File No. YM2727-3232

IN THE MATTER OF A WAGE RECOVERY APPEAL UNDER DIVISION XVI - PART III, SECTION 251.1 OF THE *CANADA LABOUR CODE*;

AND IN THE MATTER OF A HEARING OF THE SAID APPEAL

BETWEEN:

DRIVER-MAN INC.,

APPELLANT,

- and -

ASHLEY O'NEIL,

RESPONDENT.

REFEREE'S DECISION
November 26, 2012

T. F. (TED) KOSKIE, B.Sc., J.D.

Date of Hearing: August 28, 2012

Place of Hearing: Saskatoon, SK

Representatives: Barry Howard Foster for the Appellant, Driver-Man-Inc.

Ashley O'Neil, Respondent, Self Represented

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I. INTRODUCTION

[1] Ashley Joanne O'Neil ("O'Neil") lodged a complaint (the "Complaint") dated November 3, 20122, with the Labour Standards Division of the Saskatchewan Ministry of Labour Relations and Workplace Safety alleging that Driver-Man Inc. ("DMI")not only failed to pay her certain regular wages, overtime and vacation pay, but made unauthorized deductions from her pay.[1]

[2] Since DMI is a federally regulated road transportation company transporting oil and water covered under federal jurisdiction pursuant to subsection 2(b) of the *Canada Labour Code*,[2] the Complaint was forwarded to Human Resources and Skills Development Canada, Labour Program.

[3] A Payment Order[3] was issued on June 6, 2012, ordering DMI to pay on account of O'Neil the total amount of $2,275.50, calculated as follows:

a) $1,404.75 for wages outstanding for work performed from August 16 to 30, 2011, minus advances received on August 22, 2011, and September 2, 2011;

b) $137.40 for vacation pay outstanding on total earnings from August 16, 2011, to October 4, 2011, minus vacation pay received; and

c) $734.35 for reimbursement of unauthorized deductions.

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[1]Appeal Request Report, Appendix VIII, O'Neil Complaint dated November 3, 2011

[2]R.S.C. 1985, c. L-2

[3]Exhibit L-1, Payment Order dated June 6, 2012

[4] DMI appealed[4] the Payment Order.

[5] The Minister of Labour (Canada) appointed me to hear and determine the Appeal.

II. THE DISPUTE

[6] At the commencement of the hearing, DMI said that it was not disputing that it made unauthorized deductions from O'Neil's pay and, therefore, admitted she was entitled to reimbursement of $734.35 as ordered.

[7] DMI, however, took the position that O'Neil was not an employee from August 16 to 30, 2011, and, therefore, denied wages and vacation pay were owing for work performed during that period.

[8] The issue is not whether O'Neil was an employee or independent contractor. It is simply whether or not she was employed during the period in question.

III. EVIDENCE

[9] Both parties acknowledged they had received and reviewed the Appeal Request Report prepared by the Inspector. Both parties advised me that they did not dispute the accuracy of the various time records and the method of calculations appended to the Appeal Request Report.[5] Aside from the rate of pay, they were prepared to rely upon same if they applied.

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[4]Appeal Request Report, Appendix I, Appeal dated June 18, 2012

[5]Appeal Request Report dated June 29, 2012

A. APPELLANT

1. Barry Howard Foster

[10] Barry Howard Foster ("Foster") testified:

a) DMI's head office is in Calgary, Alberta;

b) DMI is trucking company that specializes in hauling fluids associated with the production of heavy oil–mainly crude oil and produced water;

c) DMI contracts with clients that direct the number of trucks, drivers and shifts that are required–it is a "24/7" operation;

d) in early August 2011, DMI agreed to hire O'Neil, but advised her that she could not commence work until she was approved by their client–Heavy Crude Hauling LP;

e) DMI completed the "paperwork" and submitted O'Neil's name to their client in the second week of August 2011;

f) DMI did not get a response from its client until the end of August 2011;

g) O'Neil's first day of work was September 1, 2011;

h) DMI could not hire O'Neil prior to September 1, 2011, because:

   i) she did not have the required credentials–Class A licence, oilfield experience and certain tickets; and

ii) DMI's client had not yet approved her as a driver;

i) DMI gave O'Neil some money in August to help her with expenses–it did not expect her to repay it;

j) DMI offered O'Neil an opportunity to ride with a regular driver prior to September 1, 2011–this was conveyed as an opportunity for experience that would help her in the future;

k) DMI is not a training company–their client does the orientation; and

l) if O'Neil is considered to be an employee for the period from August 16 to 30, 2011, she should be considered a trainee, not a driver, and be paid no more than minimum wage.

B. RESPONDENT

1. Ashley Joanne O'Neil

[11] O'Neil testified:

a) she faxed her resume to DMI–she was living in British Columbia at the time;

b) in response, Foster called her and arranged for an interview in Calgary, AB–that interview took place on either August 6 or 7, 2011;

c) DMI put her into a First Aid course on August 8, 2011;

d) DMI told her to go to Lloydminster for August 10, 2011;

e) on August 11, 2011, she took orientation in Lloydminster–which was conducted by Heavy Crude Hauling LP, DMI's client;

f) she completed her H_2S course on August 13, 2011;

g) she then worked with another driver employed by DMI from August 16 to 30, 2011–among other things, she drove the truck when it was not loaded and assisted with loading and unloading the truck;

h) she was not driving on her own–the "field" is huge and she needed to be trained before she could do it on her own; and

i) she provided DMI with her time sheet showing hours worked from August 16 to 30, 2011 but was not paid for same–DMI lodged no objections to same at they time it was submitted; and

j) she also was of the view she was entitled to vacation pay and reimbursement of unauthorized deductions from her wages for accommodations and course fees.

IV. DECISION

A. CODE

[12] The relevant provisions of the *Code* are:

> *Termination of employment during year*
> 188. When an employee ceases to be employed, the employer shall forthwith pay to the employee
>
> (a) any vacation pay then owing by the employer to the employee under this Division in

respect of any prior completed year of employment; and

(b) four per cent or, if the employee has completed six consecutive years of employment by one employer, six per cent of the wages of the employee during any part of the completed portion of his year of employment in respect of which vacation pay has not been paid to the employee.

. . .

Payment of wages
247. Except as otherwise provided by or under this Part, an employer shall

(a) pay to any employee any wages to which the employee is entitled on the regular pay-day of the employee as established by the practice of the employer; and

(b) pay any wages or other amounts to which the employee is entitled under this Part within thirty days from the time when the entitlement to the wages or other amounts arose.

. . .

Payment order
251.1(1) Where an inspector finds that an employer has not paid an employee wages or other amounts to which the employee is entitled under this Part, the inspector may issue a written payment order to the employer, or, subject to section 251.18, to a director of a corporation referred to in that section, ordering the employer or director to pay the amount in question, and the inspector shall send a copy of any such payment order to the employee at the employee's latest known address.

. . .

Appeal
251.11(1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

. . .

Appointment of referee
251.12(1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and shall provide that person with

(a) the payment order or the notice of unfounded complaint; and

(b) the document that the appellant has submitted to the Minister under subsection 251.11(1).

. . .

Referee's decision

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

(a) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;

(b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and

(c) award costs in the proceedings.

. . .

Order final
(6) The referee's order is final and shall not be questioned or reviewed in any court.

B. WAS O'NEIL AN EMPLOYEE OF DMI FROM AUGUST 16 TO 30, 2011?

[13] The Inspector referred to Interpretive Guideline 802-1-IPG-002 (the "Guideline")[6] and, in particular, the last example indicated on the last page. The Inspector concluded O'Neil's hours during the period of:

a) August 8 to 13, 2011, were training that was a condition of employment and, therefore were not hours of work; and

b) August 16 to 30, 2011, after considering the last example indicated on the last page of the Guideline, were hours of work.

[14] The provisions of the Guideline that are helpful here are as follows:

> Generally, "work" is given a broad definition as using or engaging the services of another. Furthermore, it can be said that an employee is at work when he or she is at the disposal of the employer and under the employer's direction at the place of work.

[6] Appeal Request Report, Appendix IX

...

This interpretation does not apply to preemployment testing of short duration, where hiring is contingent on successful completion of the test. However, this should be distinguished from training of longer duration, where the candidate is learning and performing certain aspects of the job. In this latter situation, where a de facto employment relationship has been established, the time constitutes hours of work. Common sense should prevail in distinguishing these situations.

The following examples are provided for purposes of illustrations only and do not constitute hard and fast applications of the interpretation:

- The employer observes the candidate hooking up a truck and tractor, manoeuvering the unit in the yard and driving it on a short run. This takes half a day. This would not constitute hours of work.

- The employer requires the candidate to accompany another driver for a week. During this time, the candidate may drive the truck, assist in loading and unloading, and learn company procedures. If things work out, the candidate will be offered a job. This week constitutes hours of work.

[15] The legal issue at hand was aptly set forth in *Gray Line of Canada* v. *Burke*.[7] There, Referee Hickling said:

35 The essential issue is whether during the period of the commentary course, the Complainant was an employee within the meaning of the Canada Labour Code (the"Code"). The provisions on recovery of wages apply only where an employer has not paid an employee wages or other amounts to which the employee is entitled under Part III. The Code defines wages in broad terms as including "every form of remuneration for work performed" excluding tips and other gratuities: Section 166. However, "work" and "employee" are not defined in the Code, and the definition of employer is singularly unhelpful. "Employer" means "any person who employs one or more employees".

36 In its ordinary dictionary or etymological sense, employment is a very broad concept. It is capable of a variety of meanings, depending upon the context. It may encompass any use of the ser-vices of another. The interpretation bulletin (802-1-IPG-002) supplied by the Ministry interprets the word broadly as "using or engaging the services of another". Likewise, "work" is capable of embracing any application of mental or physical effort.

37 The modern tendency in the interpretation of statutes, particularly in the field of labour and employment, is to take a broad purposive approach that may well result in a person being classified as an employee (or as an employer) for one purpose but not for another.

...

[7] [2001] C.L.A.D. No. 128 (M. A. Hickling)

42 While it may be useful to refer to the common law for guidance in giving content to the concept of employment in a statutory context, there is always the danger that its importation may have an effect that defeats the legislative intent. The central purpose of employment standards legislation is to prevent exploitation of workers by ensuring that they receive at least basic standards of compensation and conditions of employment. The modern approach to the interpretation of such statutes is to adopt such broad liberal interpretations as will best effect the purposes of the legislation . . . .

43 Similarly, if payment has been made to an individual, the fact that the employer has chosen to label it "road expenses" as in Daswood Lumber, or as an "advance" rather than wages, will not prevent it from being treated as a payment of wages and evidence of a contract of employment having been entered into: see Highland Creek Driving Ltd., (Bryan MacPherson) June 2, 1994 (Colson).

44 Nor can an employer escape liability on the basis that it has not yet entered into a formal contract of employment, if the evidence indicates that an employment relationship exists in fact . . . .

[16] Bringing the matter closer to home, Referee Hickling says:

45. A recurring problem, particularly in road transport cases, though not confined thereto, is the distinction between testing and training. It is legitimate for an employer to require prospective employees to demonstrate that they can safely handle the equipment before the employer hires them. That can usually be accomplished by a pre-employment demonstration in the yard, or a short road test. However, longer or repeated revenue producing runs would typically prompt the conclusion that the employer should pay for the services rendered, and an employment relationship will be found to exist: see Highland Creek Driving Ltd. (Bryan MacPherson) supra; and Highland Creek Drivers Ltd. (Gerard Madore) Y.M. 2727 - 249 June 2, 1997 (Springate); Daswood Lumber, supra; compare, however, Ken Goertzen Trucking (James Bosiak), August 14, 2000 (D'Andrea).

. . .

51 . . . [T]he interpretation bulletin calls for the application of common sense in determining whether a de facto employment relationship has been established . . . .

52 The examples given in the Interpretation Bulletin do not dwell on duration alone. A salient feature of the second example is the nature of the putative employees' activities. The applicant in that example has gone beyond mere testing and has actually performed services for the direct bene-fit of the Employer. He has driven the vehicles and performed work on what appears to be a revenue generating run. That would justify the conclusion that a de facto employment relationship had sprung up and that the Employer should pay for the services provided. In several of the road transport cases considered by this board, the claimant had actually performed the ordinary duties of the job . . . .

[17] In *Warbon Transport Inc.* v. *Fieden*,[8] Referee Dunlop heard an appeal from an Order that directed payment for a nine-day period of work. In considering same, Referee Dunlop summarized two decisions that are helpful here as follows:

> 13 The first of those decisions is Highland Creek Driving Ltd. and Bryan Macpherson (Referee Robert L. Coleson.). The issue in that case was whether or not the Respondent was a employee of the company and if he was, whether or not he was entitled to be compensated for what he said was training time and what the company said was merely testing. It was found by Referee Coleson that there was basically a difference between relatively short trips that easily can be considered training exercises as opposed to longer trips. In that case the longer trip of four (4) days was found not to be a training exercise given the length of the trip and the fact that it accorded more with common sense and more with a reasonable expectation that one would be paid for completing several days of work as opposed to several hours of training exercises.
>
> 14 The second case referred to by the Inspector, [1997] C.L.A.D. 287, involved the same company and Gerard Madore (Highland Creek Drivers and Ltd. Gerard Madore, Referee Springate). The same issue of whether or not training time was compensable was before Referee Springate. Referee Springate when analyzing the issue indicated the following:
>
> > An Employer is logically entitled to require that a prospective employee demonstrate that he or she has the basic skills and abilities required for a job. If the demonstration is reasonable and of relatively short duration, in my view it does not give rise to an employment relationship or an obligation on the part of the employer to pay wages. The road test which the complainant took with Mr. Farrell on May 11, 1995 was such a test. It lasted no longer than an hour and did not involve any revenue producing activity for the employer.
>
> 15 However, Referee Springate further found that a longer trip to Chicago of 3 days duration should be compensated for by the employer not only because of the length of the trip, but also due to the fact that no real training was provided to the employee on the trip. The Referee made the following observations:
>
> > This went beyond what might be reasonable for an unpaid road test. The complainant's uncontradicted evidence indicated that for much of the time that he was driving Mr. Manley was not in a position to observe him. Further, the fact that Mr. Manley and the complainant both utilized the bunk while the other drove suggests that the trip was completed in less time than if Mr. Manley had been alone. These considerations all point to the existence of a form of employment relationship, and an entitlement on the part of the complainant to be compensated for taking the trip.

[8] [2001] C.L.A.D. No. 408 (K. E. Dunlop); See also Greig v. British Columbia Maritime Employers' Assn., [2002] C.L.A.D. No. 345 (M. T. L. Blaxland)

[18] Finally, in dismissing the appeal, Referee Dunlop said:

> 19 Applying common sense as suggested by Internal Policy Guide (802-1-IPG-002) I find that the period of time that the Respondent drove for the Appellant company was of long enough duration and of such a character as to create a DE FACTO employment relationship. It went beyond what might be reasonable for an unpaid training period and appeared to involve very little training what sever.

[19] It is fair for DMI to expect that O'Neil have or obtain the necessary credentials for her job. In addition to what she possessed, O'Neil took the necessary training for same over the period between August 8 and 13, 2011. This occurred over a short duration of time and can appropriately be considered as "a condition of employment and not as hours of work."

[20] By way of contrast, however, the hours O'Neil spent from August 16 to 30, 2011, with another DMI driver were of a different character and did constitute hours of work. I so ruling, I make the following findings:

a) it was DMI that offered O'Neil an opportunity to ride with a regular driver prior to September 1, 2011–she did so from August 16, 2011 to and including August 30, 2011;

b) the scope and complexity of the work was huge and O'Neil needed to be trained before she could do it on her own;

c) among other things, O'Neil drove the truck when it was not loaded and assisted with loading and unloading the truck;

d) DMI paid an advance to O'Neil during the period of August 16 to 30, 2011; and

e) O'Neil believed she was employed during the period in question, kept and submitted time records for same and DMI did not object to same until after she ended her

employment.

[21] Based upon all of the circumstances, the above referenced authorities and applying common sense, I agree with the Inspector's findings. The period of time O'Neil drove for DMI was of long enough duration and of such a character as to create a *de facto* employment relationship and, therefore, the hours she spent from August 16 to 30, 2011, constituted hours of work.

V. CONCLUSION

[22] Because of the above, I:

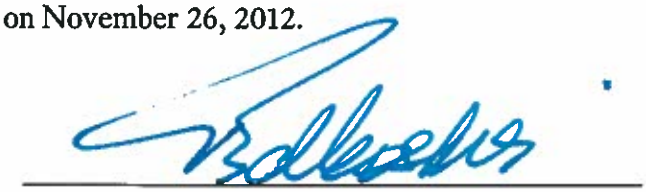
a) dismiss DMI's appeal;

b) confirm the Payment Order; and

c) direct payment to O'Neil of any money held in trust by the Receiver General that relates to the within appeal.

[23] The parties appeared without counsel and presented their evidence and argument by conference call. Under the circumstances, I decline to make any order as to costs.

Dated at Saskatoon, Saskatchewan, on November 26, 2012.



T. F. (TED)KOSKIE, B.Sc., J.D.,
REFEREE