

An appeal

- by -

Scott Cohen

- 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 (as amended)

TRIBUNAL MEMBER: Yuki Matsuno

FILE No.: 2010A/23

DATE OF DECISION: May 18, 2010

DECISION

SUBMISSIONS

| | |
|-------------------|--|
| Scott Cohen | on his own behalf |
| Diane Black | on behalf of Diane Black and Duane Black carrying on business as D & D Traffic Control |
| Theresa Robertson | on behalf of the Director of Employment Standards |

OVERVIEW

1. This decision completes an appeal filed by Mr. Cohen regarding a determination issued by the Director of Employment Standards (the “Director”) on September 4, 2009 (the “Determination”) regarding a complaint filed by Mr. Cohen with the Employment Standards Branch on December 15, 2008. The main findings made by a delegate of the Director of Employment Standards (the “Delegate”) in the Determination were (a) Mr. Cohen’s status as an employee was confirmed; (b) Mr. Cohen worked a number of hours for which he was not paid daily and weekly overtime and he had not been paid vacation pay or statutory holiday pay; (c) based on the provisions of the *Act*, the collection period for wages for Mr. Cohen was May 7 to November 6, 2009; (d) Mr. Cohen was entitled to compensation for length of service under section 63 of the *Act* in the amount of one week of pay, determined to be \$357.36; (e) the *Act* prevents an employer from making deductions other than statutory withholdings; the Employer conducted a “self audit” of the amounts it deducted from Mr. Cohen’s pay each pay period to cover Worksafe premiums and paid an additional \$368.67 as a result of the “self audit”; and (f) the Employer has paid \$2093.09 in additional wages to Mr. Cohen which have been paid into the Director’s Trust account on his behalf and disbursed to him.
2. Mr. Cohen appealed the Determination to the Tribunal. I decided the appeal (the “Decision”) and confirmed the Determination except for four areas amounting to errors of law connected to the calculation of wages owing to Mr. Cohen, as follows:
 1. **Collection period:** In the Determination, the Delegate correctly states even though Mr. Cohen worked from April 14 to November 6, 2008, due to the provision in the *Act* [section 80] that limits the time period for collection to 6 months prior to the last day worked, the collection period for Mr. Cohen’s wage complaint is May 7 to November 6, 2009. However, the Wage Calculation Summary attached to the Determination shows “Regular Wages” (\$9,567.25) and “1.5X Wages” (\$1,352.25) as being calculated from April 14, 2008 to November 6, 2008. This means that wages earned in the period April 14 to May 6, 2008 appear to be included in the calculation of wages earned by Mr. Cohen during the collection period. This amounts to an error of law because there is no evidence to support the finding that the wages that Mr. Cohen is entitled to under the Determination should include wages earned between April 14 and May 6, 2008.
 2. **Total Wages paid to Mr. Cohen:** In the Wage Calculation Summary, the Delegate indicates the amount of “Wages Paid” and “Gross Pay” to be \$10,415.25. The Delegate does not indicate in the Determination how this amount was calculated. A review of the Record reveals that this amount appears on one of the payroll documents submitted by the Employer, entitled “Scott Cohens’ actual hours worked ‘By the Week’” (“Hours by the Week” document). This two-page document contains a list of Mr. Cohen’s hours worked by the week (starting April 14, 2008),

listing the week, the location, the hours, the wage rate, the total for each wage rate, and the “(31 week) total earnings = \$10,415.25”. What is important to note is that the Hours by the Week document does not indicate that the total amount actually paid to Mr. Cohen is \$10,415.25. Further, the calculations begin on April 14, 2008, which is before the collection period.

There was other evidence before the Delegate suggesting that the amount of \$10,415.25 is not a correct calculation of the amount paid. First, there is evidence that Mr. Cohen was not paid for his last two days of work (see paragraph below). Second, the Employer issued payslips to Mr. Cohen; these payslips formed part of the Record. When the amounts contained in the “total earnings” section of all the payslips issued during the collection period are totalled, the amount does not appear to equal \$10,415.25. Therefore, the Delegate’s statement in her submissions that in calculating the wages owed to him, she used “his gross earnings as per his payslips before the deduction for “Employment Insurance” [sic]” does not appear to accord with the evidence. The Delegate’s conclusion in the Determination regarding the total wages paid to Mr. Cohen amounts to an error of law because there is no evidence to support the finding that the Employer actually paid Mr. Cohen \$10,415.25 during the collection period.

3. **Payment for November 5 and 6, 2008:** This issue is related to the issue outlined above. Mr. Cohen points out in his submissions that he has never been paid for his last two days of work, November 5 and 6, 2008. This is confirmed by the Employer on another one of its payroll documents, entitled “Scott Cohens ‘Hours Worked’ at a glance” (“Hours Worked” document). This document is a list of Mr. Cohen’s hours worked that contains the date worked, principal contractor, work location, hours worked, sign set-up and takedown, total hours paid for, pay slip number, cheque number, and cheque date. On the Hours Worked document, the Employer indicates with respect to the hours worked on November 5 and 6, 2008: “not paid as of yet – as Scott wants nearly \$11,000.00 instead of what’s owed him”. In my view, the Delegate’s failure to take into account that Mr. Cohen was not paid for November 5 and 6, 2008 amounts to acting on a view of the facts which could not reasonably be entertained, given that both Mr. Cohen and the Employer agree that payment was not made for those dates.
4. **Deductions for Worksafe premiums:** Mr. Cohen says that the Delegate erred in not confirming the accuracy of the amount paid by the Employer for the deductions from his pay to cover Worksafe premiums (indicated on the payslips as “Employee Ins (WCB/Worksafe)”. According to the Determination, the total amount calculated by the Employer in its self audit for these deductions was \$368.67. The Determination does not indicate how the Employer came to this number, nor do any documents in the Record. However, there is evidence in the Record in the form of the payslips that suggest (if all of the deductions indicated in the Payslips were totalled) that an amount greater than \$368.67 was deducted from Mr. Cohen’s pay. Therefore a greater sum may be owed. In my view, the Delegate’s acceptance of the Employer’s self audited amount for deductions without any indication of how the Employer came to that amount results in an error of law because she acted on a view of the facts which could not reasonably be entertained, given that the payslips indicate a different amount was deducted from Mr. Cohen’s pay.

3. I referred the Determination back to the Delegate for recalculation of the amount of wages owing to Mr. Cohen. The recalculation was

to be based solely on the evidence in the Record and will include a reasoned explanation, based on the evidence in the Record, for each calculation. The Delegate will not receive any additional evidence from the parties with respect to the recalculation. Further, the recalculation will take into account the additional wages already paid to Mr. Cohen by the Employer, namely \$2,093.09. All parties should note that the recalculation may result in no change to the amount owing to Mr. Cohen, or may result in an increase or decrease.
4. I further ordered that along with the recalculations of wages the Director calculate any concomitant adjustments to vacation pay, statutory holiday pay, compensation for length of service, and any interest payable under section 88(1). I ordered the Determination confirmed in every other respect.
5. In response to the referral back, the Delegate, on behalf of the Director, issued a report dated February 11, 2010 (the "Report"). The Tribunal forwarded the Report by letter dated February 15, 2010 to Mr. Cohen and Diane Black and Duane Black carrying on business as D & D Traffic Control (the "Employer") and offered them an opportunity to submit a reply, along with a copy of any records and documents in support. Subsequently, a number of letters were received by the Tribunal from the parties, often in response to each other's letters or in response to letters from the Tribunal. Mr. Cohen submitted a number of letters, one undated and the others either dated or received by the Tribunal March 4, 2010; March 19, 2010; March 31, 2010; April 6, 2010; and April 12, 2010. The Employer submitted a letter dated April 9, 2010. The Delegate submitted letters dated March 18, 2010; March 24, 2010; and April 1, 2010. Mr. Cohen submitted two additional submissions received April 19, 2010, and an additional submission received April 22, 2010, which I did not consider in this decision as they were received long after the submissions were due and more importantly, contained no submissions that are relevant to the issues discussed in the Report.

ISSUE

6. Are the conclusions reached in the Report correct, and should the Determination be confirmed, varied or cancelled as a result?

THE REPORT

7. In the Report, the Delegate addressed the four issues which I held in the Decision to be indicative of errors of law regarding the calculation of wages owing to Mr. Cohen, as follows:
 1. **Collection Period:** the Delegate stated that as indicated in the Determination and confirmed in the Decision, the collection period for wages owed to Mr. Cohen is the period from May 7 to November 6, 2008. She stated that the reasons why she included the wages earned in the entire period of employment (starting from April 16, 2008) were (a) to properly calculate vacation pay earned in the period from April 14 to May 6, 2008 (which was earned or became payable in the 6 months prior to the termination of Mr. Cohen's employment) and (b) properly calculate the statutory holiday entitlement for Mr. Cohen for May 19, 2008, "since eligibility for statutory holiday benefits based on an employee being employed 30 calendar days prior to the statutory holiday and the amount of benefit is based on an average of earnings in those 30 days". The Delegate stated that she should have explained this in her Determination. In reviewing the calculations, the Delegate stated that she noted Mr. Cohen worked 1.5 hours of overtime on April 16, 2008, for which he was only paid straight time. She noted that the amount of overtime wages that the Employer should have paid to Mr. Cohen for work on that date (\$9.00) is not

recoverable because the date it was earned and became payable lies outside the collection period. She explains that this amount had been included in the calculation of wages owing to Mr. Cohen and therefore should be subtracted from the total wages owed.

2. **Total Wages Paid:** the Delegate states, “I used the wages paid to Mr. Cohen during the entire period of his employment against the wages earned in the same period to make sure all hours worked were captured and offset against wages paid since there was not always clarity on the exact pay periods.” Her recalculation of the wages paid to Mr. Cohen according to the payslips revealed that she made an arithmetic error, which she surmises happened when she included the wages showing payment for November 5 and 6, 2008, which were not paid. She calculates the total wages paid to Mr. Cohen as being \$10,288.00, not \$10,415.32 as indicated in the Determination. She calculates the amount owing to Mr. Cohen because of this mistake as being \$127.25.
3. **Wages owed for November 5 and 6, 2008:** As outlined above, the Delegate says it appears she made a mistake in including the wages for November 5 and 6 as having been paid. She says it was never her intention to exclude the wages for November 5 and 6 in the global calculation for wages owed.
4. **Deductions for Worksafe Premiums:** the Delegate recalculated the amounts deducted for Worksafe premiums and found that the amounts were miscalculated – the amount to be repaid to Mr. Cohen should have been \$444.78 rather than \$368.67 calculated by the employer.

ARGUMENT AND ANALYSIS

8. The matter was referred back to the Director under the statutory authority given to the Tribunal in Section 115 of the *Act*, which states:

115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

9. In *Hub-City Boat Yard Ltd.*, BC EST # D028/04, the Tribunal articulated its practice with respect to matters that are referred back:

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang*, BC EST #D130/01). The Tribunal’s decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director’s reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

10. In this case, the burden rests on the parties to show that the Report is incorrect. The Employer does not disagree with the Delegate’s calculations. In his numerous submissions, Mr. Cohen takes issue with a wide range of matters. Many of his submissions are repetitious and difficult to understand. I will only refer to those parts of

Mr. Cohen's submissions that are relevant to the issues I referred back to the Delegate (with the exception of a number of points I deal with below). With respect to the matters which I referred back to the Delegate, Mr. Cohen disagrees as follows:

1. **Collection Period:** Mr. Cohen says that the \$9.00 deduction for overtime on April 16, 2008 should not be made. He asks for the Delegate's calculations of this amount, and suggests that the deduction is unfair as he was "shorted pay" for that date.

On page 1 of 3 of the Wage Calculation Summary appended to the Delegate's letter to the Tribunal dated March 24, 2010, the entry for Wednesday April 16 shows that 1.5 hours were worked at time and a half and the "wages for the week" entry shows \$27.00 as the amount that should have been paid. The Delegate says however that in actual fact Mr. Cohen was paid only straight time for that 1.5 hours of work (i.e. \$12/hr x 1.5 hrs = \$18.00). My review of the evidence shows that the Delegate's conclusion on this point is substantiated by the pay slip for April 11 to April 25, 2008. In my view, the Delegate's view is correct - the amount of overtime wages that the Employer failed to pay Mr. Cohen for overtime work on that date (\$9.00) is not recoverable because the date it was earned and became payable lies outside the collection period. I agree with the Delegate that therefore this amount should be subtracted from the total wages owed.

2. **Total Wages Paid:** Mr. Cohen says that the Delegate's calculations are wrong regarding the amount of wages that has not been paid and is still owed to him – the amount should be \$127.32, not \$127.25. I agree with Mr. Cohen that the correct amount is \$127.32 (\$10,415.32 - \$10,288.00).
3. **Deductions for Worksafe Premiums:** Mr. Cohen questions the amount owing to him for the deductions for Worksafe premiums. However, he does not say how this amount is incorrect nor does he suggest a number which he believes is correct. I accept the Delegate's choice to include the amount deducted for Worksafe premiums for the April 26 to May 9 pay period. The Delegate says the total owing is \$444.78 and when the amount already paid by the Employer under this category (\$368.67) is subtracted, the amount that remains to be paid to Mr. Cohen is \$76.11.
4. **Interest:** Mr. Cohen says that interest has not been calculated on the amounts owing to him. The Report contains no reference to the calculation of interest which may be due to Mr. Cohen under section 88 of the *Act*. A related point is that the Report makes no reference to the calculation of any concomitant adjustments to vacation pay, statutory holiday pay or compensation for length of service, although these calculations should have been carried out as part of the referral back to the Delegate. Any additional amounts owing to Mr. Cohen because of interest payable under section 88 or adjustments to vacation pay, statutory holiday pay or compensation for length of service must be calculated and paid to Mr. Cohen.

11. According to my calculations after a review of the Report, the total owing to Mr. Cohen is \$194.43 (\$127.32 + 76.11 – 9.00), subject to my order below regarding interest payable under section 88 of the *Act* and other adjustments.

12. Mr. Cohen raised numerous other issues in his various submissions. While these issues are not relevant to the matters that I referred back to the Delegate, I will address two of Mr. Cohen's salient points below.

1. **Demand for calculations and Employer records:** Mr. Cohen in several of his submissions asks for calculations. He also asks for the Employer's records. The Delegate in her letter of

March 24, 2010, attaches the global calculation and a revised summary sheet. She says that previous calculations were included with the preliminary findings letter and part of the Record forwarded to the Tribunal. She also says that the Employer's records have already been forwarded to Mr. Cohen. Further, copies of the pay slips on which she based the calculations outlined in the Report were attached to the Report. My view is that that all relevant documents and calculations with respect to the matters I referred back to the Delegate and on which she based the Report have been forwarded to Mr. Cohen. I decline therefore to make any order for any other documents to be provided to Mr. Cohen.

2. **Starting his claim from the beginning:** Mr. Cohen asks that his claim be started from the beginning "to include myself . . . [and] All the BC EMPLOYEES during the time period that worked for [the Employer] . . .". I note that it is not within the Tribunal's jurisdiction to grant his request. The Tribunal's jurisdiction is limited to the consideration of appeals of determinations; it cannot start a new Employment Standards claim for anyone.

13. Having reviewed and considered the Report and the submissions of the parties, I make the following order:

ORDER

14. Pursuant to Section 115 of the *Act*, I order that the Determination dated September 4, 2009, be varied to this extent: (a) that the total outstanding amount payable to Mr. Cohen before the calculation of any interest and adjustments is \$194.43; (b) that any interest owing to Mr. Cohen pursuant to section 88 of the *Act* on the amount of \$194.43 be calculated by the Delegate forthwith; (c) that any concomitant adjustments to vacation pay, statutory holiday pay or compensation for length of service be calculated by the Delegate forthwith; and (d) that any and all amounts described in (a) to (c) be collected from the Employer and paid to Mr. Cohen forthwith. The Determination remains confirmed in all other respects.

Yuki Matsuno
Member
Employment Standards Tribunal