**BC EST #D001/97**

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act* S.B.C. 1995, C. 38

- by -

Waysafer Wholefoods Limited
("Waysafer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 96/408

**DATE OF DECISION:** **December 5, 1996**

**DATE OF DECISION:** **January 2, 1997**

## DECISION

### APPEARANCES

| | |
|---|---|
| Walter Anderson | Waysafer Wholefoods Limited |
| Janice Hartley | Waysafer Wholefoods Limited |
| Lorraine Warren | Waysafer Wholefoods Limited |
| Paige Tesluck | Waysafer Wholefoods Limited |
| Kurstin Leith | Waysafer Wholefoods Limited |
| Davinder Sekhon | Waysafer Wholefoods Limited |
| Raymond Fichtner | On his on behalf |
| Adele Adamic | Counsel for Director of Employment Standards Branch |
| Glen Smale | Employment Standards Branch |

### OVERVIEW

This is an appeal by Waysafer Wholefoods Limited ("Waysafer") pursuant to Section 112 of the *Employment Standards Act* (the *"Act*") against Determination No. CDET 003038 which was issued by a delegate of the Director of Employment Standards on June 26, l996. The delegate determined that Waysafer owed Raymond Fichtner ("Fichtner") the sum of $6,108.67 representing unpaid wages, compensation for length of service and interest. Waysafer appealed the Determination on July 11, l996. It argues that no wages and compensation are owed to Fichtner.

A hearing was held on December 5, l996 at which time evidence was given under oath. Walter Anderson ("Anderson"), appeared for Waysafer. With him was Janice Hartley ("Hartley"), Lorraine Warren ("Warren"), Paige Tesluck ("Tesluck"), Kurstin Leith ("Leith") and Davinder Sekhon ("Sekhon"). Fichtner also appeared at the hearing. Adele Adamic appeared as counsel for the Director of Employment Standards. With her was Glen Smale, the investigating officer.

### ISSUES TO BE DECIDED

1. Is Waysafer entitled to make a deduction in the amount of $214.70 from Fichtner's wages?

2. Is Fichtner owed any overtime wages?

3. Was Fichtner's employment terminated for just cause?

**FACTS AND ARGUMENTS**

Fichtner was employed by Waysafer as a sales representative and delivery driver from November 10, l993 to September 5, l995. He was paid an hourly wage plus commissions.

Fichtner's employment was terminated on September 5, l995. He received no notice or compensation for length of service. An ROE was issued by Anderson, the General Manager of Waysafer, on September 8, l995 which gave the reason for issuance as "A" shortage of work. Approximately, one and one-half months later, Anderson advised UIC that he had made an error and the reason for issuance should have been dismissal.

Waysafer deducted the sum of $214.70 from Fichtner's August 1 to 31, l995 wages. The sum relates to a commission on Harts Deep Cove.

It is undisputed that Fichtner was paid straight time for all the hours listed on the Calculation Schedule attached to the Determination. What is in dispute is whether he worked all these hours. If he did, then he is owed overtime wages in the amount calculated by the delegate.

Anderson argues that the deduction of $214.70 from Fichtner's wages is not prohibited by the *Act*. This money was paid by mistake and never due to Fichtner. Anderson and Hartley, the President of Waysafer and wife of Anderson, testified that commissions are not due or payable on returned goods or unpaid balances owing to Waysafer. Fichtner was aware of, and verbally agreed to, this commission structure. Waysafer deducted $214.70 from Fichtner's wages because the customer returned part of the product and didn't pay for the rest. Anderson submitted a letter dated August 22, l996 signed by several drivers of Waysafer, including Sekhon, which states they were aware of the commission structure as outlined by Anderson. Anderson also submitted a transcript of a recorded conversation dated September 6, l995 between himself and Fichtner (the "transcript"), which contains references to commissions, as further evidence in support of his position.

Fichtner argues that the commission was due and payable to him and should not have been deducted by Waysafer. Commissions were to be paid on any product that he sold which were not returned in the same pay period or month in which the product was sold. The product in question was not returned in the same pay period that it was sold and therefore he is entitled to the commission. Fichtner stated that this was the first and only time he experienced a product being returned and he had never had any prior deductions or adjustments made to his commission earnings. Fichtner, who was not aware that he had been recorded by Anderson, stated that the transcript was reflective, to some extent, of the conversation he had with Anderson on September 6, l995.

Adamic argues that the deduction was made without Fichtner's authorization and as such it is in contravention of the *Act*. Further, the *Act* prohibits an employer from requiring an employee to pay any of its business costs. Adamic also argues that there was no clear policy on the payment of commissions to Fichtner. The August 22, l996 letter was signed

one year after Fichtner ceased working at Waysafer. Regarding the transcript, Adamic states that the sections pertaining to commissions indicate there is a dispute on the issue of when commissions are payable.

Anderson further argues that: he does not owe Fichtner any overtime wages; Fichtner never worked all the hours listed on the Calculation Schedule; Fichtner is guilty of "theft of time" and he was dishonest about his hours. Anderson said that Fichtner was regularly late, left work early, and took daily coffee and lunch breaks. On certain occasions he just stood around socializing or watching others work, and on other occasions he did nothing while waiting for his wife. He also conducted personal business on work time and took longer than other drivers to do the same job. Anderson said that Fichtner did not deduct any of this time from his daily hours. Neither did Waysafer. Anderson submitted affidavits from customers of Waysafer and he presented witnesses who confirmed the foregoing. Anderson stated that Waysafer was foolishly generous with Fichtner and in hindsight he should have stopped Fichtner's conduct. He said he did have discussions with Fichtner about his excessive hours, and Fichtner said his longer hours were due to his endeavoring to open new accounts and he did not expect or want to be paid overtime. Anderson said that in the 22 months Fichtner worked for Waysafer, he only opened one new account.

Fichtner claims he worked all the hours listed on the Calculation Schedule and is owed overtime rates of pay.

Adamic states that Waysafer paid Fichtner for all hours claimed at straight time, and did so without complaint, and only took issue with his hours after the issuance of the Determination. Accordingly, it condoned Fichtner's alleged conduct. Further, the evidence presented by Anderson only concerns small and not large amounts of time that Fichtner is alleged not to have worked.

Anderson also claims Fichtner's employment was terminated for just cause and therefore no compensation is owed. Anderson stated that Fichtner was terminated for incompetence, disobedience and serious insolence. Fichtner refused/neglected to stock and rotate the bread for Capers' stores, which is their largest customer. Anderson never gave Fichtner any written warnings. That is not his policy. He said he did, however, speak to Fichtner on four occasions about the complaints from Capers' store. In the last two conversations, prior to terminating Fichtner's employment on September 5, l995, he informed Fichtner of the serious nature of his behavior and warned him that he could lose his job if he continued to ignore his warnings and not provide a proper level of service. Specific time periods for improvement were not given to Fichtner as Anderson doesn't think that this is a necessary part of progressive discipline. Anderson stated that Fichtner did not heed his warnings and continued to refuse to work the products at Capers (including on the day of September 5, l995) and therefore his employment was terminated. On the day/day after Anderson told Fichtner that he was letting him go, they discussed the possibility of Fichtner going to work for Waysafer as an independent contractor operating out of Alberta. Anderson said that he wanted to let Fichtner down easy and didn't want to say he had been fired as they had been friends in the past.

Anderson submitted affidavits from individuals and presented witnesses who confirmed the above. Letters dated August 19, l995 and February 27, l996 from Capers to Waysafer indicate complaints were made about the service provided by Waysafer drivers and in particular Fichtner. Anderson said he thought he mentioned the first letter to Fichtner, although he can't recall if he actually showed him the letter. As well, Leith and Tesluck, who are employed at two of Capers stores, testified they complained to Waysafer and their head office about Fichtner. Tesluck, further testified that Fichtner told her that he was getting into trouble because of her complaints. Sekhon stated that he witnessed Anderson talking to Fichtner about the complaints from the Capers stores. Hartley stated that Fichtner knowingly put in jeopardy their contract with Capers. She further testified that she witnessed Anderson, on more than one occasion (including on
September 5, l995), advising Fichtner that his job was in jeopardy if he did not stock and rotate the bread and take the returns from the Capers stores. Anderson also referred to various sections in the transcript as further evidence in support of his argument on just cause.

Fichtner contends that when he raised the issue of the deduction with Anderson he was laid off work. He said he never received any warnings from his employer nor was he ever informed that his job was in jeopardy. He is not aware of any complaint letters from Capers and as far as he is concerned there were no complaints from Capers and he had no problems at Capers. Further, he does not recall ever dealing with Tesluck. He submitted various letters from customers of Waysafer which make favorable comments on his work performance.

Adamic argues that if Anderson had cause he would not have needed to clandestinely tape Fichtner the day after his employment was terminated. Further, Anderson doesn't have a clear understanding of progressive discipline and he has not established just cause for the dismissal of Fichtner. Anderson had a laid back approach to discipline; he did not provide Fichtner with any written warnings that his job was in jeopardy; he did not give Fichtner time to improve and did not give him any customer complaint letter. Moreover, the discussion Anderson had with Fichtner about going to work for him in Alberta does not indicate that Anderson considered Fichtner's conduct to be of such a nature as to warrant immediate dismissal. Anderson's lack of clarity concerning Fichtner's dismissal is further confirmed by his own statements in the transcript.

Anderson states that Waysafer has 20 years of untarnished history and is a good employer, and in support of this claim he submitted various letters from past and present employees. Anderson states that, in contrast to Waysafer and its witnesses, Fichtner is not credible. He was deceitful regarding the withdrawal of his small claims action and in getting letters from Waysafer customers; he was involved in questionable WCB, UIC and ICBC claims; he borrowed money from Waysafer and never paid the full amount back; he caused Waysafer to lose revenue when he stored his belongings in a space rented to someone else; he said he signed the company's no competition agreement, but in fact he never signed it; and once when product went missing, Fichtner initially suggested some one else took it, but later he confessed to the theft. Anderson submitted various affidavits which support the foregoing.

Finally, Anderson argues that the delegate, in contravention of Section 77 of the *Act*, did not give him the opportunity to see or respond to various documents (Fichtner's complaint form and reference letters ) prior to the issuance of the Determination. He only saw these documents after he filed his appeal.

Adamic states the content of the complaint form and reference letters were disclosed to Anderson, prior to the issuance of the Determination, via letters from the investigating officer. Further, Anderson admits that he did not provide the transcript and his various affidavits to the investigating officer prior to filing an appeal. Adamic also argues that the fact that Anderson clandestinely recorded Fichtner raises doubts about his credibility. As well, many of Anderson's witnesses have less than an arm's length relationship with Anderson. Hartley is his wife and Sehkon and Warren are current employees. Further, Adamic states that all the affidavits bear a striking similarity and none were produced prior to the issuance of the Determination.

**ANALYSIS**

In this appeal hearing, the appellant bears the burden of proving that the Determination was in error.

Regarding the deduction, if Waysafer had shown that Fichtner was previously aware of, and had agreed to, the commission structure as outlined by Anderson, then I would be satisfied that the deduction was not in violation of the *Act*. However, Waysafer has not shown this to be the case. First, Fichtner signed no document like the August 22, l996 letter which was signed by other drivers of Waysafer. Second, Fichtner's understanding of when a commission was to be paid is not in harmony with Anderson's view. Third, there is no past practice which would support Waysafer's position. Finally, the transcript is equivocal on the issue of when commissions are payable, and when adjustments/deductions from wages can be made if customers do not pay or return a product. Given the foregoing, I find that Waysafer is not entitled to make the deduction.

I further find that Fichtner is owed the overtime wages as calculated by the delegate.

First, Waysafer's witnesses did not provide specific and exact times when Fichtner allegedly did not work all the hours for which he received straight time rates of pay. Their evidence was vague or of a general nature and it fell short of clearly challenging Fichtner's claim regarding his hours of work. I offer the following examples. Anderson and Hartley testified that Fichtner came in late and left early, but they did not provide exact times. Anderson and Warren stated that they observed Fichtner standing around one day doing nothing for 45 minutes, but neither provided the exact day. Warren and Sekhon testified that Fichtner regularly/always came in late, but they did not agree on the length of time (Warren said 1-20 minutes late and Sekhon said 10-15 minutes late); they did not provide a specific time on a specific day; and their evidence does not establish the total time worked by Fichtner in a day.

Second, Waysafer's arguments that Fichtner took longer than others to do his job does not mean, even if it were true, that this time can be deducted from his wages. The *Act* doesn't provide for the non-payment of wages as a remedy for poor or inefficient performance.

Third, I find it unlikely that Anderson would have knowingly, for almost two years, paid Fichtner for hours he did not work. If Fichtner did not work these hours, it is more probable, in my view, that Anderson would have made the adjustments at the time and not raised it, for the first time, after Fichtner filed a complaint for overtime wages. This conclusion is bolstered by the fact that Anderson had no hesitation in deducting the amount of $214.70 from Fichtner's wages for an alleged overpayment in commissions. The amount of money involved in the "theft of time" issue is potentially much higher.

Finally, even if I were satisfied that Fichtner was overpaid in some sense (and I am not), I am not convinced that Waysafer can deduct the time/wages after allowing it for almost two years.

For the above reasons, I conclude Waysafer has not established that the Determination is incorrect as regards the overtime issue.

The burden of proof for establishing that there was just cause to terminate Fichtner's employment rests with Waysafer. Just cause can include a single act of misconduct if the act is willful, deliberate and of such a consequence as to repudiate the employment relationship. It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures by the employer. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate just cause by proving that the employee was clearly and unequivocally warned that that her/his performance or behavior is unacceptable and that failure to meet the employer's standards will result in termination of employment. The principal reason for giving a clear and unequivocal warning is to avoid any misunderstanding and giving an employee a false sense of security that her/his performance or behavior is acceptable to the employer.

I am not satisfied that just cause has been established in this case. There is no evidence to support the view that Fichtner engaged in an intentional act that fundamentally breached the employment contract. Although I accept that he probably was told about complaints from Capers, I am not satisfied that he was warned clearly and unequivocally that his job was in jeopardy. Anderson and his wife claim that Fichtner was told on more than one occasion his job was in jeopardy. This is denied by Fichtner. If Fichtner was told more than once, then his conduct was condoned by Waysafer. In my view, however, he probably was not told this on any occasion and I prefer Fichtner's evidence on this issue mainly because of the way events unfolded on September 5, l995 and thereafter. In my view, there was no clear and unequivocal dismissal for just cause on September 5, l995. First, if there had been I would have expected to find this reason and not shortage of work on the ROE. Second, Anderson's comments in his own transcript range from talking about a permanent layoff/dismissal, to giving Fichtner a new opportunity in Alberta , to giving him some time

off. I particularly find it improbable that if Fichtner was dismissed for cause on September 5, l995 that Anderson on that day or shortly thereafter would discuss taking him on as an independent contractor. Third, Anderson's testimony at the hearing about wanting to let Fichtner down easy and not wanting to tell him he was fired, shows his lack of clarity in his communication with Fichtner on September 5, l995 and shortly thereafter. In summary, given the actual dismissal was not clear, I find it highly unlikely that Fichtner received two prior clear and unequivocal warnings that his job was in jeopardy. Accordingly, I find Fichtner is owed compensation as calculated by the delegate.

Finally, I find no evidence of a contravention of Section 77 of the *Act.* My review of the investigating officers letters to Waysafer prior to the issuance of the Determination indicates nothing of any substance was withheld and Waysafer was given every opportunity to respond to the Director.

**ORDER**

I order pursuant to Section 115 of the *Act* that Determination No. CDET 003038 be confirmed.

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**Norma Edelman**
**Registrar**
**Employment Standards Tribunal**

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