

Case Name:

Big Freight Systems Inc. v. Horowitz

Wage Recovery Appeal

**IN THE MATTER OF a Wage Recovery Appeal under Division XVI - Part
III of the Canada Labour Code**

Between

**Big Freight Systems Inc., (Steinbach, Manitoba), Appellant
(Employer), and
Ari Horowitz, (Edmonton, Alberta), Respondent (Employee)**

[2009] C.L.A.D. No. 66

Human Resources and Social Development Canada File No. YM2727-2643

Canada

Labour Arbitration

Panel: Professor Bryan P. Schwartz (Referee)

Heard: February 9, 2009, held via 3 way telephone conference hearing.

Award: March 6, 2009.

(25 paras.)

Labour Arbitration -- Employee Rights and Benefits -- Remuneration -- Deductions.

The employer appealed the inspector's decision that it was not authorized to deduct money from the employee's final paycheque. The employer sought to deduct an amount representing the value of equipment that the employee failed to return. The employer relied on the wage agreement signed by the employee, which provided that the employee authorized the employer to make deductions for the disappearance of equipment.

HELD: Appeal allowed in part. The employer was entitled to deduct the amount for certain items that the employee conceded were lost. The employer had not proved on a balance of probabilities that the remainder of the items for which it sought to make deduction had actually been lost.

AWARD

Introduction

1 The Employee, Mr. Ari Horowitz ("Mr. Horowitz"), worked as a truck driver. The Employer, Big Freight Systems Inc. ("Big Freight Systems"), claims the right to deduct \$1,714.59 from Mr. Horowitz's final paycheque. Big Freight Systems states that when Mr. Horowitz terminated his employment he failed to return trucking equipment worth the said amount of \$1,714.59.

2 Mr. Horowitz filed a complaint under the *Canada Labour Code* with Human Resources and Skills Development Canada.

3 The Inspector, Ms. Donna L. Martin, determined that Big Freight Systems owed Mr. Horowitz the sum of \$1,714.59. The Inspector relied on a federal policy statement concerning employer deductions. It proposes to provide a national consistent approach to s. 254 of The *Canada Labour Code*, which provides that:

The policy statement says the employer can only make deductions if, among other things, they are authorized in writing after the transaction that causes them.

4 Big Freight Systems Inc. relies in this case on a General Freight Company Driver Wage Agreement signed by Mr. Horowitz at the time of his initial employment. The initial agreement provides that:

"a) In accordance with established Company Policy, all cash advances, other deductions and amounts owing or incurred as a Lease Operator, Owner Operator or Company Driver may be deducted during employment or at the time of termination.

b) Without restricting the generality of the foregoing, the employee directs the company to deduct from his remuneration the following:

* Disappearance of equipment, actual value of loss up to a maximum of \$3,000.00;"

5 Mr. Horowitz's position is that almost all of the equipment was returned on January 21, 2008. Mr. Horowitz acknowledged in his letter to the Inspector that 1 chain and 2 over dimensional flags were missing and accepted the company's valuation of them, and suggested that he should only pay

\$142.00 and Big Freight Systems Inc. should pay Mr. Horowitz the balance of \$1,572.59. The Inspector ruled, on the basis of the policy, that no authorization at all is permitted.

The Evidence at the Hearing

6 The hearing was conducted by teleconference on February 9, 2009. Mr. Horowitz represented himself and provided testimony under oath. Big Freight Systems was represented at the hearing by CEO Gary Coleman ("Mr. Coleman"), who also provided testimony under oath. No other person attended the hearing

7 I kept highly detailed notes of all the evidence of both witnesses at the hearing and have reviewed same before arriving at a decision. The following is a review of some of the key points.

8 Mr. Coleman testified that:

- * the company is an ethical business;
- * it also takes pains to ensure when an employee is hired that the employee understands the terms and conditions of employment;
- * the provision on employee deductions was crafted with care to overcome ambiguities that had been recognized earlier;
- * when the employee quit his job, an inventory was carried out within a few hours by Greg Mercier ("Mr. Mercier");
- * Mr. Mercier provided a list of missing items;
- * in accordance with the initial employment agreement, the value of the items were deducted.

9 Mr. Horowitz testified that:

- * he left his employment because he felt he had been too severely penalized over a disciplinary matter;
- * he routinely conducts an inventory of his truck before he sets out on his job;

- * on January 17, 2008, his last working day, he conducted the inventory;
- * on January 21st, 2008, he went in to resign and surrender his truck;
- * while he did not conduct an inventory that day, he would have noticed if anything was missing. He said that he is a well organized person, aware of what is in his truck, and that some of the items that allegedly disappeared are very large and their disappearance would certainly not have escaped his notice.

10 I found both witnesses to be impressive.

11 Mr. Coleman, CEO of Big Freight Systems, was careful and precise in his representation of what had happened and what he thought the legal consequences should be. I saw no tendency to exaggerate or obfuscate, only an honest attempt to present the facts as he understood them. He was proud about his company's integrity and confident that the system of taking inventory after a truck is turned in produces accurate results. He submitted that federal policy does not override federal law, and the latter is clear that a deduction can be authorized in advance in writing.

12 Mr. Horowitz also impressed me as entirely sincere. He was quick to accept responsibility for what he thought he was genuinely responsible for. He thought that the episode involving discipline was a mistake on his part; his only quarrel was with the penalty. He acknowledges that several items were indeed missing. He was prepared to accept responsibility for anything he signed, and did not seek to question whether it was voluntary or whether he understood it at the time. When I asked him if he should be held responsible even for items stolen by third parties, he said that he should be, on the theory that a driver can take better care to protect the vehicle against third parties.

13 The precedents suggest that Mr. Horowitz could have made some legal arguments in his defence. Referees have been prepared to uphold pre-authorized deductions only if the contract is truly consensual, and in the case law created by referees in this area, genuine consent on the part of the employee has generally been found only when the contract offers the employee some specific personal benefit in return for agreeing to the reduction; *G. Lund Trucking Inc. v. Daryl A. Petersen* [2008] C.L.A.D. No. 68 (S.M. Kubara), at paragraph 24.

14 The interpretation of the "disappearance" clause in the initial agreement in this case is open to question; should it really be construed as applying to cases where the loss is not due to any malice or negligence on the part of the employee? Is it conscionable to deduct amounts where the loss is caused by a third party, and the employee cannot be shown to have been at fault for allowing it to happen?

15 There is no need for me to consider any of these potential arguments. This case can be decided strictly on the basis of the defence raised by the Mr. Horowitz to the factuality of most of Big Freight Systems' claims and Mr. Horowitz's concession to the rest of it.

16 The onus of proof is on Big Freight Systems. It must show that the facts existed to justify a deduction. The burden is not as high as "beyond a reasonable doubt"; it is the civil standard of proof. A deduction based on employee misconduct requires supporting evidence, however, that is clear and convincing; *Carla Industries Ltd. v. Robillard*, [2000] C.L.A.D. No 7 (S.D. Kauffman); *2960941 Manitoba Ltd. (Employer), and Mr. Cary Friesen (Employee)*, [1994] C.L.A.D. No. 806 (B.P. Schwartz).

17 The same onus applies where the deduction is based on employee responsibility for an employer loss regardless of fault.

18 Mr. Coleman expressed confidence that the company's system works. I am prepared to assume that it usually does. But Mr. Horowitz presented evidence, which in my view must be given significant weight, that it did not work in his particular case. Against this, Big Freight Systems did not produce sufficient evidence of its own to convincingly establish the contrary.

19 No inventory was immediately carried out by Big Freight Systems at the time the truck was delivered. Big Freight Systems did not invite Mr. Horowitz to produce an inventory of his own or give Mr. Horowitz the option of waiting until someone from Big Freight Systems could do so in Mr. Horowitz's presence.

20 Several hours intervened before the inventory was conducted. There was no evidence offered that precluded the equipment being removed (for storage, repair, replacement or use on another truck, or even stolen) in the interim.

21 Mr. Horowitz was not present when it was carried out several hours later. Mr. Mercier, who carried out the inspection, according to Big Freight Systems, was not present at the hearing to present his recollection and be questioned about it.

22 To sum up, the evidence does not provide convincing confirmation of Big Freight Systems' position with respect to:

- * what was in the truck when Mr. Horowitz left it;
- * whether anything was removed from the truck after its return and prior to inspection;
- * whether Mr. Mercier made any errors of observation or recording when he

conducted the inventory.

23 Big Freight Systems' inventory might have been entirely right, or mostly right; but Mr. Horowitz testified that it was mostly wrong, and I cannot conclude otherwise on the basis of the evidence presented at the hearing.

24 Mr. Horowitz conceded that Big Freight Systems could make its proposed deductions for several particular items. He not only did so at the hearing, but earlier in writing, to Inspector Martin. I am prepared to find that Mr. Horowitz has voluntarily conceded in writing that this deduction is authorized.

Conclusion

25 Big Freight Systems' appeal is allowed in respect of the items conceded as lost by Mr. Horowitz. The inspectors decision is otherwise upheld. My order is that Big Freight Systems should pay Mr. Horowitz the sum of \$1,572.59. I further order that the sum of \$142.00 should be forwarded to Big Freight Systems for missing items.

DATED at the City of Winnipeg, in Manitoba, this 6th day of March, 2009.

BRYAN P. SCHWARTZ - Referee

* * * * *

APPENDIX

Canada Labour Code

Deductions

General rule

254.1 (1) No employer shall make deductions from wages or other amounts due to an employee, except as permitted by or under this section.

Permitted deductions

(2) The permitted deductions are

(a) those required by a federal or provincial Act or regulations made thereunder;

(b) those authorized by a court order or a collective agreement or other document signed by a trade union on behalf of the employee;

(c) amounts authorized in writing by the employee;

(d) overpayments of wages by the employer; and

(e) other amounts prescribed by regulation.

Damage or loss

(3) Notwithstanding paragraph (2)(c), no employer shall, pursuant to that paragraph, make a deduction in respect of damage to property, or loss of money or property, if any person other than the employee had access to the property or money in question.

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