an issue as will be outlined later. Heinze also produced detailed calculations comprised of the hours worked from the Respondents records, which were utilized by the Delegate. These calculations were based on the photostat calendar documents provided by the Delegate. These calculations show that, based on the Respondents records, the Respondents were entitled to less gross pay than the Appellant has paid them for the period in question. Again I accept the credibility of these calculations.

Based on the forgoing, I accept the credibility of the Appellant's payroll records and reject the credibility of the Respondent's records.

Turning to the issue of unauthorized deductions Kelly provided extensive evidence. All employees were provided the opportunity to open an account to purchase goods from the Appellant and have these purchases deducted from their payroll as a convenience. If the employees opened an account all they had to do was sign for the goods and the cost of the goods would be deducted from their payroll. Kelly produced many documents showing the Respondents doing this over the years.

Peter Heinze, President and co-owner of the Appellant business testified that the only unauthorized deduction brought to his attention was the photo radar speeding ticket and that there was no mention by the Delegate of unauthorized deductions for goods. Counsel stated that in his meetings with the Delegate that the only unauthorized deduction referred to was the photo radar speeding ticket. Counsel submits that this constitutes a denial of natural justice as the Appellant was unaware of this charge against him and was not in a position to rebut the allegations. Counsel for the Appellant further submits that the employees signing for the goods constituted signed authority for the deductions.

I must concur in these circumstances based on the evidence provided. I find that the payroll deductions for goods were appropriate and authorized by the Respondents. I must further conclude that a denial of natural justice has occurred in that the Appellant was denied the opportunity to meet the allegations made against it.

Turning to the deduction for the photo speeding ticket from Respondent Leamon's payroll, Kelly testified that the practice of the Appellant had been to identify who was operating the vehicle at the time of the photo radar ticket then the ticket was sent to the identified employee for confirmation. If the employee acknowledged the ticket they would sign their name on it and return it to the office. The cost of the ticket would then be deducted from the employee's next pay cheque. Counsel for the Appellant argues that the act of the employee signing the ticket constitutes authorization for a payroll deduction.

With respect, I must disagree. There have been numerous decisions dealing with this type of issue. The jurisprudence is very consistent. These type issues have consistently been found to be a part of "the cost of doing business". It has consistently been found that it is improper for employees to have these costs deducted from their payroll. The employer has other means to deal with these types of issues, primarily discipline for cause. An employee acknowledging receiving a ticket does not constitute authorization for payroll deduction.

CONCLUSIONS

The Appellant has met the onus of burden of proof to show errors in the determination that prove fatal to many aspects of the remedy awarded and the Determination will be varied accordingly.

I find that the Delegate erred in determining that the Respondent's records were more credible than the Appellant's records and accept the Appellant's records as an accurate record of hours worked by the Respondents.

I further conclude that a denial of natural justice has occurred in two instances. The first instance was a failure by the Delegate to produce the Respondents original records of hours that were utilized in establishing the remedy outlined in the Determination. It was appropriate for Counsel for the Appellant to request these documents to test the credibility of said documents.

The second instance of a denial of natural justice occurred when the Delegate failed to make the Appellant aware of the allegations of improper deductions for goods received by the Respondents and including these deductions in the remedy awarded. A party must be aware of all and any allegations made against it to allow it the opportunity to properly rebut any and all allegations. This is a fundamental principle of natural justice.

I conclude that, based on the evidence and not the denial of natural justice, that the deductions from the Respondent's payroll for goods received from the Appellant were deductions authorized by the Respondents.

I conclude that Respondent McCaffrey was not paid vacation in accordance with the *Act.*

Finally I conclude that the deduction for the speeding ticket from Respondent Leamon's payroll was not authorized by the Respondent and was improper.

ORDER

Pursuant to Section 115 of the *Act* the Determination dated March 12, 2001 is varied to read as follows:

1. Chieftain Auto Parts (1987) Inc. is ordered to pay Nichole Ecker- McCaffrey $865.46, less statutory deductions, plus interest accrual pursuant to Section 88 of the *Act.*

2. Chieftain Auto Parts (1987) Inc. is ordered to pay Nadine Leamon $115.00 plus interest accrual pursuant to Section 88 of the *Act.*

3. The "Penalty" section of the Determination is varied to reflect only Sections 58 & 21.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal