



June 7, 2016

TMS Transport Management Services Ltd.
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Via email: abenedict@tmstrans.com
Original to follow via mail

Commissioner's Decision

TMS Transportation Management Services Ltd. (CTC Decision No. 06/2016)

Introduction

1. TMS Transportation Management Services Ltd. ("TMS") is a licensee within the meaning of the *Container Trucking Act* (the "Act"). Under Sections 22 and 23 of the Act, minimum rates that licensees must pay to truckers who provide container trucking services are established by regulation, and a licensee must comply with those statutorily established rates. In particular, Section 23(2) states:

A licensee who employs or retains a trucker to provide container trucking services must pay the trucker a rate and a fuel surcharge that is not less than the rate and fuel surcharge established under section 22 for those container trucking services.

2. Under Section 26 of the Act, any person may make a complaint to the British Columbia Container Trucking Commissioner (the "Commissioner") that a licensee has contravened a provision of the Act. Under Section 29, the Commissioner reviews such complaints and, under Section 31, may conduct an audit or investigation to ensure compliance with the Act, the *Container Trucking Regulation* (the "Regulation") or a licence. (I note the Commissioner has authority under Section 31 to conduct such audits and investigations whether or not the Commissioner has received a complaint).
3. Section 27 of the Act provides, in essence, that complaints may be made confidentially to the Commissioner. That is, if a complaint is made on a confidential basis, the Commissioner "must make best efforts to avoid disclosing any identifying information respecting the complainant" unless disclosure becomes necessary for purposes of the Act.
4. On November 16, 2015 the then Acting Commissioner communicated the following to the TLS community:

As previously stated, licence holders who voluntarily bring themselves into compliance in a timely way to the satisfaction of the Commissioner are far less likely to incur penalties for non-compliance than those who fail to do so. Please see section 34 of the Act, which sets out the penalties that can be imposed for the failure to comply.

5. On December 11, 2015, the Acting Commissioner followed up with a further communication wherein she informed the TLS community that:

On the issue of retroactive pay, we once again ask for immediate voluntary compliance of that

legislation. While we have not yet exercised our discretion as Commissioners to impose penalties for non-compliance for retroactive pay to date, we are putting the industry on notice that the Office expects all retroactive pay owing to drivers can be fully paid by licence holders prior to Friday, January 22, 2016 at the very latest. Companies that come into compliance between now and January 22, 2016 may still be subject to penalties pursuant to the *Act*. Each case will be assessed on a case by case basis and the reasons for non-compliance will be assessed on that basis. It will not be acceptable for a TLS licence holder to simply wait until January 21, 2016 to come into compliance.

It is expected that all companies pay the retroactive pay owing to drivers immediately, and that the industry will be in full compliance of retroactive pay owing by January 22, 2016 at the latest. After January 22, 2016, the imposition of a penalty pursuant to s. 34 of the *Act* will be highly likely for any company found in non-compliance with the retroactive provisions of the legislation.

Facts

6. The *Act* and the *Regulation* came into effect on December 22, 2014, and a Commissioner was appointed on February 16, 2015. Subsequently, the Commissioner's office received a complaint alleging that TMS was paying less than the required minimum rates of remuneration required under the *Act* to directly employed operators ("company drivers"). The then Commissioner directed an audit to begin with respect to the complaint.
7. On June 11, 2015, the auditor asked TMS to provide all relevant records for audit purposes for the period of April 3, 2014 to May 31, 2015 (the "Audit Period") to determine if TMS was complying with the minimum hourly rates for company drivers required by the *Regulation*. TMS complied with the auditor's request for its records.
8. The records showed that during the Audit Period, TMS employed 34 company drivers to drive its 15 company trucks, and that TMS provides and fully pays for health and welfare benefits for its company drivers after three months' employment. The drivers are paid hourly rates of \$22.50 or \$23.50. At the time, TMS took the position that, taking into account the benefits, it had met the minimum pay requirements.
9. The auditor, however, calculated that the combination of the hourly rates paid and the benefits provided fell short of meeting the minimum hourly pay requirement of \$26.28 per hour. She calculated that a total of \$27,742.45 in adjustments were owing to 33 of the 34 drivers.
10. After communications with the auditor, TMS provided the auditor with its own calculation the total amount it believed it owed its drivers for the Audit Period, \$2,696.41. TMS advised the auditor it would pay that amount by December 7, 2015, the date by which the auditor had asked TMS to pay the amount she had found it owed its company drivers for the Audit Period.
11. The auditor reconsidered her initial calculation and concluded the correct amount owing was \$25,354.90. Taking into account TMS' December 7, 2015 adjustment payment of \$2,696.41, she found a balance of \$22,658.49 was owing for the Audit Period.

12. The auditor sent a sample of her revised calculations to TMS on December 21, 2015 to notify the company she had re-considered her method of calculation, and she sent her completed calculation revisions to TMS on January 4, 2016. TMS indicated it disagreed with her calculations and it did not pay the amount found to be outstanding (\$22,658.49) by January 22, 2016, or thereafter.

Discussion

13. The communications between TMS and the auditor raised a number of issues. For guidance to the community, as well as the company, the issues and their answers can be summarized as follows:

Issue #1: Determination of Applicable Hourly Rate

How does the Commissioner determine which of the two hourly minimum rates of compensation set out in Section 13 of the Regulation is to be applied (\$25.13/hour for company drivers with less than 2,340 hours for any licensee or \$26.28/hour for drivers with 2,340 or more hours for any licensee)?

Issue #2: Is Vacation Pay a Benefit for Purposes of Determining the Hourly Rate?

Section 13(1) of the Regulation states that the minimum hourly rates of pay is “inclusive of benefits” Is vacation pay a benefit the purpose of calculating minimum hourly rates of pay?

Issue #3: How is the Value of Benefits Calculated for Wage Rate Determination?

Can the value of benefits be averaged or otherwise applied to cover a period when the driver was not receiving the benefits, for purposes of calculating a driver’s wage rate for that period?

Issue #4: Are Overtime Premiums Included in Calculating Hourly Rates?

14. The Commissioner’s policies with respect these issues are outlined below:

Issue #1: Determination of Applicable Hourly Rate

If a company provides evidence satisfactory to the Commissioner’s auditor that a company driver has worked less than 2,340 hours for any licensee, audits are done at the \$25.13/hour rate for that driver. Otherwise, audits are done to the \$26.28/hour rate. See, for example, the following two decisions recently issued by the Commissioner and available on the website: *Amalgamated Transport Systems Ltd.*, CTC Decision No. 2/2015 (“*Amalgamated*”) and *AC Transport Ltd.*, CTC Decision No. 3/2105 (“*AC Transport*”).

Issue #2: Is Vacation Pay a Benefit?

Section 13(1) of the Regulation states the minimum hourly rates of pay are “inclusive of benefits”. Section 1.1 of the Regulation states that “benefit” does not include “(c) wages or other remuneration calculated on the basis of work done or productivity”. As vacation pay is a form of wages or other remuneration calculated on the basis of work done, it is not a benefit that can be included in calculating payment of the minimum hourly rate. It must be paid in addition to the minimum hourly rate.

Issue #3: How are Benefits Calculated?

Benefits will only to be included in the calculation of hourly rates for those periods for which

there is coverage. Benefit payments will not be retroactively or prospectively applied to periods during which there is no coverage.

Issue #4: Are Overtime Premiums Included in Calculating Hourly Rates?

Overtime premiums are not considered in the calculation of hourly rates.

15. After receiving and reviewing the information provided by TMS and giving consideration to the above noted policies, the auditor determined that TMS was not paying the minimum rates of remuneration required under the *Regulation* to its employee drivers. The auditor concluded that TMS had underpaid its drivers in aggregate by a total of \$22,658.49. The completed calculations were shared with TMS on January 4, 2016. TMS disagreed with the auditor's conclusions and to date has refused to pay the amounts found to be owing.
16. I have reviewed the auditor's report and conclude that the auditor properly applied the Commissioner's policies outlined above. Additionally I accept the conclusion of the auditor that during the audit period TMS failed to comply with the hourly rates required by the *Regulation* and has underpaid its company drivers by a total amount of \$22,658.49.
17. The auditor identified that the fundamental difference between her calculations and those of TMS related to how the value of benefits was applied to calculate a company driver's hourly rate of pay. The 34 company drivers employed by TMS receive a base rate of pay of \$22.50 per hour or \$23.50 per hour, plus health and welfare benefits. The auditor accepted that the value of these benefits should be included for purposes of determining a driver's hourly rate of pay "inclusive of benefits". However, TMS company drivers only become eligible to receive benefits after three months of employment. The auditor explained how TMS nonetheless calculated no adjustment amount was owing, using the example of one operator, M.D., who had begun working for TMS in March 2015.
18. M.D. was paid \$22.50 per hour by TMS during his first three months of employment (March, April and May 2015) and received no benefits during that three-month period. He worked a total of 282 TLS hours during that period. The auditor calculated M.D. was therefore owed $282 \times \$3.78$ (the difference between \$22.50 and 26.28), that is, a pay adjustment of \$1065.95 for the Audit Period. TMS, however, argued that once M.D. began receiving benefits in June 2015, his rate of pay inclusive of benefits increased such that his averaged annual rate of pay for hours worked in 2015 (March to May without benefits and June to December with benefits) was \$25.63 per hour. If that rate of pay is applied to the March to May 2015 period, TMS argued, M.D. is only owed an adjustment amount of \$183.30 (282×0.65 , the difference between \$25.63 and \$26.28).
19. I find the auditor correctly determined that the adjustment amounts calculated by TMS on an annualized hourly rate basis cannot be accepted. M.D. was not paid \$25.63 per hour from March to May 2015; he was paid \$22.50 per hour. The fact that he subsequently received a higher wage rate (of base rate and benefits combined) cannot be used to offset the fact that he was paid below the statutory minimum for the first three months of his employment with TMS. The pay adjustment calculated by the auditor is owed for that period.

Decision

20. As described above, the circumstances of this case are that TMS:

- has undergone an audit, during which it cooperated with the auditor;
- disagreed with the adjustment amounts calculated by the auditor to be owing to its employee drivers and refused to pay the calculated amounts needed to bring itself into compliance during the audit period.
- failed to bring itself into compliance by the January 22, 2016 deadline established by the former acting commissioner.

21. As TMS has been found to be non-compliant during the audit period, failed to make adjustment payments necessary to bring itself into compliance during the audit period, and as there is no evidence to indicate that it has corrected its non-compliant payment practices, I hereby make the following orders pursuant to Section 9 of the *Act*:

- a. I order TMS to make the adjustment payments owing to its drivers as calculated by the auditor by no later than June 30th, 2016;
- b. I further order TMS to bring itself into full compliance with the rate requirements of the *Act* going forward from June 1, 2015 and continuing to the date of this decision by no later than June 30th, 2016;
- c. I further order that on or before July 15th, 2016 TMS report to the auditor outlining what steps it has taken to ensure ensure full compliance with the *Act*.

22. Section 34 of the *Act* provides that, if the Commissioner is satisfied that a licensee has failed to comply with the *Act*, the Commissioner may impose a penalty or penalties on the licensee. Available penalties include suspending or cancelling the licensee's licence or imposing an administrative fine. Under Section 28 of the *Regulation*, an administrative fine for a contravention relating to the payment of remuneration, wait time remuneration or fuel surcharge can be an amount up to \$500,000.

23. The seriousness of the available penalties indicates the gravity of non-compliance with the *Act*. The *Act* is beneficial legislation intended to ensure that licensees pay their employees and independent operators in compliance with the rates established by the legislation (*Act* and *Regulation*). Licensees must comply with the legislation, as well as the terms and conditions of their licences, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.

24. On Dec. 11, 2015 the former Acting Commissioner warned the industry that:

"It is expected that all companies pay the retroactive pay owing to drivers immediately, and that the industry will be in full compliance of retroactive pay owing by January 22, 2016 at the latest. After January 22, 2016, the imposition of a penalty pursuant to s. 34 of the *Act* will be highly likely for any company found in non-compliance with the retroactive provisions of the legislation."

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25. Under the *Act* the Commissioner's power to impose a penalty is discretionary. As noted in previous decisions there are many circumstances where the discretion to impose a penalty or penalties is more likely to be exercised. These include, but are not limited to, where a licensee:
- does not cooperate fully with an audit or investigation;
 - does not comply with orders or directions given by the Commissioner (or a delegate of the Commissioner, including an auditor);
 - engages in meritless dispute of, or delays in paying, amounts found to be owing;
 - engages in any form of fraudulent, deceptive, dishonest or bad faith behavior with respect to compliance with the requirements of the *Act*, the *Regulation* or a licence.
26. While the audit discloses that TMS cooperated fully with the auditor's investigation of the complaint, and while I accept that TMS has not engaged in any form of fraudulent, deceptive, dishonest or bad faith behavior, I have also concluded that TMS failed take the necessary steps to bring itself into compliance prior to the January 22, 2016 deadline set by the former Acting Commissioner and remains non-compliant today.
27. Does TMS have an acceptable excuse for its non-compliant behaviour? In my view it does not.
28. The company's disagreement with the auditor's approach and calculations did not relieve TMS of its compliance obligations. Licensees who choose not to accept an auditor's audit results proceed at their own peril and risk facing the consequences of not having their views accepted by the Commissioner.
29. In this case, I have found that the auditor correctly followed the policies of the OBCCTC and correctly concluded that TMS was and is non-compliant. TMS took the risk of remaining non-compliant beyond the January 22, 2016 deadline, in the face of clear notice from the Acting Commissioner, as noted above, that a finding of non-compliance in these circumstances would entail a "significant risk" of having a penalty imposed.
30. Taking into account all of the facts present in this case, including the outstanding amounts which continue to be owed to TMS drivers and TMS's failure to bring itself into compliance on or before the January 22nd, 2016 compliance deadline imposed by the former Acting Commissioner, I have decided that this is an appropriate case to issue a penalty. In the result and in accordance with Section 34(2) of the *Act*, I hereby give notice as follows:
- a. I propose to impose an administrative fine against TMS in the amount of \$6,000.00;
 - b. Should it wish to do so, TMS has 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;
 - c. If TMS provides a written response in accordance with the above I will consider its response, and I will provide notice to TMS of my decision to either:
 - i. Refrain from imposing any or all of the penalty; or
 - ii. Impose any or all of the proposed penalty.

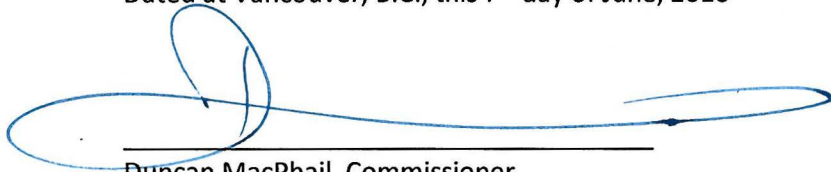
31. Additionally, I make the following orders:
- a. TMS is ordered to make the adjustment payments owing to its drivers as calculated by the auditor by no later than June 30th, 2016;
 - b. TMS is ordered to bring itself into full compliance with the rate requirements of the *Act* going forward from June 1, 2015 and continuing to the date of this decision by June 30th, 2016;
 - c. TMS is ordered to report to the auditor outlining what steps it has taken to ensure ensure full and ongoing compliance with the *Act* by no later than July 15th, 2016.
32. In addition to the above I will direct the auditor to take any further audit steps that may be necessary to ensure that TMS is in full compliance for the period beginning of June 1st, 2015 and continuing to the date of this decision.

Conclusion

33. With the publication of this decision, I have provided guidance on how the Commissioner and the auditors will interpret the *Act* and the *Regulation*. I have also taken the opportunity to reinforce the principle that the onus to become and remain compliant with the requirements of the *Act* and the *Regulation* rests with the licensee. Finally, I have made clear that there will be consequences for failing to meet the January 22nd, 2016 compliance deadline imposed by my predecessor.
34. The penalty imposed on TMS in this case does not flow from the fact that it challenged the auditor's calculations or approach, but rather from its failure to pay retroactive wages owing in a timely manner. Clear notice was given of the requirement to pay such wages by January 22, 2016. TMS chose not to accede to that requirement, presumably in hopes that I would find the auditor's calculations to be incorrect. That did not occur, and as a result, TMS has received a penalty for its flouting of the January 22, 2016 deadline. As noted above, TMS took a calculated risk in refusing to pay the amounts the auditor found owing by that deadline.
35. I would add that companies are entitled and indeed invited by the auditor to review the auditor's calculation, and they may engage in discussions with the auditor about the auditor's audit findings. However, once the auditor has considered a company's arguments and advised that the auditor still considers the company to be non-compliant and owing money to its drivers, a company that fails to comply with the auditor's direction to make the requested pay adjustments takes the risk I may not accept the auditor was incorrect, as happened in this case. In that case, as here, a penalty for non-compliance is highly likely to result. Among other things, the penalty ensures that companies do not dispute the auditor's findings merely to prolong or complicate the audit process to delay or deny payment of monies owing to their drivers. It must be remembered that a fundamental reason and purpose for the *Act* and *Regulation* is to ensure drivers are paid wages owing in a timely manner. Additionally it is consistent with this purpose that, when a deadline is given for payment of retroactive wages owing, companies who voluntarily comply with that deadline are not penalized whereas companies who choose not to comply are highly likely to face a penalty as a consequence.

36. This decision will be delivered to TMS and published on the Commissioner's website (www.bc-ctc.ca).

Dated at Vancouver, B.C., this 7th day of June, 2016

A handwritten signature in blue ink, consisting of a large loop on the left and a long horizontal stroke extending to the right.

Duncan MacPhail, Commissioner