

An appeal

- by -

Advantage Plumbing and Drainage Inc.  
(“Advantage”)

- 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

**TRIBUNAL MEMBER:** Ian Lawson

**FILE No.:** 2005A/30

**DATE OF DECISION:** May 27, 2005

## DECISION

### SUBMISSIONS

Fred van Hunenstijn	on behalf of Advantage Plumbing and Drainage Inc.
Ted Mitchell	on behalf of the Director
David Abrams	on his own behalf

### OVERVIEW

This is an appeal by Advantage Plumbing and Drainage Inc. ("Advantage") pursuant to section 112 of the *Employment Standards Act*. The appeal is from Determination ER#114-480 issued by Ted Mitchell, a delegate of the Director of Employment Standards on January 17, 2005. The Determination required Advantage to pay wages, vacation pay, statutory holiday pay, compensation for length of service and interest to David Abrams ("Abrams") in the total amount of \$4,529.46. The delegate exercised his discretion not to impose an administrative penalty because the contraventions occurred before November 30, 2002.

Advantage filed its appeal on February 24, 2005. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

### FACTS

Advantage operates a plumbing and drainage business in New Westminster, British Columbia. Advantage employed Abrams as a plumber in its business between May 15, 2001 and June 21, 2002. Abrams filed a complaint with the Director on June 25, 2002, alleging he was terminated without notice or just cause and was owed compensation for length of service, regular wages, vacation pay and statutory holiday pay. The delegate conducted an investigation of this complaint, and after a considerable delay, issued a Determination on January 17, 2005. The results of the delegate's investigation are summarized as follows.

#### a) Compensation for Length of Service

Advantage alleged Abrams had been insubordinate after having telephone communication with two other employees who had been terminated for conflict of interest. Advantage had given Abrams written instruction on April 12, 2002 that he was not to communicate with these former employees while he was "on duty" and to restrict "off-duty" communications with them to "non-business related topics." Advantage presented telephone logs to the delegate which indicated Abrams had communicated with one of these former employees subsequent to the written instruction. Advantage argued it was entitled to dismiss Abrams for his "conspiracy and collusion" with the former employees, who were operating in conflict of interest with Advantage. Advantage also alleged Abrams had "pocketed" cash, on the basis his ratios of cash to credit card sales was below normal.

The delegate found that although there was evidence Abrams had telephone communication with the former employees, Advantage had failed to prove just cause:

There was no evidence that the employer unequivocally informed the complainant that certain behaviours would guarantee termination of employment. Further, some of the employer's concerns about the complainant's behaviour are speculative and are not clearly supported by the evidence. In summary, the evidence submitted by the employer is insufficiently conclusive to support a case for termination with just cause.

**b) Regular Wages**

Advantage made several deductions from Abrams' wages during the course of his employment, which Abrams alleged were made without his consent:

- i) \$77.00 on account of credit extended to a customer which Advantage says Abrams had not been authorized to extend;
- ii) \$52.50 on account of a recall to correct work performed by Abrams;
- iii) \$87.15 on account of a water tank allegedly signed out by Abrams;
- iv) \$115.50 for parts allegedly not returned by Abrams;
- v) \$38.33 on account of alleged truck lease and insurance overpayments; and
- vi) \$7.50 on account of a cash remittance for an unspecified job.

In addition, Abrams complained he was owed \$157.50 on account of work done on the Wilford job for which he had not been paid. He also alleged he had been charged twice for parts in his work bay area in the amount of \$127.51; and Advantage had used \$337.90 in parts from his personal inventory which had not been re-stocked before his termination.

After conducting his investigation, the delegate concluded as follows:

- i) regardless of Advantage's credit policy, Abrams had performed work and was owed \$77.00 on account of same;
- ii) even though it was alleged Abrams performed poor work which resulted in a recall, he had nevertheless done the work and \$52.50 was deducted from his pay unlawfully;
- iii) in the absence of any records from Advantage or consent from Abrams, \$87.15 was wrongly deducted from Abrams' pay;
- iv) in the absence of any records from Advantage regarding its deduction for \$115.50 in parts allegedly not returned, that amount was wrongly deducted from Abrams' pay;
- v) Advantage's records relating to the truck lease and insurance overpayment were accepted and Abrams was not owed \$38.33; and
- vi) in the absence of any records, the deduction of \$7.50 for an unspecified job was unlawful.

The delegate also found that in the absence of evidence to the contrary, Advantage's position that it has no record of the "Wilford job" was accepted and Abrams was not owed wages of \$157.50. In the absence of evidence that Abrams had in fact been charged twice for parts allegedly found in his work bay, Abrams is not owed \$127.51 as he alleged. Finally, the delegate found Abrams did not have conclusive evidence that parts had been used from his personal inventory, and he was not owed \$337.90 as he alleged.

**c) Vacation Pay**

The contract of employment between the parties provided that Abrams would be paid a commission of 32.61% of his gross sales, plus a further 1.31% on account of vacation pay. The delegate was restricted by section 80 of the *Act* to the 26-week period from December 21, 2001 to June 21, 2002, and found that \$944.97 was owing in vacation pay. The delegate found Advantage's commission structure did not comply with the *Act*, and ordered \$944.97 to be paid to Abrams, without crediting Advantage with paying 1.31% of gross sales toward vacation pay.

**d) Statutory Holiday Pay**

The same contract of employment provided that Abrams was to receive 1.08% of gross sales as statutory holiday pay. The delegate found four statutory holidays occurred during the 26-week period in question, and that Advantage's commission method of payment did not comply with the *Act*. Abrams' average daily pay was then calculated based on his gross wages in the 30-day period preceding each statutory holiday. The delegate found total statutory holiday pay owing to Abrams in the amount of \$955.75, without crediting Advantage for the 1.08% that was paid as statutory holiday pay.

**ISSUE**

Whether the delegate made any error in the Determination on each of the four issues outlined above.

**ANALYSIS**

Advantage's Appeal Form alleges that in making this Determination the Director erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.

**a) Compensation for Length of Service**

Advantage argues Abrams had misrepresented himself as a qualified plumber at the time he was hired, and repeats the facts alleged before the delegate in relation to the telephone calls made to former employees found to have been in a conflict of interest. Advantage also refers to additional calls made by Abrams to another competitor, Maple Leaf Plumbing, and alleges Abrams committed theft of cell phone time by making personal and "competing business" calls at Advantage's expense.

Some of these allegations, and the evidence in support, do not appear to have been put before the delegate during his investigation. I am not prepared to consider such new evidence at this appeal, chiefly because in order to protect the integrity of the appeal process this Tribunal has held that appellants are not normally allowed to introduce new evidence on appeal which could have been put before the delegate but was not (see *Tri-West Tractor Ltd.* BC EST No. D268/96, and *Kaiser Stables Ltd.* BC EST No. D058/97).

As Advantage offers no explanation why this evidence could not have been put before the delegate in the course of his investigation, I decline to consider it.

By simply repeating the arguments made before the delegate, Advantage fails to point out any error of law or breach of the principles of natural justice in the making of the Determination. Although the delegate's reasons are brief, he seems to have applied the correct principles in deciding whether Advantage had just cause to dismiss Abrams. I suspect Advantage offers these same arguments in the hope I might find them more persuasive than did the delegate. Advantage, however, bears the burden of demonstrating some error or unfairness in the Determination that might persuade me to vary it, cancel or refer it back to the Director under section 115 of the *Act*. The Tribunal has described this burden as the "risk of non-persuasion": the *status quo* of the Determination prevails if the party seeking to change it fails to provide some evidence or argument that the Determination contains an error. If it were otherwise, every party who is unhappy with a Determination could file an appeal without worrying about proving any error, in the hope the Tribunal might see the case differently. The fairness and efficiency principles in the *Act* would clearly be violated if the appeal process amounted to a "second kick at the can" for parties whose dispute has been the subject of a Determination. In the absence of any reason why I should find the delegate erred or committed some unfairness, therefore, I must dismiss this aspect of Advantage's appeal.

**b) Regular Wages**

Advantage again merely repeats the arguments it advanced before the delegate that Abrams was not authorized to extend customer credit, that his substandard work required a recall in the amount of \$52.50, that he had taken a hot water tank from stock, that \$115.50 in parts had been used by Abrams, and the deduction of \$7.50 for an unspecified job was correct. In the absence of any argument or evidence that the Determination contains an error, I must find Advantage has again failed to meet the threshold test. In any event, sections 21 and 22 of the *Act* are very clear: no deductions may be made from an employee's wages other than written assignments by the employee for specified purposes. It is obvious that Abrams did not give a written assignment that could have authorized any of the deductions in question.

**c) Vacation Pay**

The vacation pay issues arising from Advantage's employment contract have been canvassed in two previous decisions regarding the same employer: BC EST No. 47/05 and BC EST No. 53/05. In both decisions, it was held the *Act* does permit parties to agree in writing to a vacation pay regime that differs from the formula set out in section 58, provided the employee receives the statutory minimum vacation pay. In principle, therefore, the payment of Abram's vacation pay as a percentage of his gross sales is not in breach of the *Act*. The question, however, is whether Abrams received the minimum required by the *Act*. While the Determination sets out the correct calculation of the minimum vacation pay to which Abrams is entitled, it does not set out the amount he was actually paid by Advantage in the form of 1.31% of his gross sales during the period in question. The bargain struck by the parties was that Abrams' wage would be 32.61% of his gross sales, and he would be paid a further 1.31% on account of statutory holiday pay. For the reasons given in those two previous decisions, the Determination is in error to the extent it does not credit Advantage with the 1.31% already paid to Abrams. Despite the extraordinary delay it has taken Abrams' complaint to be determined, I must refer the matter of his correct entitlement back to the Director.

**d) Statutory Holiday Pay**

The two previous decisions regarding this employer also addressed the statutory holiday pay issues arising from this employment contract (BC EST Nos. 47/05 and 53/05). In those decisions, it was found that parties are not able to depart from the exact formula for the payment of statutory holiday pay set out in sections 44 to 46 of the *Act*. Advantage's method of paying statutory holiday pay as 1.08% of Abrams' gross sales is therefore contrary to the *Act*, for the reasons set out in those previous decisions. The delegate correctly calculated the statutory holiday pay owed to Abrams, but he did not credit Advantage for the monies already paid to Abrams as 1.08% of his gross sales during the period in question. The matter of Abrams correct entitlement must therefore be referred back to the Director.

**ORDER**

Pursuant to section 115(1)(b) of the *Act*, I refer this matter back to the Director for further investigation into the following:

1. to determine what amount of money Abrams was paid by Advantage above 32.61% of his total gross sales between December 21, 2001 and June 21, 2002; and
2. to determine whether or not that amount satisfies Abrams' entitlement to vacation pay and statutory holiday pay.

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**Ian Lawson**  
**Member**  
**Employment Standards Tribunal**