

Manitoba Labour Board

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Case No. 225/12/ESC

File No. 112185

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN:

**MAXIM TRANSPORTATION SERVICES INC.
t/a MAXIM TRUCK & TRAILER,**

Employer,

- and -

D.A.,

Employee.

BEFORE:

M. L. Harrison, Vice-Chairperson

B. Peto, Board Member

T. Murphy, Board Member

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

SUBSTANTIVE ORDER

WHEREAS:

1. On July 18, 2012, pursuant to Section 95 of *The Employment Standards Code* (the “Code”), the Director of the Employment Standards Division, by Order, dismissed the complaint by the above-named Employee against the above-named Employer.
2. In brief Reasons which accompanied the Dismissal Order, the investigating Employment Standards Officer stated as follows:

Your claim for Vacation Wages and Unauthorized Deduction was investigated [and] the determination has been that there has been no breach of the code. The following is an explanation of reason for dismissal.

On the issue of Vacation Wages the employer has paid all of the vacation wages owing on wages earned within the twenty two months prior to termination.

On the issue of Wages Earned/Unauthorized Deductions, the employee [sic] has paid all commissions owed according to the Employment Code [sic] for the six months prior to termination.

Therefore, your claim is hereby dismissed.

3. The Statement of Adjustment prepared by the Employment Standards Officer shows that wages paid to the Employee exceeded the sum of the wages (commissions) earned within the last six months of his employment (\$34,888.85) and vacation wages due and payable within the last 22 months of his employment (\$11,543.84), with the result that there was an overpayment to the Employee of \$1,746.39. Accordingly, no amount was found to be owing by the Employer to the Employee.
4. The Employee having disputed the above-mentioned Order, the Director of the Division, pursuant to Section 110 of the *Code*, referred the matter to the Manitoba Labour Board (the "Board").
5. In summary, the basis of the Employee's appeal is that a Vacation Balance in the amount of \$23,108.25 is owed to him, as stated on his Pay Statement dated May 4, 2012 and confirmed by the Employer's Payroll Administrator. It is his position that vacation pay was to be paid in addition to and separate from his normal draw and commissions, and that the Employer was not entitled to deduct draws which he had received in excess of commissions earned from his Vacation Balance.
6. On November 28, 2012, the Board conducted a hearing at which both parties appeared before the Board and presented evidence and argument. The Employee testified on his own behalf. The Employer called two witnesses, namely Y.C., the Employer's Payroll Manager, and P.V., the Employer's Sales Support Manager.
7. The Board, following consideration of material filed, evidence and argument presented, has determined that the following material facts are relevant to the disposition of this appeal:
 - a) The Employee commenced employment with the Employer in Saskatchewan at or about the beginning of April 1999, as a Trailer Salesperson.
 - b) The Employee was to be compensated on a commission basis. Details of his employment were confirmed by letter dated March 30, 1999 (Ex. 3) which stated, in part, as follows:

Compensation:

You will start with a forgivable, guaranteed draw against commission of \$4000/month for the first 6 months. After that time, your draw against commission will become \$3500/month (unforgivable). Your commission rate will be 30% of net margin. . . .

Benefits:

Effective one year after your start date, you will be eligible for two (2) weeks paid holidays on an annual basis.

- c) At the bottom of Exhibit 3 is the statement “I have read, understood and agree to these conditions of employment”, followed by the Employee’s signature and the date of March 31, 1999.
- d) In 2002, the Employee moved to a sales position with the Employer in Winnipeg. At or about the same time, his draw against commission became \$5,000.00 per month, and he became eligible for three weeks’ paid vacation per year.
- e) The Employee remained in the Employer’s employ, and continued to receive a monthly draw of \$5,000.00 and to be eligible for three weeks’ paid vacation each year, until early May, 2012, when he submitted his resignation.
- f) Y.C. referred to the Employee’s draw as an advance on commissions to be earned. She testified that the purpose of the draws is to provide the salesmen with a steady income, since commissions fluctuate. She said that salesmen are in a negative position for many months of the year, their draws exceeding what they have earned in commissions. Their negative balance is always carried forward, and is not wiped out until enough significant deals close to result in a positive balance.
- g) Payroll reports for approximately the last two years of the Employee’s employment were before the Board, and show that the Employee received certain amounts as vacation pay in each of those years.
- h) The Employee’s Pay Statement for the pay period ending April 28, 2012, and dated May 4, 2012, was filed as Exhibit 2 at the hearing. There is a reference on that Pay Statement, under the heading “Statement of Earnings”, to “Vacation Balance: 23,108.25”. A note which accompanied that Pay Statement states as follows:

As you are aware, Supervisors have recently been working on verifying all **Full time** employees’ vacation pay balances so that they could be printed on the pay stubs each pay. We are pleased to advise you that your vacation pay balance has . . . now been added to your pay stub directly below your Net Pay so that you will always be aware how much pay you have accumulated. This will help you to ensure that you do not book more time than you have pay available. If you have any questions regarding your vacation balance or calculation of time available please contact your Supervisor.

(Emphasis in original)

- i) The Employee testified that he phoned Y.C. after he received Exhibit 2. He said that she confirmed that the \$23,108.25 Vacation Balance was owed to him, and was

over and above and in addition to his normal draw or commission. She also acknowledged that this would average over \$7,000.00 a week for each of the three weeks of vacation.

- j) The Employee further testified that he understood, from what Y.C. said, that a “shortfall” may have been included in the Vacation Balance. In response to a question from the Board, the Employee stated that Y.C. indicated that the Vacation Balance was more than what the Employer had generally paid in the past, and that there had been errors with respect to missed vacation in previous years or vacation amounts having been underpaid in the past.
 - k) Y.C. testified that the vacation balance would change from one pay day to the next, depending on the draws paid and commissions earned. Her evidence, which the Board accepts, is that by the time the Employee left his employment, his accumulated vacation balance had become \$22,003.70.
 - l) The Employee’s final Pay Statement dated May 18, 2012 was filed as Exhibit 1 at the hearing. The “Statement of Earnings” on Exhibit 1 and the payroll report for the period ending May 12, 2012 show that a final payment in the amount of \$3,594.47 was paid to the Employee, representing the difference between a negative amount for commission (-\$18,409.23) and the vacation pay balance (\$22,003.70).
 - m) The Employee stated in his evidence that he had no dispute with the Employer’s calculation of commission. In his final submission, he confirmed that he had received payment of the \$3,594.47 referred to in Exhibit 1 and indicated that his claim should be adjusted accordingly.
 - n) In its final submission, the Employer confirmed that it did not dispute that the accumulated balance of \$22,003.70 was owing to the Employee when he resigned. The Employer’s position was that it was entitled to offset draws which had been advanced to the Employee in excess of commissions earned against the accumulated vacation pay.
8. The Board, following consideration of material filed, evidence and argument presented, has further determined that the following statutory provisions are relevant to the disposition of this appeal:
- a) Section 96(2) of the *Code* sets out the maximum amount of wages which can be recovered pursuant to an order for payment under the *Code*. Specifically, that section reads as follows:

Maximum wages recoverable by order

96(2) The wages that may be ordered to be paid under clause (1)(a) are limited to

- (a) unpaid wages, other than those included in clause (b), that became due and payable
 - (i) within the last six months before the complaint was filed, or
 - (ii) if the employment was terminated before the complaint was filed, within the last six months of that employment or after it was terminated; and
 - (b) unpaid vacation allowance that became due and payable within, and any unpaid wages in respect of general holidays that occurred within,
 - (i) the last 22 months before the complaint was filed, or
 - (ii) if the employment was terminated before the complaint was filed, the last 22 months of that employment.
- b) Section 19(1) of the *Employment Standards Regulation* (the “*Regulation*”) provides that an employer may not deduct any amount from the wages payable to an employee “except as required by federal or provincial law or as permitted by a court order or subsection (2).” One of the exceptions under the *Regulation* is that an employer may deduct cash advances from wages owing to an employee pursuant to Rule 7 of Subsection 19(2), which reads as follows:

Deduction for payroll error, cash advance or service charge

7. An employer may deduct the greater of the following amounts if the employer has made a payroll error that is to the employee’s favour or has made a cash advance to the employee:

- (a) with the consent of the employee, the amount of the payroll error or the cash advance;
- (b) the amount that could be seized or attached by a garnishment order, if the employer had a garnishment order under *The Garnishment Act* in respect of the employee’s wages for the amount of the payroll error or cash advance.

The employer must not deduct any amount in respect of interest or a service charge or fee in relation to a payroll error, a cash advance or the cashing of a cheque.

9. The Board, following consideration of material filed, evidence and argument presented, and in the context of the facts as summarized in paragraph 7 and the provisions set out in paragraph 8, has determined as follows:
- a) The Board, being a statutory tribunal, can only deal with the Employee’s claim for wages, including vacation wages, in accordance with the specific provisions of the *Code* and the *Regulation*.

- b) The Board is satisfied, on the evidence which is before it, that the sum of \$22,003.70 represented the aggregate vacation balance owing to the Employee at the time of his resignation, and included unpaid vacation pay accumulated over the entire length of his employment with the Employer.
- c) Under the *Code*, the Employee is limited in his claim for vacation pay to the amounts outlined in Section 96(2)(b) of the *Code*, namely unpaid vacation allowance that “became due and payable within . . . the last 22 months of . . . employment”.
- d) The Board is satisfied, based on the totality of the evidence, that the Employee was entitled to a vacation allowance calculated at a rate of 6% of the wages that he earned in the year of employment in respect of which he was entitled to the vacation.
- e) The Employment Standards Officer calculated the Employee’s vacation allowance entitlement for the 22 months prior to the termination of his employment, based on 6% of the Employee’s earnings during that period of time, to be in the amount of \$11,543.84. Neither party identified any error with respect to that calculation.
- f) On the evidence before it, and having reviewed the earnings and vacation pay paid to the Employee as recorded on the payroll reports, the Board is satisfied, on the balance of probabilities, that the Employee was paid all wages owing to him under the *Code*, including all vacation wages which became due and payable within, and were owing to him in respect of, the last 22 months of his employment.
- g) Further, or in any event, the Board does not agree with the Employee’s contention that the Employer was not entitled to deduct draws which he had received in excess of commissions earned from his vacation pay. The Board is satisfied that the monthly draws which were paid to the Employee fall within the scope of deductions which are permitted under Rule 7(a) of Subsection 19(2) of the *Regulation*. The Board is persuaded that the Employee’s consent to such a deduction is reasonably implied based on the nature of the draw system itself, and on the evidence, which reflects that draws were paid over the years in advance of actual earnings, to be adjusted later. The Board is also convinced that the Employee’s consent to such a deduction is recognized in Exhibit 3, pursuant to which it was agreed that draws would become “unforgivable” after the original grace period of six months.
- h) As indicated above, the Employee argued that vacation pay is separate from commission and must be treated separately under the *Code*. In his submission, any “charge back” for draws paid in excess of commissions earned cannot be applied to vacation pay owing, but must be dealt with in another forum. The Board does not accept that argument. Subsection 19(2) of the *Regulation* specifies what may be

deducted “from a payment of wages”. The term “wage”, as defined in Section 1(1) of the *Code*, means “compensation for work performed that is paid or payable to an employee by his or her employer”, and includes both commission and a vacation allowance to which an employee is entitled under the *Code*. The Board is therefore satisfied that the Employer was entitled, pursuant to Rule 7(a) of Subsection 19(2) of the *Regulation*, to deduct or offset the amount of the draws which had been paid to the Employee in excess of commissions earned, from or against the total wages, including vacation wages, due and payable to the Employee under the *Code*.

- i) In the result, the Board is satisfied that the Employee has failed to establish, on the balance of probabilities, that any outstanding amounts are owing to him under the *Code*. The Employee’s appeal is therefore dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the claim of D.A.

DATED at **WINNIPEG, Manitoba** this 17th day of July, 2013, and signed on behalf of the Manitoba Labour Board by

“Original signed by”

M. L. Harrison, Vice-Chairperson

“Original signed by”

B. Peto, Board Member

“Original signed by”

T. Murphy, Board Member