

An appeal

- by -

Jody Nelson

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: John Savage

FILE No.: 2004A/178

DATE OF DECISION: January 4, 2005

DECISION

SUBMISSIONS

Jody Nelson, the Complainant, for the Appellant

Bonnie Hall and Bhagwan Sangtani, for the Respondent

Luke Krayenhoff for the Director of Employment Standards

INTRODUCTION

This is an appeal pursuant to section 112(1) of the *Employment Standards Act* from a determination of a Delegate of the Director (the “Delegate”) that no wages were due Jody Nelson, the employee (“Nelson”), from the employer, Bonnie Hall and Bhagwan Sangtani, operating as Beyond Sense Silver Jewelry (“Beyond Sense”).

The appeal was heard by written submissions.

Before the Delegate a major issue was whether Nelson was an employee of Beyond Sense or an independent contractor. The Delegate found that Nelson was an employee. No appeal is taken from that determination.

In detailed reasons the Delegate found that Beyond Sense was the employer and that Beyond Sense owed Nelson for unpaid commissions. The Delegate also found that while travel expenses were not paid, the amount paid in commissions exceeded minimum wages and expenses, so no additional claim for expenses was made out.

Finally, the delegate found that inventory was missing and this could be treated as an unauthorized advance and deducted from unpaid wages.

Since inventory was missing, and there were some missing sequential invoices, the Delegate concluded that sales were made but not reported, and this constituted just cause for dismissal. Prior to Nelson’s termination there is no evidence of or suggestion of there being any issue regarding missing inventory. As an alternate ground, the Delegate concluded that the employee by making themselves unavailable for work could be dismissed for just cause.

Nelson appeals the findings of the Delegate of the Director alleging that the Director erred in law.

ISSUES IN APPEAL

The issues in the appeal are whether the Delegate of the Director erred in law (1) in determining that missing inventory could be treated as an unauthorized advance and deducted from unpaid wages, (2) in determining the amount of unpaid wages, and (3) in determining that there was just cause for dismissal.

Missing Inventory as an “Unauthorized Advance”

As noted, the Delegate found that there were unpaid wages. The Delegate, however, found that the amount of wages due could be offset by the cost of missing inventory. The Delegate called this an “unauthorized advance” on wages.

Section 21(1) of the *Employment Standards Act*, R.S.B.C. 1996, Chap. 113, provides for the payment of wages as follows:

- 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose....

1995, c. 38, s. 21.

As some wages were admittedly due, it is necessary to find authority in an enactment to “withhold, deduct or require payment of all or part of an employee’s wages for any purpose”.

The Delegate does not reference any enactment in his decision, nor can I find any authority to withhold payment of wages in these circumstances. This Tribunal has consistently held that section 21(1) means that, absent statutory authorization, wages cannot be withheld: see, for example, *D. W. D. Logging Ltd.* BC EST D290/01, *Aluminex Extrusions Limited* BC EST D250/98, *Classic Collision Ltd.* BC EST D197/97, etc. Thus, in the absence of an assignment, cash shortages cannot be deducted (*Kalum Kabs* BC EST D008/99) nor money lost (*S & A Enterprises* BC EST D284/97) nor monies stolen (*Dominion Hotel* BC EST D539/98 varied on other grounds, *Vancast Investments* BC EST D010/96).

In his reasons the Delegate describes the value of the missing inventory as an “unauthorized advance”. The agreement between Beyond Sense and Nelson was entered as an exhibit in this proceeding and makes it clear that the jewelry was “consigned” to Nelson and continued to be owned by Beyond Sense. There is simply no evidence to support a finding that inventory supplied Nelson was an advance of any kind.

In the result, the Delegate erred in law in finding the value of the missing inventory to be an unauthorized advance and to be deductible from wages payable.

This is not to say that the employer is without remedy with respect to any alleged missing inventory. The employer is open to pursue other remedies such as an action in the civil courts in order to adjudicate the question of whether there is missing inventory and whether, in law, Nelson is responsible for the same: *Dominion Hotel* BC EST D539/98 varied on other grounds, *Vancast Investments* BC EST D010/96, *Dan Foss Couriers* BC EST D690/01, *Al’s Custom Autobody* BC EST D299/01.

Just Cause for Dismissal

The Delegate found there to be just cause for dismissal. As a result, no termination pay was warranted. Just cause was founded by the delegate on two grounds, (1) the missing inventory, and (2) the fact that the employee was not available to work during the month of December.

Nelson was employed as a sales representative of Beyond Sense from October 2002 until December 5, 2003 when she was terminated by Beyond Sense. The hourly records submitted indicate that she worked intermittent but regular hours for Beyond Sense prior to that time.

Shortly before Nelson's termination she advised Beyond Sense that she would be working full time for the month of December with another employer. She declined an offer of 6 days work through December. She was then terminated.

Nelson demanded to be paid her unpaid commissions. Beyond Sense refused to make payment until the inventory was reconciled. Beyond Sense then took the position that although commissions were unpaid this was offset by the missing inventory. I have described above how the Delegate construed, wrongly, the missing inventory as an unauthorized advance.

With respect to the issue of the missing inventory, Nelson said she returned the entire inventory that she had. There were some missing invoice numbers which she explained as involving mistakes in writing up orders, such that some invoices had to be rewritten. Of course the question of missing inventory only arose after Nelson's termination from employment.

I have reviewed the documents and submissions regarding the missing inventory in some detail. This allegation is, in effect, an allegation of fraud or dishonesty. The onus of proof required is commensurate with the seriousness of the allegations. Such a ground may be proven by a preponderance of probabilities, but there are degrees of probability within that standard. A civil proceeding does not require a standard so high as a criminal court, but does require a degree of probability which is commensurate with the allegation: *Bater v. Bater* [1950] 2 All E.R. 458 at page 459.

It is apparent that there were significant inconsistencies in the way Nelson and Beyond Sense tallied and itemized inventory. For example, Beyond Sense in its correspondence of December 23, 2003 claim a differing tally of the inventory returned by 7 pieces, however, there is an arithmetical addition error of this amount. The total returned inventory was 1222 pieces as claimed by Nelson not 1214 as claimed in the correspondence.

Moreover the correspondence reveals that in some cases there are more items returned and sold than the records of Beyond Sense indicated were actually given, although some of this may be explained by differing descriptions given the various items. The letter also describes 1365 rings as having been given Nelson, itemizes 66 rings as being returned, notes 882 rings as being sold, but then tallies under the "Missing" column "3 over" instead of 417 missing. Faced with these inconsistencies in my view it would be difficult to come to a reliable conclusion regarding the missing inventory. Moreover, the Delegate seems to equate missing inventory with intent to deceive the employer, which simply does not follow.

It should be noted that the termination of Nelson was made prior to any allegation of missing inventory. In the original complaint filed Nelson describes the termination thus:

"The Complaint started on Dec 5/04 when Bonnie fired me and refused to pay me. Bonnie had fired me because she was angry with me for not working for her at her jewelry kiosk at the mall. She had offered me 6 days through the month of December. I had accepted another job for the month which was going to provide me with full time work. She became angry with me over this and fired me – saying that I was unreliable. She asked me to return her jewelry – which I did..."

Beyond Sense in correspondence to the Director dated April 24, 2004 describes the event in these terms:

"The final clause in the agreement between these parties states 'Both the Company and Jody retain the right to suspend this agreement at any time. If this agreement is suspended for any reason, all unsold jewelry will be immediately returned to the Company'. The Company had asked Jody if

she would work some retail for them at the end of November and during December. Jody agreed, but then verbally informed the Company on November 26th and in writing, copy of undated letter attached, that she had accepted full-time employment with a floral company, starting immediately, which would lead to part time-employment in the new year. The Company then asked for return of the Company's jewelry and suspended their agreement".

Thus, the evidence of both parties is consistent: the question of missing inventory had no bearing on the decision of Beyond Sense to terminate the employment of Nelson. The accounting for inventory took place after Nelson had been terminated. If the wrong alleged is that Nelson failed to report sold inventory during the taking of inventory then the wrong took place at the time of the accounting. At that time the employment relationship had already been terminated.

In terminating an employee an employer can rely on incidents or conduct which is only ascertained after the employee has been discharged: *Ennis v. Canadian Imperial Bank of Commerce* (1986), 13 C.C.E.L. 25 at page 43. The cause, however, must have existed at the time of termination: *Brown v. OK Builders Supplies Ltd.* (1985), 11 C.C.E.L. 243 (B.C.S.C.), affd 3 A.C.W.S. (3d) 282 (C.A.).

In my opinion it is unnecessary for the Delegate to have come to any conclusion regarding the missing inventory. In this case while the contract between Nelson and Beyond Sense does not specify set hours of work it is apparent that the hours worked while intermittent were also regular. The month of December was a busy period for Beyond Sense. Thus, as the Delegate concludes, the complainant "made herself unavailable for work during a busy period for the employer" without reasonable excuse, and this warranted her dismissal.

In the circumstances I would uphold the Delegate's finding that the dismissal was for just cause but only on the basis that the employee made herself unavailable to work for the employer without reasonable excuse.

Amount of Wages Due

Nelson appeals the finding of the Delegate regarding the amount of wages due. The wages owing calculated by the Delegate were comprised of five components, minimum wage owing, commission owing, vacation pay, travel expenses and compensation for length of service. In light of my earlier findings it is only necessary to consider the first four categories.

Minimum Wage Owing

The Delegate found that \$194.38 is owed in minimum wages for the month of June. Nelson argues that \$201.13 is owed for the month of June. Beyond Sense supports the Delegate's finding. There is no error in law apparent from the record provided. I therefore affirm the Delegate's finding that \$194.38 is owed in wages for the month of June.

Commission Owing

The Delegate found that \$687.16 is owing in commissions. This is close to the figure put forward by Beyond Sense. Beyond Sense supports the Delegate's finding. There is no error in law apparent from the record provided. I therefore affirm the Delegate's finding that \$687.16 is owing in unpaid commissions.

Travel Expenses

Nelson claimed travel costs paid on sales trips. The amount claimed is \$534.25. The written contract between the parties specifies that expenses incurred by Nelson on sales trips are to be paid by her. Thus, the 15% commission paid by Beyond Sense is to cover the hours worked and travel costs incurred.

The Delegate found that “This provision is not inconsistent with the Act so I accept that the commission can be applied to travel expenses in addition to regular wages”. The commissions earned for the final six months of employment were \$2,416.43 which, the Delegate found, exceeds the expenses claimed and minimum wage earned.

The *Employment Standards Act* contains the following provision:

21. ...

- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

1995, c. 38, s. 21.

In discussing what minimum wages were owed the Delegate made the following finding:

“At the complaint hearing she estimated her travel time spent on her sales trips at my request. Beyond Sense’s position was that the travel time should not be paid as the trips were primarily for pleasure with sales visits on the side. However, the employment contract specifically contemplates the complainant traveling throughout BC and Washington State and specifically excludes much of the Lower Mainland as a sales region. Therefore for the complainant to undertake her job properly she had to travel and her time spent doing this must be compensated.”

The Delegate rejected the position that these trips were for pleasure and required compensation for travel time. Indeed, Nelson was required to travel since, as the Delegate notes, much of the Lower Mainland was excluded from her sales region.

This Tribunal has determined that a variety of expenses are the business costs of an employer including travel costs (*Pacific Forest Maintenance Ltd.* BC ESTD# 202/96) costs of a company vehicle (*Aluminex Extrusions Ltd.* BC ESTD# 250/98) credit card costs (*Pacific Shores Nature Resort* BC ESTD# 309/00), the cost of courses (*Lacroix* BC ESTD# 267/96) gasoline costs (*Keep on Trucking* BC ESTD# 087/99) airfare costs (*Olympic Forest Products* BC ESTD# 588/98), the lease payments on a laptop computer (*City Choices Digital Guides Inc.*, BC ESTD # 510/02) etc.

It follows that the expenses incurred in making sales trips were a business cost for the employer, are wages, and must be paid.

I find that travel costs in the amount of \$534.25 are wages owed Nelson by Beyond Sense.

SUMMARY

The appeal is allowed, in part.

The findings by the Delegate of the Director (1) that minimum wages are owing in the amount of \$194.38, and (2) that commissions are owing in the amount of \$687.16, are confirmed.

The finding by the Delegate of the Director that the Employer could offset the value of alleged missing inventory as an unauthorized advance is reversed.

The finding by the Delegate of the Director that travel expenses could be deducted from wages owed is reversed, and those expenses are found to be \$534.25.

The finding by the Delegate of the Director that the dismissal was for just cause is confirmed, but on the basis that the employee made themselves unavailable for work, without reasonable excuse.

ORDER

The appeal is allowed, in part.

Beyond Sense is ordered to pay Nelson unpaid wages in the amount of \$1415.79 plus interest as required by the Act.

John Savage
Member
Employment Standards Tribunal