EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Coquihalla Towing Co. Ltd.

("Coquihalla")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	96/423
DATE OF HEARING:	September 30, 1996
DATE OF DECISION:	October 10, 1996

DECISION

APPEARANCES

Finn Jensen	for Coquihalla Towing Co. Ltd.
Lawrence Cox	on his own behalf
Oona Whelan	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Coquihalla Towing Co. Ltd. ("Coquihalla") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 003035 issued by the Director of Employment Standards (the "Director") on June 25, 1996. The Director determined that Coquihalla owed its former employee, Lawrence Cox ("Cox"), the sum of $963.74 representing unpaid statutory holiday pay, reimbursement for unauthorized wage deductions, vacation pay and interest.

ISSUES TO BE DECIDED

The employer argues, firstly, that Cox was an independent contractor and, therefore, not entitled to file any claims under the Act. Secondly, the employer argues that any deductions from Cox's pay were specifically authorized; that Cox is not entitled to any statutory holiday pay; and that any vacation pay to which Cox was entitled has already been paid as part of his regular earnings.

FACTS

Coquihalla is a B.C. corporation that operates a fleet of some twelve tow trucks. The company has two offices, one in Hope and another in Merritt. According to Mr. Leo Ouellet, who is the president/secretary, director and principal shareholder of Coquihalla, Cox approached him in March 1995 looking for work. As Cox held the appropriate class 5 licence and because Coquihalla was looking for a new

driver, Cox was hired to work as a "contract driver". Ouellet testified that during the initial meeting with Cox, the two reviewed a proposed one-year "contractor" agreement (Exhibit 1) which was signed by Cox on or about April 27, 1995 (i.e., after Cox actually began working for Coquihalla on March 11, 1995, according to the Record of Employment prepared by the employer).

Exhibit 1 states that Cox is an "independent contractor" and that he will "be responsible for any damage caused to a vehicle being towed or retrieved where such damage is not due to equipment failure but is caused by the negligence of [Cox]. This agreement also stipulates that Cox shall receive 30% of the gross monthly earnings of the towing equipment that he operates and that this percentage fee shall include "holiday pay".

Cox worked as a tow truck operator with Coquihalla from approximately mid-March 1995 to September 28, 1995 when he quit. Shortly thereafter, on October 17, 1995, Cox filed a complaint with the Employment Standards Branch alleging that Coquihalla owed him statutory holiday pay, vacation pay and that Coquihalla had improperly deducted certain charges from his commission cheques. In due course, a Determination was made in favour of Cox; the Determination essentially upheld each of Cox's complaints. I will address these various complaints below as well as the threshold question of Cox's employment status.

ANALYSIS

Was Cox an employee or an independent contractor?

I first must address whether or not Cox was an employee (and therefore entitled to benefit of the Act), or was, as alleged by Coquihalla, an independent contractor. At common law, whether or not one is an employee depends on a variety of factors--Who provides the equipment to be used in the work setting?; Who provides the direction or control as to how the work is to be done?; Is an individual able to profit or possibly risk incurring a loss as a result of their work? In addition, some courts have examined the function performed by the individual--is it an integral part of the overall operations of the "employer"?

Applying these criteria to the facts at hand, I am satisfied that, notwithstanding the language of Exhibit 1, Cox was an employee. While he may have had some discretion as to when and where he worked, Coquihalla nonetheless expected Cox to be on the job on a regular basis. Coquihalla provided (and maintained) the necessary equipment to do the job--the tow truck (Coquihalla also paid the fuel

costs), the two dispatch offices, the two-way radio equipment. Cox collected funds and credit card charges on behalf of Coquihalla, not in his own right. Coquihalla also exercised some measure of control over Cox, an example being when it directed Cox to take as a customer's vehicle to a particular repair shop after the car had been damaged while being towed. Cox's duties as a tow truck driver were an essential aspect of Coquihalla's business operations. Indeed, Cox was under a contractual obligation to provide his services "exclusively" to Coquihalla (see Exhibit 1). Coquihalla also treated Cox as an employee for purposes of federal payroll deductions such as unemployment insurance and the Canada Pension Plan. Finally, when Cox's employment terminated, Coquihalla issued him a Record of Employment so that Cox could apply for unemployment insurance.

In addition, in the language of section 1 of the Act, Cox was a person who received "wages" (in the form of commissions) for the "work" (tow truck driver) that he did on behalf of the "employer" (Coquihalla).

As I have found that Cox was an employee, rather than an independent contractor, I must now turn to the various claims he has advanced under the Act. By virtue of section 128(3) of the Act, Cox's various claims must be decided on the basis of the current, rather than the former, Employment Standards Act. I will deal with the three claims in turn--statutory holiday pay; vacation pay; and unauthorized payroll deductions.

Statutory Holiday Pay

Statutory holiday pay is governed by Part 5 of the Act. The Director's delegate awarded Cox approximately $550 representing four particular holidays--Victoria Day, Canada Day, B.C. Day and Labour Day. It would appear, based on the evidence and records produced at the hearing, that Cox actually worked on three of the four days (Labour Day being the exception). An employee is entitled to be paid for all statutory holidays after completing 30 calendar days of employment (section 44); thus Cox was entitled to be paid for all four statutory holidays.

If an employee works on a statutory holiday, section 46 provides that the employee is to be paid at an overtime rate (time and one-half up to 11 hours and double-time thereafter). Based on a ten-hour day (which was Cox's low estimate of the hours worked on a typical day--this evidence was not seriously challenged by Coquihalla), I calculate (the following figures are "best estimates" given the dearth of payroll records before me, and in particular records as to earnings for each payroll period) Cox's entitlement to statutory holiday pay is as follows:

Victoria Day:	$163.50 paid x 1.5 = $245.25 - $163.50 =	$81.75
Canada Day:	$123.00 paid x 1.5 = $184.50 - $123.00 =	$61.50
B.C. Day:	$ 99.75 paid x 1.5 = $149.63 - $ 99.75 =	$49.88
Subtotal:		$193.13

As Cox did not work on Labour Day, his claim for this day is governed by section 45 of the Act. Based on the information available to me, my best estimate is that he would have earned an average of the three previous holidays worked, namely, $128.75 ($386.25 ÷ 3). Accordingly, the total claim for statutory holiday pay amounts to $321.88 plus 4% vacation pay for a total claim of **$334.76.**

Vacation Pay

Pursuant to section 58 of the Act, vacation pay must be paid, on an annual basis, to all employees. In Cox's case, the rate is calculated at 4% of earnings [section 58(1)(a)]. It is common ground that Cox was paid $8,681.35 in commissions. Coquihalla, however, relying on the contractor agreement signed by Cox (Exhibit 1) maintains that Cox's vacation pay was included in his regular commission earnings and thus the Director erred in awarding any additional monies on account of vacation pay. In particular, Coquihalla relies on clause 4 (page 3) of the Agreement which states: "The parties agree that the percentage of pay will include holiday pay." Although Exhibit 1 refers to "holiday pay" rather than "vacation pay", I am satisfied that both Cox and Coquihalla understood when their employment relationship was established that the 30% commission was intended to include statutory vacation pay.

Section 58(2)(b) states that an employer and employee may agree that vacation pay is to be included in the employee's regular paycheque. Further, there is nothing in section 27 of the Act requiring vacation pay to be separately itemized on a wage statement (these conclusions would equally apply under the "old" Act). Accordingly, I am satisfied that Cox was paid the statutory vacation pay to which he was entitled save with respect to the vacation pay on his statutory holiday pay which I have already taken into account (see above).

Unauthorized Payroll Deductions

The Director ordered the employer to reimburse Cox for three separate payroll deductions, namely, a cellular phone charge ($347.04), a property damage claim ($105.51) and a Visa refund ($32.10). At the appeal hearing, it was agreed between the parties that the Visa refund had been deducted and then subsequently credited to Cox. Cox also testified at the hearing that he was only seeking to recover

$204.38 with respect to the cellular account--the balance being clearly personal charges. Thus, I need only deal with the first two deductions.

Section 21(1) of the Act provides as follows:

> **21.** (1) 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.* (emphasis added)

Section 21(2) states that an employer must not require an employee to pay any of the employer's business costs (except as permitted by regulation). Section 22 of the Act provides that an employer must honour an employee's written assignment of wages for certain purposes, none of which is relevant here. Whether or not Coquihalla is entitled to claim against Cox for the cellular phone account and the property damage claim [and I am not satisfied that the employer is on solid footing with respect to these two claims in light of subsection 21(2)], the mandatory language of section 21(1) prohibited Coquihalla from deducting these claims from Cox's wages. The section 21(1) prohibition applies even if Cox authorized the wage deductions because section 4 prohibits any "contracting out" of the Act. In my view, if Coquihalla wishes to pursue Cox for reimbursement, it must do so by way of a separate civil action; Coquihalla was not entitled to engage in a form of "self-help" by simply deducting these claims from Cox's wages.

Summary

I have found that Cox was an employee, not an independent contractor. As such, he is entitled to statutory holiday pay in the total amount of $334.76. I have also found that Cox was paid vacation pay but that the employer did improperly deduct a cellular phone charge ($204.38) and a property damage claim ($105.51) from Cox's wages.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003035 be varied and that a new Determination be issued as against Coquihalla in the amount of $644.65 together with interest to be calculated by the Director in accordance with section 88 of the Act.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal