

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Syncon Investments Ltd. Operating as
George & Dragon Pub Style Restaurant
("Syncon")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Niki Buchan

FILE NO.: 96/650

DATE OF HEARING: February 24, 1997

DATE OF DECISION: May 1, 1997

DECISION

APEARANCES

Allan Sproule	For Syncon
Dale Sproule	For Syncon
Michael Taylor	For the Director
Larry Bott	For Himself

OVERVIEW

This is an appeal by Syncon Investments Ltd. (“Syncon”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 004264 issued by a delegate of the Director (the “Director”) on October 9, 1996. The Director determined that Syncon owed its former employee, Larry Bott (“Bott”), the sum of \$1,723.41 on account of unpaid regular wages and vacation pay pursuant to Sections 18(1) and Section 58(1) of the “Act”.

Syncon’s reasons for appeal are:

1. that Bott’s claim for regular wages owing for February 16-24, 1996 is negated because he received payment, March 16-22, 1995, for time he did not work. Mr. Bott took this time off agreeing that his wages were an advance against money he would receive from a WCB claim. Mr. Bott terminated his employment before the WCB claim processs was completed.
2. that Mr. Bott was sent a cheque and employment record at the time of his termination and if he failed to cash this cheque he could have contacted Syncon, explain what happened and why a replacement cheque should be provided.
3. that there is no interest due as there are no moneys outstanding or owed to Bott.

PRELIMINARY ISSUE

Mr. Taylor, delegate for the Director, brought a preliminary objection to the hearing of this appeal. He has just been informed of a recently published Decision of this Tribunal, *Kaiser Stables*, BC EST No. D058/97. He argues that this decision finds that if an employer chooses not to deal with an officer on the investigation it should not have an appeal to the Tribunal. Also, he referred me to *Tri-West Ltd.*, BC EST No. D268/96. He had not read the cases but provided copies to Syncon and to me. I heard brief argument from the parties.

Mr. Taylor states that he received the Complaint on April 2, 1996. He wrote to Syncon, by certified mail, on August 6, 1996 notifying the company of Bott's complaint and asking for either payment of the wages or proof that the wages had been paid. There was no response to the letter; therefore, a Demand for Employee Records was issued on September 11, 1996. He received confirmation that the certified mailing of that demand was received. There was no response within the time limit set and the Determination was issued on October 9, 1996. He argues that this appeal should not be allowed to proceed because the appellant did not cooperate with the investigator.

Syncon responds that rules should not be changed in the middle of the case. It is not fair. The company followed instructions of procedure from the Tribunal. It was told that it had a right to appeal the Determination. At no time was it informed that the right to appeal could be withdrawn. Syncon argues that I should follow the guidelines set out in the notification that there was a right to appeal.

I decided to hear the evidence and arguments then to decide this preliminary issue prior to making a decision on the appeal of the Determination.

ISSUES TO BE DECIDED

1. Whether regular wages are owing for February 16-24, 1996?
2. Whether vacation pay is owing?
3. Whether interest is owing?

FACTS

- Bott commenced work as a kitchen manager on September 3, 1994.
- On March 16-22, 1995, Bott took time off for a complaint of lower back pain. Syncon paid him wages for the time he did not work expecting to recover the amount when the WCB claim was settled. Syncon did not have a wage loss program in place at the time.
- Bott filed a WCB claim which was turned down. Syncon supported Bott in his appeal of this claim. The claim had not been decided at the time Bott terminated his employment with Syncon.
- Bott terminated his employment February 24, 1996.
- Syncon did not pay Bott his regular wages for the time worked February 16-24, 1996. It off set those wages against the wages paid for the time taken off on March 16-22, 1995.

- By letter dated, April 25, 1996, WCB notified Syncon that Mr. Bott had withdrawn his complaint against the WCB.
- Bott took no vacation during his employment and was paid a total of \$400.00 in annual vacation pay during this time.
- Syncon issued a cheque in the amount of \$991.58 on February 29, 1996 which was sent to Bott along with a record of employment. That cheque did not clear the employers bank account.
- Mr. Bott did not receive that cheque.
- The parties agreed that \$988.00 is an inaccurate amount as set out in the Determination. The correct amount is \$991.58. Syncon admits this amount is owed to Bott.

ANALYSIS

I have considered the cases referred to me and the arguments of the parties on the preliminary objection. It is the pattern established in the previous cases that the Tribunal will not allow an employer who refuses to participate in the Directors' investigation to file an appeal on the merits of the Determination. An appeal under Section 112 of the "Act" is not a complete re-examination of the Complaint: It is an appeal to determine whether the Determination is correct in the context of the facts and the statutory requirements. In this case, part of the Determination is in error and the employer has withdrawn his appeal with respect to payment of vacation pay. For these reasons the appeal will be reviewed.

Normally, Syncon's argument would fail at the outset because it refused to cooperate with the investigation of the Complaint. I set out the reasons that the appeal fails on the merits in order that Syncon understand the operation of the "Act" and to reflect the agreement of the parties to correct the error in the Determined amount of vacation pay.

Syncon argues that it paid Bott full wages for his time off in March 1995 as an advance against moneys that would be forthcoming upon settlement of his WCB claim. Mr. Bott did file a WCB claim which was appealed with the support of Syncon. That WCB claim was still under appeal when Mr. Bott terminated his employment. Syncon claims that upon termination Mr. Bott told them that the amounts were about even and would balance out. Mr Bott says that he never agreed to repayment by deduction from his final payment.

Under the "Act", wages are due and owing within 6 days after an employee terminates his employment. The delegate for the Director argued that even if there was an agreement to repay the money when the WCB claim was resolved, Syncon was wrong not to pay the wages owing for the last week of work. The company does not have the right to withhold wages while waiting for the WCB claim to be paid to him.

Section 21(1) of the Act specifically intends to protect employee wages from deductions by the employer:

“Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee’s wages for any purpose.”

I recognize that if an employer gives an employee an overpayment or an advance on wages, the employer is permitted to later deduct that overpayment or advance on later wages earned. However, in the case of an advance the employer must clearly identify that payment as an advance. In this case, the payroll record does not indicate that the money paid was an advance. Also, there is no written agreement for repayment of moneys when the WCB claim is resolved. Without proof of some mutual agreement between the parties, I find that the Determination that payment of regular wages are owing is a reasonable one. Syncon contravened the “Act”. The Determination is confirmed with respect to regular wages owing.

Syncon has agreed that vacation pay is owing to Mr. Bott. It had issued him a cheque that did not clear. Bott claims he did not receive that cheque. I accept that the amount set out in the Determination is incorrect and should be corrected to reflect the amount as \$991.58. Syncon agreed to issue a cheque in this amount to Mr. Bott which will be sent to Mr. Taylor for delivery to Bott.

On the matter of interest payable, I find the employer failed to pay regular wages and vacation pay as required by the *Act*; therefore, interest is to be recalculated taking into consideration the variation of the vacation pay adjustment. Syncon could have saved itself some of the interest on vacation pay had it responded during the investigation. It did choose not to respond. Interest is confirmed.

ORDER

In summary, I order under Section 115 of the *Act*, the Determination No. CDET 004264 be varied as follows:

Regular wages owing are \$666.67

Annual vacation pay owing is \$991.58 instead of \$988.00 as set out in the Determination.

Interest is to be recalculated to reflect this varied amount for annual vacation pay.

The adjusted total amount is payable together with whatever interest may have accrued since the date of issuance pursuant to Section 88 of the *Act*.

Niki Buchan
Adjudicator
Employment Standards Tribunal