

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 -

Scott Alexander Operating as Peregrine Consulting
("Alexander")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/596

DATES OF HEARING: October 27, November 10 and
November 24, 1997

DATE OF DECISION: January 5, 1998

DECISION

APPEARANCES

for Scott Alexander: in person

for Todd William Cashin: in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Scott Alexander operating as Peregrine Consulting (“Alexander”) of a Determination which was issued on July 15, 1997 by a delegate of the Director of Employment Standards (the “Director”). The Determination resulted from a complaint by Todd William Cashin (“Cashin”) and concluded that Alexander had contravened the *Act* by failing to pay Cashin at the negotiated wage rate, failing to pay wages for all work performed by Cashin, failing to pay overtime wages, failing to comply with minimum daily pay requirements and making unauthorized deductions from wages payable. The Director ordered Alexander to pay \$654.60. Alexander has appealed all aspects of the Determination. Alexander also claims Cashin was overpaid and seeks a set-off of \$238.00 against any money determined to be still owing following the decision on his appeal.

ISSUES TO BE DECIDED

There are a number of issues that arise in this appeal. First, whether all of the work performed by Cashin during the relevant period of time was work for which Alexander was the employer and therefore legally required to pay the wages earned by Cashin. Second, what was the negotiated wage rate for the work performed by Cashin. Third, whether Cashin inflated his hours of work and caused the Director to err in the calculation of regular and overtime wages owed. Fourth, whether Alexander, in the appeal process, can introduce a claim to set-off amounts which Alexander says were paid to, but not earned by, Cashin against any wages which at the end of the day may be owed to Cashin and, if so, whether any claim of set-off has been proved.

I will also comment at this point about the evidentiary value of three letters from former employees of Alexander which were introduced by him as evidence, among other things, of the general untruthfulness of Cashin. The letters were simply unsworn written statements made by each of the three individuals. In reaching factual conclusions in this appeal, I have not placed much significance on the contents of the letters and, apart from a few instances where I have

found them to be corroborative, I have not accepted them. I have a number of reasons for my approach to these letters. First, the letters, for the most part, addressed very contentious matters, including the issue of the credibility of Cashin. It would have been unfair to Cashin to allow them to be given weight absent his ability to cross examine on their contents. Second, Alexander acknowledged that he provided each of the individuals with an outline of what he wished them to include in their letters. As such, I am concerned I may not be getting the individuals' recollections of the matters addressed in the letters, but rather the information Alexander provided to them. Third, at the end of the first day's hearing, I recommended to Alexander that he give some consideration to having the individuals give evidence directly. He indicated that one of the individuals was in Ontario and could not be available. No explanation was given for why neither of the other individuals attended to confirm the contents of their letters under oath.

FACTS

Alexander owns Peregrine Consulting. In the summer of 1995 Alexander operated, through Peregrine Consulting, an outdoor educational day camp program for children at Bear Creek Provincial Park near Kelowna called "Bear Creek Ranger Camps". The program operated five days a week during the summer and was staffed by two persons, described as "Park Naturalists". For a period commencing "officially" on June 26, 1995 and ending July 21, 1995, Cashin was one of the two Park Naturalists for the program. He was employed by Alexander. When his employment was terminated, he was replaced by another person and the program continued to be staffed by two persons.

As well as operating Peregrine Consulting, Alexander was employed by Rocky Mountain Projects Ltd. ("Rocky Mountain") as Senior Naturalist/Projects Manager for B.C. Provincial Parks in the Central Okanagan District. In his evidence, Alexander testified that Rocky Mountain was owned by David R. Cowan and that he was not an officer or director and had no direct or indirect ownership interest in that company. He also testified that his responsibilities with that company included hiring, training and supervising staff for Visitor Services/Naturalist Programming in Central Okanagan District Provincial Parks, preparing naturalist programs for visitors to the Provincial Parks in the district and leading some of those programs.

Cashin contacted Alexander in late March or early April, 1995 about job opportunities in Provincial Parks in the district. Cashin knew of Alexander's involvement in hiring for the Parks. He had been offered a job by Alexander the year before which he had been unable to accept. They generally discussed jobs that were or might be available and Alexander told Cashin he would like to hire him. Later, Cashin was offered a job as camp counselor/leader for the Ranger Camp. While I accept the camp counselor/leader job was the only position to which Cashin was formally hired, there is no doubt that he was led to believe his employment in that position would result in some casual work as a park naturalist in the Provincial Park program which Alexander managed in the Okanagan District. There was some general talk about a

wage rate for Cashin, but I can find no evidence there was any confirmation of a specific wage rate for the camp counselor/leader job. There was also some talk about when Cashin might start his employment, but again, I can find no evidence that this discussion was more than a general one involving work which was contingent upon the issuance of grants or the establishment of programs that, in the final analysis, did not materialize.

On May 18, 19, 23 and 26, 1995, Cashin attended a number of training sessions held by Alexander for persons who would be employed as park naturalists for Rocky Mountain. Cashin attended these sessions. The session on May 23 involved a seminar to elementary school teachers on an "in service" day at A.S. Matheson Elementary School in the morning and an orientation at Bear Creek Provincial Park in the afternoon. Alexander testified this experience would benefit Cashin in his capacity as camp counselor/leader at Ranger Camps. The session on May 26 occurred at Kalamalka Lake Provincial Park.

On June 18, 25, July 3 and 10, 1995 Cashin conducted a number of interpretive sessions at Bear Creek Provincial Park. One of the two programs he was scheduled to conduct in June was rained out. On the two dates in July, he claims he conducted an outdoor interpretive program during the day as well as an evening lecture interpretive program. He also claims he did an introduction to a program focussing on the art of native basket-weaving on July 12. The evidence is that Cashin was to be paid \$30.00 for any interpretive programs he conducted. There was no discussion at the time this payment amount was set about what he would be paid if the program was rained out or if he was only doing the introductory portion of the program. As it turned out, he received \$10.00 for a program that was rained out and \$20.00 for doing the introductory portion of a program. He was paid for the sessions in June but not for any of the sessions in July and the Determination ordered Alexander to pay an amount of \$60.00 for two sessions, one for July 3 and the other for July 10. Much was made by Alexander in evidence and argument that Cashin conducted the outdoor interpretive programs on July 3 and 10 while working as a camp counselor/leader and was being paid in that capacity by Alexander during the time the programs were being conducted.

On July 15, Parks Day '95, Cashin was asked by Alexander to lead a hike at Kalamalka Lake Provincial Park. He did so and was paid for that activity by Alexander. The evidence shows Alexander credited Cashin with 7.5 hours of work that day and on documents submitted to the Director, said that the work was performed for Peregrine Consulting, not Rocky Mountain. In fact, the document filed stated:

- *all work in July was for Peregrine Consulting
- *no work was done for Rocky Mountain Projects

That statement may not be entirely accurate as Alexander had not taken into account the interpretive lecture programs Cashin says he performed on July 3 and 10 when that statement was made. It did, however, include any interpretive programs conducted by Cashin between 8:00 am and 5:00 pm.

Cashin was not happy with Alexander or with the terms of his employment. He felt Alexander had not lived up to promises he had made to him about the amount and type of work he would be given. On or about July 3 he received his first pay statement from Alexander. It showed his rate of pay as \$8.50 an hour. Up to this time Cashin was not aware the base rate for his employment with Alexander would be \$8.50 an hour and that rate of pay was viewed by him as another failure on the part of Alexander to live up to his promises. He decided to look for other employment. By July 15 he had found other employment.

What occurred between July 14 and July 17 was the subject of much argument, animosity and conflict in evidence between the parties. The following represents my conclusions about what happened during that time. July 15 was the cutoff day for the pay period. Normally, pay statements and cheques are prepared at the end of the period and given to employees on the first working day after the cutoff day, which in this case would have been July 17. On July 16, the day before he would have received his second paycheque, Cashin discussed his wage rate with Alexander. His intention in doing so was to try to get money he felt was owed to him before he told Alexander he was leaving. From Alexander's perspective, the increase simply represented prepayment of a bonus which Cashin would normally have received only if he stayed with Alexander for the season. In any event, Cashin's wage rate was adjusted to \$10.50 an hour and two new pay statements and a cheque were prepared by Alexander. The adjustment was retroactive to Cashin's first day of employment. The adjusted pay statements for the two pay periods and a single cheque containing all of the adjustments were given to Cashin the following day. Shortly after, Cashin told Alexander he was quitting and followed verbal notice with a letter of resignation, prepared on July 19 and backdated to July 17.

The Ranger Camp officially operated five days per week, from 9:00 am to 4:30 pm. One-half hour was added at each end of the day to accommodate early arrivals and tardy pickups. Cashin says he was present at 8:30 am each day and was present until 5:00 pm each day except for two Mondays, July 3 and 10 when he conducted outdoor interpretive programs for Rocky Mountain and "booked off" from the camp at 12:00 noon. No record of hours worked by each employee in a day were kept by Alexander. Nor did Cashin maintain a contemporaneous daily record of hours worked. Alexander says it was normal operating practice to have one of the two persons employed as camp counselors/leaders to either arrive early or stay late, but not both. He says if one of the camp counselors/leaders arrived early, that person would not stay late, but would leave at the end of the day. That evidence is confirmed by a letter from Jennifer Capell, who writes:

Tuesday to Friday our [she and Cashin] standard procedure was to have one of us arrive at 8:30 a.m. to greet the children if they arrived early, and whichever of us performed that task, then that individual left work at 4:30 p.m.

For reasons related to Cashin's demonstrated inability to accurately record the details of his claim at the time it was made to the Director, I am disinclined to accept his recollection of his daily hours of work over the evidence of Alexander, supported by the letter from Jennifer Capell, and conclude Cashin worked no more than 8 hours a day as a camp counselor/leader.

On September 2, 1997, Alexander notified the Tribunal he claimed a set-off against any amounts found to be owed to Cashin at the conclusion of the appeal process. The claim of set-off related to three days (22.5 hours) in June for which Cashin received wages for what was described as "training" and for 5.5 hours on July 15 for which Cashin was paid 7.5 hours on a day Alexander asserts he worked only two hours. Alexander relies upon Section 21 of the *Act* in support of his claim of set-off.

ANALYSIS

I will deal first with the matter of the claim of set-off made by Alexander on September 2, 1997. I choose not to consider this claim. There are three reasons for this result. First, until September 2, 1997, more than two years after the complaint of Cashin was made, no set-off was claimed or raised by Alexander. No adequate explanation for that has been provided by Alexander. Second, and in addition to my concern about the lengthy delay in bringing this issue forward, the appeal process is not the appropriate forum to raise new issues relating to the merits of a complaint. The Tribunal is an adjudicative body functioning in a quasi-judicial capacity. The *Act* does not contemplate the Tribunal having an administrative or investigative role or being the first level of application for relief. In my opinion, it would be generally undesirable that the impartiality of the Tribunal be compromised or threatened by being placed in such a role. Third, Section 112 of the *Act* requires appellants to file an appeal request, which is also required to include the reasons for the request, within 15 days of the receipt of the Determination. The Determination in this case was dated July 15, 1997 - 49 days before the claim of set-off was raised by Alexander. To the extent the matter as a reason for the appeal, Alexander is out of time to do that.

Even if I were inclined to allow this claim to be introduced at this stage, the evidence does not satisfy me that there is any merit to the claims made by Alexander. In respect of both matters, Alexander made the payments to Cashin with full knowledge of the circumstances. There was no "mistake" or error involved in either payment. In respect of the 22.5 hours paid for training in June, 1995, Alexander knew there was no "formal" training days associated with this payment when he paid Cashin. Cashin says, and I accept this part of his evidence, that he received a general instruction from Alexander to use those three days to do some preparatory work for the Ranger Camp and he did so. Also, two other persons besides Cashin were paid for the training period. Alexander seeks only to recover it from Cashin. I would consider such a claim, in the context of subsection 114(1)(c), to not be brought in good faith. Much the same considerations arise in the context of the claim to recover 5.5 hours of the 7.5 hours of wages paid to Cashin for work done on July 15, 1995. As well, Alexander simply has not persuaded

me that Cashin did not work at least 7.5 hours on that day. As I attempted to explain to Alexander during the hearing, the statutory notion of work encompasses much more than, in this case, the physical activity of conducting a hike. Work can, in certain circumstances, include travel time. Also, wage entitlement could include application of minimum daily hours of work provisions of the *Act*. I am unable to say the conclusion of the Director is wrong that Cashin was entitled to receive wages for 8 hours on July 15.

Turning to the balance of the appeal, I conclude as follows: first, based on the findings of fact reached above, the conclusion of the Director that Cashin worked 8.5 hours on each of July 4, 5, 6, 7, 11, 12, 13, and 14 is wrong and the Determination will be varied to reflect my finding that Cashin worked 8 hours on each of those days; second, the finding of the Director that Cashin was entitled to wages from Alexander for May 18 and 19 and for two interpretive programs, one on July 3 and the other on July 10, is wrong and the Determination will be varied to exclude a wage claim for those days; third, the appeal on the wage rate and the unauthorized deduction is dismissed and the Determination is confirmed in respect of those matters.

1. Hours of Work

My reasons for the conclusion on the hours of work are explained above. Alexander has persuaded me the Determination was in error. I accept that Cashin did not work more than 8 hours on any of those eight days. Also, for July 3 and July 10, Cashin will be credited with 7.5 hours of work, not 4 hours as found in the Determination. The reason for this result is Alexander's evidence and argument that all work performed by Cashin from Monday to Friday, between 8:30 a.m. and 5:00 p.m. was performed for Alexander, including any interpretive hikes organized through Rocky Mountain.

2. Training and Other Work for Rocky Mountain

Under the *Act*, a person being trained by an employer for the employer's business is an employee and is performing "work" while training. The issue is not whether Cashin was performing work on the "training" days is therefore entitled to be paid wages. Clearly he was. The real issue is whether Alexander should be considered to be the employer for that work.

The evidence shows the work performed on May 18 and 19 had nothing to do with Alexander's business. The training received by Cashin was at Okanagan Lake Provincial Park and Ellison Lake Provincial Park respectively and that training was for Rocky Mountain. No relationship between that training and the job Cashin did for Alexander has been shown to exist on either the material or the evidence.

It is apparent the Director made no distinction between Alexander and Rocky Mountain. What is less apparent is the reason for doing so. The evidence reveals Alexander and Rocky Mountain are neither the same employer nor associated employers. As the Director chose not to attend the hearing, we are denied the benefit of their reasoning. I conclude Alexander cannot

be made responsible for the obligations of Rocky Mountain under the *Act* and set aside wages determined to be payable to Cashin for work performed for Rocky Mountain, specifically the training on May 18 and 19 and the evening interpretive programs on July 3 and July 10.

I reach a different conclusion regarding the work performed by Cashin on May 23 and 26. On those 2 days, Cashin was being trained for Alexander's business. It was Alexander's evidence that the training Cashin received on May 23 related directly to things Cashin would need to know in his position as camp counselor/leader at the Bear Creek Ranger Camp. The training he received at Kalamalka Lake Provincial Park on May 26 allowed Alexander to assign Cashin to that location on Parks Day, July 15 and perform work which Alexander says was performed for him, not Rocky Mountain. It makes no difference the training was "voluntary". Cashin was invited to attend these training days by his employer and he did so. In doing so, he performed work for Alexander and is entitled to be paid for that work.

3. Wage Rate and Unauthorized Deduction

On July 16, Cashin asked Alexander to increase his wage rate. I agree with Alexander that Cashin was devious in how he approached the issue with him and I am certain that no increase would have been given if Cashin had told him he had found alternate employment and would be resigning his employment. However, on that day, Alexander made the decision to grant Cashin a \$2.00 an hour increase and to immediately raise his wage rate from \$8.50 an hour to \$10.50 an hour. There is no indication the increase was being paid as a bonus unrelated to work performed or as an advance on future wages payable. The wages were paid by Alexander with full knowledge he had agreed to grant the increase and to pay it immediately. In the circumstances, there is no other conclusion available to me except that the increase was given and paid as wages and must be treated as such under the *Act*. The Director did not err in concluding Cashin's wage rate, for the purpose of calculating wages owing under the *Act*, was \$10.50 an hour.

Section 21(1) of the *Act* says:

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.

Having concluded the increase given and paid to Cashin was wages, Alexander is prohibited from withholding those wages, either directly or indirectly. There is nothing in the *Act*, and I was not referred to any other enactment, that would permit Alexander to withhold from Cashin's wages an amount Alexander felt was not owed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 15, 1997 be referred back to the Director to be varied in accordance with this appeal.

.....

Adjudicator
Employment Standards Tribunal