Civil Resolution Tribunal

Date Issued: April 20, 2020

File: SC-2019-005216

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Interstellar Commerce Ltd. v. Trudeau*, 2020 BCCRT 419

B E T W E E N :

INTERSTELLAR COMMERCE LTD.

**APPLICANT**

A N D :

PAUL TRUDEAU

**RESPONDENT**

A N D :

INTERSTELLAR COMMERCE LTD.

**RESPONDENT BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member: Micah Carmody

## INTRODUCTION

1. This dispute is about an employer's overpayment of a housing allowance, and its later refusal to keep paying that allowance.

2. The applicant and respondent by counterclaim, Interstellar Commerce Ltd. (Interstellar), employed the respondent and applicant by counterclaim, Paul Trudeau. Interstellar says it paid Mr. Trudeau a $900 housing allowance twice rather than once per month for approximately 7 months until December 2018. Interstellar seeks $3,800, which it says is the after-tax amount it paid Mr. Trudeau.

3. Mr. Trudeau says he understood the extra $900 monthly payment to be a raise. He also says it would be unfair to make him pay it back now given his low earnings. In the counterclaim, Mr. Trudeau says in December 2018 Interstellar abruptly stopped paying not only the alleged overpayment but also the housing allowance. He says the housing allowance was a contractual entitlement. He seeks $4,410 (gross) for the housing allowance from December 2018 to April 28, 2019.

4. Interstellar is represented by an employee or principal. Mr. Trudeau is self-represented.

## JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties in this dispute call into question each other's credibility. Credibility of

witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the tribunal's mandate that includes proportionality and a prompt resolution of disputes, I decided to hear this dispute through written submissions.

7. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something or pay money. The tribunal may also order any terms or conditions the tribunal considers appropriate.

9. In Interstellar's claim against Mr. Trudeau, it identified itself as "Interstellar Commerce Ltd", whereas in Mr. Trudeau's counterclaim, Interstellar is identified as "Interstellar Commerce Ltd.", with a period after the "Ltd.". Given the documents in evidence I find the omission of the period was an error and I have amended the style of cause accordingly.

## ISSUES

10. The issues in this dispute are

    a. Is Interstellar entitled to recover its housing allowance overpayment?

    b. Did Interstellar breach the parties' contract when it stopped paying the housing allowance?

    c. What is the appropriate remedy?

## EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicant Interstellar must prove its claim on a balance of probabilities. Mr. Trudeau must prove his counterclaim to the same standard. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

12. Interstellar operates a hotel business in BC. Mr. Trudeau worked for Interstellar as the hotel's general manager from November 2015 to April 2019, when he quit his employment. Mr. Trudeau resided at the hotel throughout that period.

13. Interstellar planned to renovate the hotel, which meant Mr. Trudeau would have to move off-site. At some point in 2018, Interstellar began paying Mr. Trudeau a monthly $900 housing allowance. Due to construction delays, Mr. Trudeau remained on-site until his employment ended. The parties apparently did not reduce the terms of the housing allowance (or the employment contract) to writing.

### *Overpayment*

14. Interstellar says in November 2018 it discovered an accounting error. It says Mr. Trudeau received 2 housing allowance payments per month for approximately 7 months, beginning in May 2018. At that time Interstellar's accountant began including the housing allowance in Mr. Trudeau's biweekly pay. Interstellar says one of its owners, Jane Wang, "still" sent email money transfers of $900 to Mr. Trudeau. It is not clear when Ms. Wang began sending these money transfers, or whether they were subject to statutory deductions. Interstellar provided no documentation of electronic funds paid to Mr. Trudeau. That said, Mr. Trudeau does not dispute that the housing allowance was supposed to be $900 or that he received the extra payments as stated by Interstellar, amounting to $3,800 in net wages.

15. Interstellar argues that Mr. Trudeau is obligated to return the money he received above the agreed-upon monthly housing allowance. Alternatively, it says Mr. Trudeau has been unjustly enriched by the extra payments.

16. Mr. Trudeau says he believed the extra payment represented a raise for good performance and for managing the hotel with limited assistance. He says he would not have remained as the GM had he not received the extra payments. Regardless of what Mr. Trudeau believed at the time, he now acknowledges, and I find, that Mr. Trudeau did not receive a salary increase. The May 14, 2018 wage statement clearly identifies his salary separate from the housing allowance.

17. As set out in *Health Employers Assn. of B.C. v. B.C. Nurses Union*, 2005 BCCA 343, an employer cannot unilaterally address overpayments by deducting them from wages ("aggressive self-help"). Unless the employee agrees or legislation or a collective agreement authorizes deductions, the employer must attempt to recover overpayments by bringing a grievance or claim against the employee.

18. Such claims typically proceed under 1 of 2 common law doctrines: mistake of fact or unjust enrichment. For the reasons explained below, I find that Interstellar is entitled to recover the overpayment under mistake of fact, so it is not necessary to consider Interstellar's unjust enrichment argument.

19. At common law, if the mistake that caused an overpayment can be characterized as a mistake of fact (rather than a mistake of law), the employer can recover the overpayment unless an exception applies. The exceptions include "detrimental reliance" (the employee relied on the overpayment), and "unreasonable delay" (the employer delayed seeking to enforce its rights) (Donald Brown and David Beatty, *Canadian Labour Arbitration*, 5th Ed., (Westlaw: 2019) at 8:1410).

20. Here, I find Interstellar's double payment of the housing allowance was a clerical error and a mistake of fact. There is no dispute that Interstellar did not intend, and did not believe it was required, to pay Mr. Trudeau the housing allowance twice each month. So, the question is whether one of the exceptions applies.

21. The legal test for detrimental reliance is whether the employee underwent a material change in financial circumstances as a result of the overpayment. The employee

bears the burden of proving detrimental reliance (see *Alberta v. Alberta Union of Provincial Employees*, 2018 ABQB 221 ("*Alberta*").

22. Mr. Trudeau says it would be difficult repay his former employer and still provide for his family. I find he is arguing financial hardship, which is not the same as detrimental reliance. Detrimental reliance occurs at the time of the error and arises when the employee incurs a debt or obligation as a result of reliance on the employer's error. Typical cases involve large purchases or loan obligations that the employee would not have made but for the overpayment. Financial hardship arises from the employer's request to repay what has been paid in error and the difficulty in doing so (*Alberta*).

23. The burden of repayment that Mr. Trudeau raises was acknowledged in *Vancouver School District No. 39 v. I.U.O.E. Local 963*, 2000 CarswellBC 2977 ("*VSD39*"). In *VSD39*, the employer erroneously continued to pay its employee a percentage of his salary in lieu of benefits after he became entitled to, and received, benefits. This continued for over 2 years. Despite acknowledging that many employees live paycheque to paycheque and adjust their lifestyle to their take-home pay, Member Dorsey held that the employer was entitled to recover its overpayment. This was because the employee's evidence was "too vague and inconclusive" to conclude that the employee's purchases were made because of the overpayment. There was no evidence of the employee's overall financial situation and the context within which he made the decisions he did.

24. In the present case, Mr. Trudeau has not provided evidence of his financial situation or any purchases made or obligations incurred in reliance on the overpayment. He does refer to mortgage payments but he does not say when he purchased a home or whether it was as a result of the extra $900 monthly payment. I find Mr. Trudeau has not met his onus of establishing detrimental reliance.

25. As for unreasonable delay, it is undisputed that Interstellar became aware of its mistake after no more than 7 months, and immediately upon discovery requested Mr. Trudeau repay the overpayment. I find there was no unreasonable delay.

26. I find Mr. Trudeau was not entitled to the extra $900 per month he received. It follows that he must repay the overpayment. Interstellar claimed $3,800 as the net overpayment, which was not disputed by Mr. Trudeau. I find Interstellar has established its entitlement to this amount, subject to any reduction proven in the counterclaim.

### *Counterclaim – breach of contract*

27. Mr. Trudeau gave an unchallenged account of a November 27, 2018 meeting with Ms. Wang. I accept that in that meeting, Ms. Wang told him that he had to pay back the housing allowance overpayments. I accept she also told him that he would no longer receive a housing allowance. Although there are no wage statements to confirm, Interstellar does not dispute that it revoked the housing allowance at that time.

28. An employer's obligation to pay any monetary benefit must be founded in the employment agreement. It follows that an employer that mistakenly pays its employees more than they are entitled to is not obliged to continue overpaying. In such circumstances, it may correct the mistake and revert to paying its employees under the agreement's terms (Donald Brown and David Beatty, *Canadian Labour Arbitration*, 5th Ed., (Westlaw: 2019) at 8:1410).

29. Mr. Trudeau appears to agree about the applicable law, as he does not claim to be entitled to the overpayment after Interstellar discovered and rectified it. What Mr. Trudeau claims is that he was still entitled to the original $900 housing allowance. He says there was no legitimate reason for Interstellar to take it away.

30. The employment relationship is a contract and is governed by general principles of contract law. Once the parties agree to the terms of employment, neither party can unilaterally impose new or different fundamental terms into the agreement. Even if the employee accepts the employer's new terms, consideration (something of value to which the party was not already entitled) is generally required to modify the agreement (see *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25).

31. Courts have been clear that compensation is a fundamental term of employment. In *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327 ("*Wronko*"), the court said that an employee who clearly rejects a change to a fundamental term of an employment contract can later insist on adherence to the previous terms, even if he remains in employment. In other words, an employee's continued work does not amount to acceptance of an employer's unilateral change to the employment contract. There are many reasons an employee may continue to work despite rejecting a change to their contract, including the need to support a family. It is undisputed that Mr. Trudeau supported a family.

32. Mr. Trudeau says at the November 2018 meeting he was upset and expressed his frustration to Ms. Wang over the loss of the housing allowance. I find that he voiced his objection to Interstellar. Although he continued working, I find he made it clear that he did not accept the wage reduction. I find Interstellar imposed the change unilaterally. I also find no evidence that Mr. Trudeau received any consideration for giving up $900 per month, which amounted to 23% of his bi-weekly earnings. This further supports the finding that there was no binding agreement on the wage reduction.

33. Interstellar argues that because the hotel did not start construction, Mr. Trudeau was not entitled to the housing allowance. While I am mindful that the purpose of a housing allowance, on its face, is to compensate an employee for housing costs, the facts do not support Interstellar's asserted right to revoke the allowance without notice.

34. Mr. Trudeau received the housing allowance for at least 7 months while living at the hotel, waiting for construction to start. There is no evidence that parties agreed to any conditions on the housing allowance. It was not stated to be temporary or time-limited. It was not contingent on construction proceeding within a certain time frame.

35. Even if there were conditions, there is no evidence of any change in a condition on which the allowance could have been based. By all accounts, Interstellar still planned to proceed with construction and still required Mr. Trudeau to move off-site.

There is no evidence Mr. Trudeau would not have continued to receive the housing allowance but for the employer's double payment error. In that respect, revoking the allowance may be characterized as prohibited "aggressive self-help" (see *Health Employers Assn.*, above). Additionally, Mr. Trudeau said he would not have remained employed had he not received the allowance. In those respects, I find the housing allowance became part of Mr. Trudeau's overall compensation package. I further find that the housing allowance, at 24% of his earnings, was a significant part of Mr. Trudeau's compensation.

36. For those reasons, I find Interstellar's revocation of the housing allowance was a breach of the employment contract. It follows that Mr. Trudeau is entitled to continued payment of the allowance to the end of his employment.

37. Interstellar did not dispute Mr. Trudeau's calculation of $4,410 for the unpaid housing allowance. I accept Mr. Trudeau's calculation, acknowledging that Interstellar paid biweekly so it is an approximation. That is all the evidence allows, given the lack of payroll records.

***Remedy***

38. Mr. Trudeau has proved his entitlement to $4,410 in gross wages. Interstellar has proved its entitlement to recover an overpayment of $3,800 in net wages, after deductions for income tax, Canada Pension Plan (CPP) and Employment Insurance (EI). The gross wage overpayment is certainly higher. But because Interstellar did not supply payroll records, I am unable to precisely translate net wages into gross or vice versa.

39. Ordering Mr. Trudeau to repay wages will have implications for both parties. It will mean Mr. Trudeau will have been taxed on a higher income than he has received. Interstellar would be required to issue revised T4s for 2018 and 2019, allowing Mr. Trudeau to refile his income tax returns for those years.

40. In *VSD39*, Member Dorsey was faced with a similar lack of evidence on the exact amounts of gross and net overpayments and the impact those overpayments had

on income tax, CPP and EI. He decided that the employee had to repay the employer but reserved jurisdiction to determine the amount and manner of repayment if the parties were unable to agree. Other decisions have ordered the employee to make the first step of paying back the overpayment, but emphasized that the employer is obligated to "sort out all of the resulting implications." (*Mira Nursing Home v. King-MacCullu*, 2016 NSSM 35).

41. The parties did not ask me to decide who was correct on the issues and leave it to them to sort out the appropriate payments. Even if they had, a declaratory order is outside the tribunal's small claims jurisdiction. The tribunal's mandate is to provide speedy and economical dispute resolution. Therefore, I am making an order based on the evidence before me, bearing in mind that bringing certainty and finality to this dispute is in both parties' interests.

42. Interstellar said it paid Mr. Trudeau an extra $900 gross per month for 7 months. That amounts to $6,300, which does not square with a $3,800 net overpayment. Mr. Trudeau's 2018 T4 showed the employer remitted approximately 23% of his income to income tax, CPP and EI. A $3,800 net payment on $6,300 gross amounts to remittance of 40%.

43. Interstellar is required by section 28 of the *Employment Standards Act* to keep payroll records, including wage statements. I draw an adverse inference against Interstellar for failing to produce the records that would verify the gross wages overpaid. For that reason, and because Interstellar only claimed $3,800, I do not order Mr. Trudeau to pay Interstellar anything. However, I find his $4,410 counterclaim is fully set off by the undetermined gross overpayment. The result is that the amounts owed entirely offset each other and I make no order for payment.

44. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. The parties had divided success, so I make no order for reimbursement of tribunal fees. Neither party claimed dispute-related expenses.

## ORDER

45. I allow Interstellar’s clam and Mr. Trudeau’s counterclaim in part. The result is that I find nothing is owed, and so I make no order for payment between the parties.

Micah Carmody, Tribunal Member