

BC EST #D412/99

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-

Coastline Cleaning Services Ltd.
(the Employer)

-of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR: Hugh R. Jamieson

FILE No: 1999/438

DATE OF DECISION: October 4, 1999

DECISION

OVERVIEW

This decision deals with an appeal dated July 12, 1999, brought by the Employer against a Determination issued by the Director on June 17, 1999, wherein it was found that the Employer owed the amount of \$928.16 to Mr. Bradley Morrice (the Employee). The amount found due consisted of commissions, compensation for length of service, vacation pay, interest and, reimbursement for an unlawful deduction from the Employee's wages for the use of a cell phone. In regards to the cell phone, the Determination infers that the Employer may have unlawfully passed some of its operating costs to the Employee.

The basis for the appeal is twofold. (1) That the Director erred in the amount owing as a payment of \$369.09 to the Employee had not been taken into consideration in the final calculations. In response to the appeal, the Director conceded the miscalculation involving the \$369.09 so this aspect of the appeal is no longer at issue. (2) That the sum of \$130.00 deducted from the Employee's wages were charges for his personal use of the cell phone in accordance with a purported verbal agreement to this effect with the Employee. The Employee disputes that such an agreement existed.

Further, in a later submission dated August 14, 1999, the Employer attempts to enlarge the appeal by raising issues regarding the Director's assessment of compensation for length of service in the amount of \$492.00. According to the Determination, the Employer had acknowledged that these wages were owing. However, in this submission of August 14, 1999, the Employer claims that the Employee was discharged for cause. The reasons for the Employer taking this position were said to have been provided to the Director's Delegate during the investigation. However, these reasons are not before me in the appeal, nor were they raised in the original appeal filed on July 12, 1999.

The only issues raised then were the two issues described above. The time limit for appealing the Determination expired well before August 14, 1999, when this challenge to the compensation for length of service was raised by the Employer. Consequently, these submissions are untimely and the compensation for length of service is therefore not an issue in this appeal.

ISSUES TO BE DECIDED

The only issues left to be decided are whether the Employer did in fact require the Employee to pay some of its business costs and, whether the deductions made from the Employee's wages for the use of a cell phone were lawfully made.

FACTS

While employed as a salesperson from October 15, 1998 to April 19, 1999, the Employee was provided with a cell phone for business purposes. According to the Employer, there was a verbal agreement at the commencement of the employment that cost of the cell phone would be that the first \$100.00 per month was to be paid by the Employer. All time in excess of this limit was to be paid by the Employee. The Employer says that the \$130.00 in dispute represents the Employee's share of the costs for his personal use of the cell phone as per the foregoing agreement. As indicated earlier, the Employee denies that there was such an agreement. According to the Employee, the Employer had passed on the total cost of the cell phone to him including the equipment rental and the costs for business calls. As for his personal use of the cell phone, the Employee estimates that the phone was used 99.999% for business.

In response to this, the Employer provided a complete billing breakdown for the use of this particular cell phone and, by identifying non business telephone numbers, the Employer reckons that the total percentage of the Employee's personal cellular usage was 35%. The Employee came back of course, with explanations as to why some of these non business telephone numbers highlighted by the Employer, were indeed used for business purposes.

In the Director's reply to the appeal dated July 14, 1999, in addition to conceding the aforementioned miscalculation in the amount found due to the Employee, it was pointed out that the Determination dealt only with one final deduction for cell phone costs. Apparently there had been other such deductions made previously that only came to light in the Employer's appeal submissions. The Director submits that these deductions must now be taken into account.

ANALYSIS

For my purposes here, I need not get into the issues of what cell phone usage was business as opposed to personal. In this regard, there can be little doubt that there was indeed more personal use of the cell phone than the Employee is willing to admit. However, that is not the issue. If there are monies owed by the Employee to the Employer for personal phone calls and the Director does not allow a set off of these monies against wages due, there are other forums where this alleged debt can be collected. What is at issue here, is whether the Employer passed on some of its operating costs to the Employee and, whether the deductions made for cell phone costs from the Employee's wages were lawful.

The circumstances here clearly fall within the scope of Section 21 of the *Employment Standards Act (the Act)*, which prohibits unauthorized deductions from wages. It also prohibits employers from passing on business costs to employees:

DEDUCTIONS

- “ **Section 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.
- (2) An employer must not require an employee to pay any of the employer’s business costs except as permitted by the Regulations.”

Obviously, requiring an employee to pay for personal telephone calls is hardly passing on business costs to an employee. However, Section 21 (1) of the *Act* clearly prohibits such costs from being deducted from an employee’s wages without the employee’s authorization.

It follows then that in the circumstances here, where there was no *written authorization* from the Employee for any monies related to the cost of the cell phone to be taken from his wages, the deductions made by the Employer must be characterized as being unlawful. I emphasize the words *written authorization*, because that is what it takes for the Director or the Tribunal to be convinced that such authorization exists. In this context, allegations of verbal argeements are worthless if either party disputes their existence.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated June 17, 1999, is hereby referred back to the Director for recalculation of the amount due to the Employee. This will include any commissions and vacation pay owing, compensation for length of service, all of the monies deducted from the Employee’s wages related to the usage of the cell phone and any interest accruing. The Director shall of course take into account the amount of \$369.09 paid by the Employer, that was omitted from the original calculations.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal