Paying employees with your favourite things? Court permits giving equipment as severance

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Money may buy matching diamonds, but can an employer then pay its employees with those diamonds when money is running low? A recent decision in Alberta, *Hubbard v. 651398 British Columbia Ltd*,[1] suggests that in the right circumstances, giving tools, steel, and aluminum to a federally regulated employee as severance pay is acceptable.

What you need to know

1. The *Canada Labour Code* governs employment standards for federally regulated employees, while the Alberta *Employment Standards Code* governs employment standards for provincially regulated employees in Alberta.
2. The *Canada Labour Code* may permit federally regulated employers to give items of value to employees as severance pay if the value of the items exceeds the employees' statutory entitlement and the employees accept the items.
3. However, provincially regulated employers in many provinces are prohibited from doing the same. For example, the Alberta *Employment Standards Code* specifies that termination pay must be paid by an employer in Canadian currency.

The decision

The employee was originally a truck driver and then a fabricator for the employer, and was employed from June 28, 2010 to November 22, 2018, when his employment was terminated. The parties agreed that under the *Canada Labour Code*,[2] the employee would have been entitled to severance pay in the amount of $9,828. The employee was further claiming $1,033 in vacation pay.

The employee testified that the employer gave him a welder, a set of torches, and two welding curtains at the time of termination. The employer's evidence was that the employee received a welder, toolbox, tools, steel, aluminum, and other business supplies. The parties disputed over which items were given and the value of the items.

Most importantly, the employee testified that he asked the employer, in regards to the items, "Is this severance?", and the employer answered, "That's all I have to offer. There is no severance. I'm just giving this to you."

The employer argued at trial that the items were provided to the employee as severance pay, and not as a gift. On this point, the Court emphasized that the employee accepted the items without protest, and found that there was an oral agreement between the employee and employer that the items were given as severance.

The Court accepted that the items were worth at least $30,000, which was significantly more than the $9,828 of severance owed. The Court found that there was no basis to refuse to uphold the parties' agreement, particularly given that the benefit provided to the employee was greater than his mandatory minimum severance pay entitlement under the *Canada Labour Code*. This arrangement was acceptable under section 168 of the *Canada Labour Code*, which allows for contracting or making any arrangement if the benefit conferred upon the employee is greater than their statutory benefits.

You can pay employees with your car? Not so fast

The Court in *Hubbard* allowed an employer to pay severance pay to employees with items of value; however, it is important to note that the employer in *Hubbard* is a federal undertaking subject to the *Canada Labour Code* as opposed to provincial legislation.

If the employee was provincially regulated in Alberta, the outcome of this decision would likely have been quite different. Section 11 of the Alberta *Employment Standards Code*[3] states:

> 11(2) An employee's earnings must be paid by an employer in Canadian currency
>
> > (a) in cash or by cheque, bill of exchange or order to pay, payable on demand, drawn on an authorized financial institution, or
> >
> > (b) if the employer so chooses, by direct deposit to the employee's account in an authorized financial institution of the employee's choice.

Similar legislation exists in Saskatchewan, Manitoba, and British Columbia, and several decisions have found that paying employees "in kind" is a breach of employment standards legislation in those provinces.

In the British Columbia Employment Standards Tribunal (BCEST) decision, *Kootenay Network Systems Inc. v. British Columbia (Director of Employment Standards)*,[4] for example, the employer argued that a vehicle was validly offered to an employee in exchange for the wages due to him, but he declined to accept it in lieu of cash. The Tribunal agreed with the Director's Delegate that Section 20 of the British Columbia *Employment Standards Act*,[5] which requires wages to be paid in Canadian currency, cheque, draft or money order, or by direct deposit was determinative of the issue, and the employee was therefore not obliged to accept a vehicle for wages owed.

Similarly, in the Saskatchewan Labour Relations Board decision in *Thiele and Saskatchewan (Director of Employment Standards), Re*[6], the employer argued unsuccessfully that the issuance of shares to its employees for no consideration constituted payment of wages equivalent to the value of the shares. The Board agreed with the adjudicator's decision that, "Even if shares were issued in exchange for unpaid wages, I cannot take the value of the shares into account as payment for wages. Both

Acts say that an employer must pay all wages to an employee in Canadian currency by cheques or deposit to the employee's account and that **any agreement allowing for payment of wages in any other manner is void**" [emphasis added].

This same reasoning was applied by the BCEST in *Mason Trains Ltd., Re*,[7], where the Tribunal upheld the finding that an arrangement to issue shares to employees in exchange for labour was a contravention of section 20 of the British Columbia *Employment Standards Act* and thereby void.

The BCEST has also held that wages cannot be paid in the form of free accommodations. In *MDK Enterprises Inc.*, *Re*,[8], the employer argued that the value of both rent and utilities that the employees benefited from during their term as caretakers of a resort property should have been deducted from their wage determination. The Tribunal found, however, that such an arrangement is not permissible as it would contravene section 20 of the British Columbia *Employment Standards Act.*

Although the Court in *Hubbard* allowed the employer, in the circumstances of that case, to give tools and other items to its employee as severance pay, such an arrangement has been found to be prohibited for provincially regulated employers in at least Saskatchewan and British Columbia, and would likely be prohibited in Alberta and Manitoba based on similar language in their respective provincial employment standards legislation.

[1] 2022 ABPC 22 (*Hubbard*).

[2] RSC 1985, c L-2: the employer's operations were a federal undertaking.

[3] RSA 2000, c E-9.

[4] 2002 CarswellBC 4361 (British Columbia Employment Standards Tribunal).

[5] RSBC 1996, c 113.

[6] 2016 CarswellSask 789 (Saskatchewan Labour Relations Board).

[7] 2012 CarswellBC 829 (British Columbia Employment Standards Tribunal).

[8] 2010 CarswellBC 4360 (British Columbia Employment Standards Tribunal).

By

Tommy Leung, Emma Morgan

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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