

# CANADIAN Employment Law Today

## Reclaiming overpayments due to clerical errors

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January 22, 2014



**Question:** If an employee's paycheque was too much due to a clerical error, can the employer reduce the subsequent paycheque to even it out? The employee has a set salary and regular pay schedule.

**Answer:** Yes. In the case of a clerical error, the employer can deduct the overpayment from the subsequent paycheque so long as the reconciliation of the overpayment is done within a reasonable amount of time after discovering the overpayment.

In Ontario, s. 13 of the Employment Standards Act (ESA) places specific limitations on the ability of an employer to make deductions from employee wages. An employer shall not deduct or withhold wages except in the following circumstances: as required or authorized by statute, pursuant to a court order, or with the employee's written authorization (including the precise amount or formula to calculate the amount of the deduction).

However, none of those exceptions applies to the scenario posed in the question above. So how can the employer make the deduction? The answer comes from case law and an examination of the purpose of legislation such as s. 13 of the ESA.

Section 13 is designed to prevent an employer from unilaterally recovering amounts through a payroll deduction. For example, a dispute between employer and employee over an unpaid loan cannot result in the employer simply deducting the disputed sum from the employee's payroll.

However, in the scenario posed above, the employee was overpaid through a clerical error. Accordingly, the amount in dispute was never owed to the employee and is therefore not to be regarded as wages payable.

In *MenuPalace.com Corp. v. Saladino*, a deduction from an employee's wages for vacation days taken but which had not yet been earned did not violate the ESA. The vice-chair explained that s.13 was not intended to prevent an employer from recovering a recent overpayment of wages, stating:

"Section 13 of the act significantly limits when an employer can make a deduction from an employee's wages. However, this provision is not so prescriptive that it prevents the employer from subsequently recovering

an overpayment of this nature, provided the deduction occurs within a reasonable period of time. The act is concerned with ensuring that employees are paid all the wages they have earned. Section 13 is designed to prevent an employer from recovering, through a payroll deduction, amounts that are unrelated to wages. Recovering a recent overpayment of wages, as is the case in this instance, cannot be considered a “set-off” or deduction from wages that is subject to section 13 of the act.”

Employers should be cautious about applying these principles too broadly. A clear mistake due to a clerical error is to be distinguished from other circumstances where an employer may wish to make a payroll deduction. For example, where an employer decides to pay an employee during a leave of absence when not required to do so, the employer cannot later characterize the payment as an “overpayment” and deduct the amount from the employee’s wages.

Where the issue is not a clerical error — for example, where a loan to the employee needs to be repaid — then the employer would require a clear written acknowledgement from the employee regarding a specific amount or formula to repay the money from wages. Failing such an acknowledgement, it would be necessary to commence legal proceedings seeking repayment of the money.

Finally, in a workplace where the employee’s relationship with the employer is governed by a collective agreement, it will be important to review the agreement for applicable language, if any.

For more information see:

- *Bear Day Care v. Hollander*, 2010 CarswellOnt 11089 (Ont. Lab. Rel. Bd.).
- *All-Way Transportation Services Ltd, Re*, 1979 CarswellOnt 855 (Ont. E.S.B. (Adjud.)).
- *MenuPalace.com Corp. v. Saladino*, 2008 CarswellOnt 5544 (Ont. Lab. Rel. Bd.).
- *Altman v. Steve’s Music Store Inc.*, 2011 CarswellOnt 1703 (Ont. S.C.J.).

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