

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

-by-

Falcon Overhead Doors Ltd.
(the Employer)

-of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR: Hugh R. Jamieson

FILE No.: 1999/434

DATE OF DECISION: September 23, 1999

DECISION

OVERVIEW

This decision deals with an appeal dated June 23, 1999, filed by the Employer against a Determination issued on June 17, 1999, wherein the Director found that an amount of \$4,175.65 is owing as wages and interest to Mr. Peter Lafayette (the Employee). The basis of the appeal is the Employer's contention that the Employee was paid all wages accruing. Along with the appeal, the Employer submitted copies of two cheques dating back to 1996, one of which the Employee had denied receiving. These cheques were not produced to the Director during the investigation.

ISSUES TO BE DECIDED

The issue is whether this evidence of payment of wages to the Employee should be accepted by the Tribunal.

FACTS

The Employee was employed by the Employer as an overhead door installer from May 1994 to January 1998. On April 1, 1998, the Employee filed a complaint alleging that he had not been paid all wages, vacation wages and statutory holiday pay that he had earned. In response to the complaint, the Employer submitted payroll records dating back to 1996. According to these records the Employee had not only been paid all monies accruing, he had been overpaid by some \$1,817.13.

On being provided with a copy of the Employer's submissions, the Employee apparently reviewed his bank statements and alleged that he had not received five of the payments recorded by the Employer. After further exchanges, it came down to three cheques that the Employee disputed having received. The other two being conceded by the Employer as having been cancelled or withdrawn. The reasons for these cheques being withdrawn or cancelled is not clear from the facts before me.

The outstanding cheques were identified by the Director to the Employer by a letter dated January 25, 1999, as being:

cheque number 970	July 1996	\$1,600.00
cheque number 1160	March 1997	\$1,000.00
cheque number 1165	March 1997	\$1,000.00

BC EST #D405/99

The Employer responded by providing a cheque stub showing that cheque number 970 for \$1,600.00 had been issued to the Employee on August 15, 1996. A copy of a bank statement was also provided by the Employer indicating that two cheques for \$1,000.00 each had been processed through the Employer's account on April, 1 and April 9, 1997. However, the payee for these cheques was not identified on the statements.

The Director required the Employer to produce the cancelled cheques in question by May 31, 1999, but no further word was heard from the Employer until the Determination was issued on June 17, 1999. As indicated, the appeal now includes a copy of cancelled cheque number 970 dated August 15, 1996 issued to the Employee in the amount of \$1,600.00. A copy of another cheque number 960 issued to the Employee on August 1, 1996 in the amount of \$950.00 was also provided with the appeal. The Employer contends that both these amounts should be now taken into consideration and the amount of wages found owing to the Employee adjusted accordingly. The Employer also insists that the remaining \$2,000.00 was definitely paid to the Employee back in 1997 and asks for some extra time to come up with the two other cancelled cheques numbers 1160 & 1165.

Replying to the appeal on July 27, 1999, the Director basically says that the Employer had ample time to come up with the payroll evidence and, considering that these wages were supposed to be paid in 1996 and 1997, a further delay would not be appropriate.

The Employee replied to the appeal on August 18, 1999, indicating that the copies of cheques numbers 960 & 970 that he was supplied with are not clear enough to make a determination as to their authentication. He asks for the originals or clearer copies and requests more time to have his bank go over the records to verify receipt.

ANALYSIS

The Tribunal's practice regarding accepting evidence from employers that was not produced to the Director during the investigation stage of the process is quite clear. The general rule is that at an appeal employers will not be permitted to rely on evidence that was available and could have been presented to the investigating officer. The clearer it is to the Tribunal that there has been a concerted refusal by an employer to participate in an investigation, the stricter this principle will be applied - see - *Tri-West Tractor Ltd.*, BC EST# D268/96; *Kaiser Stables Ltd.*, BC EST# D58/97; and *Specialty Motor Cars (1970) Ltd.*, BC EST# D570/98.

Here, there can be no issue of any refusal to cooperate with the Director. The Employer clearly did all that it could to respond to all of the demands made by the Director. Payroll records were produced and questions arising from the records were answered. Dealing with the three cheques which the Employee denied receiving, the Director was completely aware of the Employer's position that the monies were paid and that the cancelled cheques existed. More specifically, the Director was clearly aware of the Employer's position that cheque number 970 had been issued in the Employee's name on August 15, 1996, in the amount of \$1,600.00. The corresponding cheque

stub had been produced by the Employer during the investigation. The Employer also indicated to the Director that there was difficulty locating the cancelled cheques. In those circumstances, the production of cancelled cheque number 970 along with the appeal may be characterized as late evidence, but it is certainly not new evidence of the kind normally rejected by the Tribunal. I accept it as being admissible.

Looking at this copy of cheque number 970, one does not need to be a handwriting expert to see the similarity between the signature on the back of the cheque and the Employee's signatures on his complaint and on his submissions to the Director and the Tribunal. In the circumstances, where the Employer has produced payroll records showing this payment to the Employee, a cheque stub showing that the cheque was issued to the Employee and now, the cancelled cheque showing that in all probability the Employee did cash this cheque, I believe that it is time to acknowledge that these wages were indeed paid.

As for the significance of the copy of the other cheque, number 960 dated August 1, 1996 in the amount of \$950.00 that was also provided with the appeal, I really have no idea where this fits into the picture. From what I can see from the payroll records, this cheque was issued for work done in the period ending July 6, 1996. However, I see no corresponding record of such a payment in the Employee's summary of the wages he admits receiving. What is clear though is that this cheque also bears a signature similar to that of the Employee.

In the circumstances and particularly where both parties are seeking more time to check out their respective positions, the only logical course of action that I can see is to refer this matter back to the Director for further investigation and recalculation should it be found that there are still wages owing to the Employee.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated June 17, 1999 is hereby referred back to the Director.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal