

An appeal

- by -

Paragon Custom Developments Ltd.
("Paragon or employer")

- 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

ADJUDICATOR: Paul E. Love

FILE No.: 2001/145

DATE OF DECISION: April 3, 2001

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated January 23, 2001, issued by a Delegate of the Director of Employment Standards pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). In the Determination the Delegate found, by consent, that 18 employees were entitled to the sum of \$32,728.14. After the communication of its consent to a Determination in the amount of \$32,728.14, and the issuance of the Determination, the employer filed an appeal of the Determination. The employer claimed that it had paid certain employees the amount of \$4,128.84, and claimed a corresponding reduction of the amount of the Determination.

A number of employees had negotiated cheques with Money Mart, and had received value from Money Mart. The value received by each employee from Money Mart, was less than the face value of each cheque. Money Mart apparently presented the cheques for payment and the cheques were dishonoured by the employer’s financial institution. Money Mart demanded payment of the amount from the employer, and the employer seeks a reduction in the amount of the Determination on the basis that the employees were paid.

The employer has not shown that the wages have been paid to the employees. From a review of the *Bills of Exchange Act*, (s. 94, 132 and 134) it is clear that while the employer has issued pay cheques, Money Mart can proceed against the employer or employee for the full value of a dishonoured cheque. While the employer has written cheques in the amount of \$4,128.84, the writing of a cheque, which has been dishonoured does not constitute payment of wages under s. 20 of the *Employment Standards Act, R.S.B.C. 1996 c. 113*.

ISSUE TO BE DECIDED

Has an employee who has negotiated and received value for a pay cheque from a holder in due course, received payment of wages from the employer, when the cheque has been dishonoured by the employer’s issuing financial institution?

FACTS

The Delegate commenced an investigation in relation to complaints made by 18 employees of Paragon Custom Developments Ltd (the “employer”). The Delegate reached an agreement with the employer concerning the amounts owing to the employees in the amount of \$32,728.14 to be divided among the employees according to a schedule attached to the Determination. The employer communicated its acceptance of a consent determination by email dated January 23, 2001. The Delegate then issued the Determination. For the purposes of this appeal, it is unnecessary to identify the group of employees covered by the Determination, or the amounts owing to each individual employee.

The amount at issue in this appeal is the sum of \$4,128.84, of the \$32,728.14, which the employer claims it has paid to Bob Huckel, Gary Cochrane and Tyler Cochrane (the “employees”).

The employer issued cheques for wages in the amount of \$4,128.84 to the employees in the following amounts.

\$997.97, issued January 5, 2001, to Bob Huckel (cheque number 2964)
\$1256.37, issued December 22, 2000, to Gary Cochrane (cheque number 2982)
\$ 757.37, issued December 22, 2000 to Tyler Cochrane (cheque number 2983)
\$705.20, issued January 5, 2001, to Gary Cochrane (cheque number 2984)
\$411.93, issued January 5, 2001, to Tyler Cochrane (cheque number 2985)
(the “cheques”)

These employees cashed the cheques at Money Mart, and Money Mart paid to the employees a discounted value of the cheque. Money Mart derives a portion of its business by “discounting”, that is cashing a pay cheque for a lesser amount than the face amount of the cheque, and then presenting the cheque for full payment, through its financial institution (Bank of Montreal) to the issuing financial institution (Greater Vancouver Savings and Credit Union).

The Bank of Montreal presented the cheques to the Greater Vancouver Savings and Credit Union, and the cheques were dishonoured and returned to Money Mart marked “Pursuant to Clearing Rules this item must not be cleared again unless certified”. Money Mart made demand on the employer to make good the cheques by letters to the employer dated January 22 and 23, 2001. On the basis of the information before me, the employer has refused or neglected to pay Money Mart the value of the cheques.

After receiving the demand for payment from Money Mart, the employer filed an appeal alleging that it had paid the wages in the amount of \$4,128.84 to the employees, and sought to reserve a right to amend the amounts in the Determination in the event that other records showed payments to other employees.

Employer’s Argument

The employer takes the position that the Determination should be reduced by the value of the cheques which it issued to the employees, because the employees have received funds from Money Mart, and have therefore been paid. The employer argues that one should not speculate on the course of action that Money Mart will take in accordance with the dishonoured cheques, and issue a credit for payment of wages to the employees. I have no information before me that Money Mart has taken any collection proceeds against the employees for the dishonoured cheques, or intends to take collection proceedings against an employee.

The Delegate did verify with Money Mart, that it believed it had the right as a holder in due course of the cheques to collect the value of the cheques from the employees and the employer.

ANALYSIS

The burden rests with the appellant, in this case the employer, to establish an error in the Determination, such that I should vary or cancel the Determination. In my view, the employer has the onus of proving and has not established that it has paid wages to the employees in the amount of \$4,128.84. It is clear that the employer has issued cheques in the amount of \$4,128.84 to the employees. Section 17 of the *Act* requires that wages are to be paid within 8 days after the end of the pay period. Section 20 of the *Act* requires, the wages must be paid in currency, by cheque, draft or money order, payable on demand, drawn on a savings or credit union, unless there is an authorization by the employee for a direct deposit to an account in a savings institution.

The employer has asserted in this appeal, in effect that it has paid wages in the amount of \$4,128.84 by issuing cheques in that amount, for which an employee has received value from Money Mart. The issuance of a cheque by an employer may or may not be “payment” of wages, within the meaning of s. 20 of the *Act*. In the ordinary course, where the cheque is delivered to the employee and honoured, delivery of the cheque by the employer to the employee, will satisfy any requirements for payment of wages set out in the *Act*. If the cheque is dishonoured, the wages cannot be said to be paid, even if partial value for the cheque is received by the employee from a person who cashes the cheque. The clearing stamp on the front of the cheque, however, is strong evidence, in this case, that the employer has not given any value for the cheques.

I note that in British Columbia, as in all Canadian provinces, banking and bills of exchange are the subject of exclusive federal legislative jurisdiction. The rights and obligations with regard to cheques is governed by the *Bill of Exchange Act R.S.C., c. B-4*. This case involves the application of principles under the *Bills of Exchange Act*, as a cheque is a type of bill of exchange. It is my decision that the issuance of a cheque, which has been dishonoured, does not amount to a payment by the employer of wages under the *Act*. The terms “holder”, “holder in due course”, “value”, “holder for value” are all terms which are defined in the *Bills of Exchange Act*.

Here the employer’s bank or issuing financial institution refused to pay the cheque which Money Mart attempted to deposit to its Bank of Montreal account and was presented to the employer’s financial institution for payment. Presumably, the employer’s financial institution refused to pay on the cheque because the employer’s accounts were in default or its credit facilities were exhausted. This refusal of payment has set into account a chain of events and rights under the federal *Bills of Exchange Act*, (s. 94 and 134) which gives Money Mart the right to recover the value of the cheque from any party who endorsed the cheque including the maker (employer) and the payee of the cheque (employee). Section 94 of the *Bills of Exchange Act* reads as follows:

94. (1) A bill is dishonoured by non-payment when

- (a) it is duly presented for payment and payment is refused or cannot be obtained; or
- (b) presentment is excused and the bill is overdue and unpaid.

Recourse

- (2) Subject to this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer, acceptor and endorsers accrues to the holder

Section 134 of the *Bills of Exchange Act* reads as follows:

134. In the case of a bill that has been dishonoured, the holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior endorser, the damages prescribed in section 133.

The employees also have recourse against the employer (or a right to sue under the *Bills of Exchange Act* for drawing a cheque which has been dishonoured.

The first stage of that process has occurred, Money Mart has demanded payment from the employer. I need not speculate whether Money Mart will proceed against the individual employees for payment, it is sufficient that it has the legal right under the *Bills of Exchange Act* to do so. Money Mart is a holder in due course of each cheque, as it has given value for each cheque, to the payee of the cheque. Should Money Mart proceed against each individual employee for the value of the cheque dishonoured, that employee would have no defence to a claim made by Money Mart. This is apparent from s. 132 of the *Bills of Exchange Act*:

132. The endorser of a bill by endorsing it, subject to the effect of any express stipulation authorized by this Act,

- (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken;
- (b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements; and

- (c) is precluded from denying to his immediate or a subsequent endorsee that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title thereto.

If an employer chooses to pay an employee by cheque, the writing of the cheque does not extinguish the employer's obligation to make good the cheque. While the cheque is a bill of exchange and can be negotiated (delivered), the wages cannot be considered to be "paid" until the cheque is accepted for payment by the employer's issuing financial institution. While an employee who is issued a bad cheque has recourse or can sue under the *Bills of Exchange Act*, this does not exclude the employee's right to proceed to enforce employment rights under the *Employment Standards Act*. It is clear that the employer has not paid wages, although it has issued cheques.

The Delegate has made submissions that there is urgency to this matter, and it is in the process of collecting the Determination by securing and recovering assets. I note that if the employer can show to the Employment Standards Branch that it has actually paid the sum of \$4,128.84 to the employees or Money Mart, it may be entitled to a credit against the Determination. At this point in time, however, I am not satisfied that the employer has shown that the Delegate has erred, as alleged by this employer, in the calculation of the amount of the Determination. The employer may have other processes available to it to obtain credit for money paid to employees, should it be in a position to show, at a later time, that it has actually paid wages, by honouring the cheques which have been presented to it for payment. At this point in time while the employer has issued cheques in the amount of \$4,128.84, it has not paid wages in the amount of \$4,128.84 because those cheques were dishonoured.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated January 23, 2001 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal