



An appeal

- by -

United Specialty Products Ltd.
(“USP”)

- 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: Shafik Bhalloo

FILE No.: 2012A/85

DATE OF DECISION: October 3, 2012

DECISION

SUBMISSIONS

| | |
|----------------|---|
| Roger Repay | on behalf of United Specialty Products Ltd. |
| Diana Douglas | on her own behalf |
| Chantal Martel | on behalf of the Director of Employment Standards |

OVERVIEW AND SUBMISSIONS

1. United Specialty Projects Ltd. (“USP”) originally appealed a determination of the Director of Employment Standards (the “Director”) issued on March 26, 2012 (the “Determination”). In the Determination, the delegate went on to find, on the basis of the evidence of the parties, that Ms. Douglas was owed \$1,000 in wages and one (1) week’s compensation for length of service in the amount of \$500. The delegate also concluded that Ms. Douglas was entitled to receive vacation pay on all her wages and she was due \$418.84 in respect of vacation pay. The delegate also ordered accrued interest on the foregoing amounts, pursuant to section 88 of the *Employment Standards Act* (the “*Act*”), for a total award of \$1,991.71 to Ms. Douglas.
2. In addition, the delegate levied two (2) administrative penalties of \$500 each against USP for contraventions of sections 18 and 63 of the *Act*.
3. USP appealed the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination, and sought the Tribunal to cancel the Determination.
4. USP also sought a suspension of the Determination pending the appeal, and the Tribunal, in a decision dated June 13, 2012 (reported at BC EST # D061/12), granted the suspension request on the condition that USP deposit the amount of \$1,991.71 with the Director.
5. USP also requested the appeal to proceed by way of an oral hearing and requested the notes of the delegate who conducted the hearing of Ms. Douglas’ complaint. This Tribunal rejected both of these requests in a separate decision reported at BC EST # D057/12.
6. Subsequently, on July 26, 2012, this Tribunal issued its decision on the merits of USP’s appeal (the “Original Decision”). The relevant facts in the appeal are set out at pages 3 to 8 inclusive of the Original Decision and I will not reiterate them here. In the Original Decision, this Tribunal rejected USP’s natural justice ground of appeal but found, with respect to the error of law ground of appeal, that the delegate, in part, erred in law in concluding that Ms. Douglas received a weekly salary of \$500 which amount was not an advance against future earnings. In so concluding, this Tribunal stated:

I do not find that the delegate took into consideration Ms. Douglas’ own emails to Mr. Repay dated April 25, 2010, and July 10, 2010. The first email dated April 25, 2010, from Ms. Douglas to Mr. Repay encloses a spreadsheet in which she refers to the \$500 weekly amount as a ‘wage’. In her second email to Mr. Repay, dated July 10, 2010, she states:

Payback of your previous payments to me of \$500 per week is basically ‘frozen’ from April 6 (start date) forward and I don’t owe any of that back at this time, and we’ll assess terms

for repayment from my commissionable sales, in approximately one month (can we set a date to discuss that? Say Aug?)

In the face of these two emails of Ms. Douglas, I find it difficult how the delegate could have concluded that the \$500 weekly payments Ms. Douglas was receiving was not an advance against future earnings or commissions. In the circumstances, I find that the delegate, in concluding that the \$500 weekly payment was salary, acted on a view of the facts which could not reasonably be entertained and thus erred in law.

7. This Tribunal then went on to note the minimum wage requirements in section 16 of the *Act* and reasoned that this section in the *Act* entitled commissioned salespeople to earn at least the equivalent of minimum wage, subject to the exception in section 37.14 of the *Employment Standards Regulation* (the “*Regulation*”). The Tribunal went on to state:

Where the commissions do not total at least the minimum wage for the number of hours worked in a pay period, the employer is obligated to pay the difference between the commissions earned and the minimum wage. Further, where the employer makes up a shortfall between commissions actually earned and minimum wage owed for hours worked in a pay period, the employer cannot recover that payment in a subsequent pay period where the employee makes a commission in excess of minimum wage.

8. In referring the matter back to the Director for recalculation of wages, this Tribunal stated:

In the case of Ms. Douglas, the delegate calculated her entitlement for two weeks wages based on her conclusion that Ms. Douglas earned a weekly salary of \$500. The delegate also calculated the compensation for length of service pay pursuant to section 63 based on the same premise. Having found that the delegate erred in concluding that Ms. Douglas’ [*sic*] was receiving a weekly salary of \$500, the calculations for both outstanding wages for the period November 3 to 17, 2010, and compensation for length of service require to be calculated based on Ms. Douglas’ minimum wage entitlement for hours worked on a weekly basis. In the Reasons, the delegate states that there was no disagreement between the parties that Ms. [Douglas] worked 40 hours per week on average. In the circumstances, I would, pursuant to Section 115(1)(b) refer the matter back to the Director, with express instructions to calculate outstanding wages as well as compensation for length of service of Ms. Douglas and also vacation pay based on the minimum wage entitlement under the *Act*. Of course this would also entail a recalculation of interest pursuant to Section 88 of the *Act*.

9. Pursuant to the above instructions, the Director issued a referral back report on August 8, 2012 (the “*Report*”) with the following recalculations of the awards:

| | |
|---|-----------------|
| <u>Regular Wages</u> | |
| (2 weeks November 3 – 17, 2010) – 40 hrs/wk X \$8.00/hr X 2 wks = | \$640.00 |
| <u>Compensation for length of service</u> | |
| 1 week (40 hrs X \$8.00) = | \$320.00 |
| <u>Vacation Pay</u> | |
| Wages and commissions to November 3, 2010 - \$21,971.06 X 4% = | \$878.84 |
| Additional wages found owing \$960.00 X 4% = | \$38.40 |
| Less vacation pay already received as per Determination | <u>\$500.00</u> |
| | \$1,377.24 |
| Interest per section 88 | <u>\$55.92</u> |
| Total wages owing | \$1,433.16 |

10. The Director noted that USP had previously deposited \$1,991.71 with the Director and, therefore, after deducting the amount of \$1,433.16 from the said amount, the Director would refund the balance, \$558.55, to USP subject to the Tribunal's decision.
11. Roger Repay ("Mr. Repay"), on behalf of USP, disagrees with the calculation in the Director's Report with respect to each of the awards, namely the outstanding wages, compensation for length of service, vacation pay, as well as interest. While I have read all of his submissions, I do not find it necessary to reiterate them here, except to summarize that the common thread in his submissions rejecting the Director's Report is his view that USP should be allowed to offset against the amounts in the Report any advances USP made to Ms. Douglas prior to November 3, 2010, to the extent that those advances exceeded USP's obligation to pay Ms. Douglas the minimum wage for all of the hours she worked in any pay period. It is Mr. Repay's contention that if the offset is allowed, there is nothing owing to Ms. Douglas, and the full amount of the deposit, \$1,991.71, the Director is holding in trust should be returned to USP.
12. Ms. Douglas, on her part, goes on to make a lengthy submission re-arguing why the \$500 per week payments made by USP to her "were salary wages and not draws against commissions". I have reviewed Ms. Douglas' submissions very carefully, and I do not find them helpful at this stage, as they are merely in the nature of re-argument on an issue with respect to which this Tribunal, in the Original Decision, made a conclusive decision. In addition, Ms. Douglas is seeking "wages for the week of June 9, 2010", and is asking this Tribunal to order Mr. Repay to produce a copy of the cheque he issued to her for that period for the purpose of establishing whether it was cashed or not because she cannot now find a record of that payment. She is seeking the Tribunal to make an award for that missing payment, if Mr. Repay is unable to produce the evidence she has requested. I do not find this is an appropriate time for Ms. Douglas to make such a request. She should have done so in her original complaint or during the investigation of that complaint, but not at this stage in USP's appeal, and particularly, not at the Referral Back stage of the appeal.

ANALYSIS

13. Section 21(1) of the *Act* prohibits an employer from withholding wages for any reason except as permitted or required by the *Act* "or any other enactment of British Columbia or Canada". This section has the effect of preventing an employer from deducting unilaterally from future wage payments of an employee any overpayment of wages, including any advances in wages (which may turn out to be overpayments). However, the *Act*, in section 22(4), allows an employee to make arrangement for assignment of her wages to meet a personal credit obligation, but that assignment must be in accordance with *written* employee instructions.
14. In this case, USP does not have a written assignment of wages from Ms. Douglas and, therefore, the offset or "claw back" USP is seeking (of any portion of the advances on wages it made to Ms. Douglas that exceeds USP's minimum wage obligations to Ms. Douglas) cannot be allowed. To accede to USP's request is to effectively read into the evidence adduced by USP, the existence of an assignment agreement from Ms. Douglas in favour of USP. The Tribunal cannot justifiably do this; it is inconsistent with sections 21 and 22 of the *Act*, as well as the purposes of the *Act* set out in section 2(a), (b) and (d). Having said this, I have reviewed the delegate's calculations in the Report and I confirm the Report and find no basis to interfere with the conclusions found within.

ORDER

15. Pursuant to section 115 of the *Act*, I order that the delegate's Referral Back Report dated August 8, 2012, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal