Employment Standards TRIBUNAL

An appeal

- by -

Clifford Morris and Darlene Morris operating as Westwood Vitamins

- 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

ADJUDICATOR: E. Casey McCabe

FILE No.: 2001/708

DATE OF HEARING: December 20, 2001

DATE OF DECISION: January 14, 2002

DECISION

APPEARANCES:

Clifford Morris, on behalf of Westwood Vitamins

Debra Miltimore, for herself

No one appearing on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act by Clifford Morris on behalf of Westwood Vitamins from a Determination dated September 18, 2001 which found the employer liable for unpaid wages in the amount of $711.07.

ISSUE

Is the Complainant owed wages?

FACTS

A preliminary issue arose at the commencement of the hearing. On December 18, 2001 the complainant telephoned the Employment Standards Tribunal to inform the Tribunal that she would not be able to attend the hearing scheduled for December 20. She indicated that she would be available to participate by telephone but that she would only be available between the hours of 9:00 and 10:00 a.m. The complainant submitted an undated letter received at the Tribunal office on December 19, 2001, explaining that she had started a new job in October, 2001, and that due to the constraints of starting her new position and some personal limitations she would not be able to attend the hearing. She also advised that her new employment required her to interview clients and that her first appointment of the day was scheduled for 10:00 a.m. on December 20, 2001.

Mr. Morris attended at the hearing. He objected to the complainant being allowed to participate in the hearing by telephone. He advanced the argument that if the complainant, as a respondent, was not able to attend the hearing that his appeal should succeed on that basis. He asked that his appeal be allowed on a summary basis.

I considered the written submission of the complainant and the oral submission of the appellant. I concluded that I would allow the complainant to participate by telephone. I did not accede to the appellant's request that his appeal be allowed on a summary basis. The failure or refusal of a respondent to participate in a proceeding does not affect the onus upon an appellant to convince

the Tribunal that a Determination is wrong. A respondent may choose whether to participate in a hearing or not.

In this case the respondent chose to participate for the first hour. As indicated in her letter promptly at 10:00 a.m. the respondent advised that she had a client waiting and terminated her participation in the hearing. At this point Mr. Morris was giving his evidence. The respondent signed off and Mr. Morris continued with his participation in the hearing. I had informed the respondent at the commencement of the hearing, when she reiterated that her participation would be limited to approximately one hour, that her withdrawal from the proceeding was by her choice at her peril. The respondent acknowledged that she would be voluntarily leaving the proceedings and acknowledged the risk in doing so.

I turn now to the background facts of this case. The appellants operate a store known as Westwood vitamins which sells vitamins and other health products. The complainant worked at the store from April 3, 1999 to July 28, 2000 as a salesperson. She commenced employment at the rate of $9.50 per hour and received two wage increases to bring her rate at the time of her termination of employment to $10.50 per hour.

The evidence given by the complainant both in her written submission and during the time that she did participate in the hearing indicates that she gave her employer approximately 3 weeks notice of her intention to leave. That notice spanned the mid month payday. The complainant states that she worked 114 hours in total in the month of July and therefore claims payment of $1,1097.00 which is 114 hours at $10.50 per hour. She received a mid-month advance of $500.00 leaving a balance of $697.00.

The employer did not pay her the balance of the wages owing. The employer testified that once he received her notice of intention to terminate the employment relationship he undertook an investigation regarding the hours the employee had worked. His investigation revealed that she had claimed 6 hours per day for Thursdays commencing in April of 1999 when in fact she had worked only 5 ½ hours on those days because she was required to pick her children up from school. Secondly, a dispute arose over whether she was working between 9:00 and 10:00 a.m. in the period of April, 2000 to July 2000, or whether she was attending at a health and fitness club. The employer took the position that it was entitled to deduct the ½ hour that was missed on the consecutive Thursdays and that it was entitled to deduct 1 hours' pay for the 35 days worked between April and July where the complainant did not attend the health and fitness club.

Finally, the employer decided, even after the deduction of the ½ hour for the Thursdays and the hour for the days upon which she was not attending at the health club that there was not money owing to the complainant for the following reason. When she left her employment there were a number of open containers of vitamins and other supplements in the store. The employer asked the remaining employees if they had opened those bottles. The employees denied doing so. The employer therefore assumed that the complainant had opened the bottles and, by not affixing a till receipt to the open bottles, had violated company policy. The employer therefore withheld

the balance of the pay on the basis that the retail value of the open bottles exceeded the amount of pay that the complainant was entitled to after the deductions for the Thursdays and the hours not worked between 9:00 and 10:00 a.m. had been made. I will return to this later.

The appellant also indicated in its appeal and at the oral hearing that it was unhappy with the manner in which the Branch conducted the investigation. The appellant took the position that the officer that had written the Determination was not the officer that had originally commenced the investigation. The appellant stated that after he had provided his evidence to the officer who had commenced the investigation that officer had indicated to him that the complainant had no wage claim and that the matter would go no farther. Obviously, the officer that had concluded the investigation determined that there was a wage claim and made a Determination. The appellant argues that the Determination should be vacated on the basis of the oral statements made by the original investigating officer.

I am not prepared to vacate or cancel the Determination based on this evidence. The appellant has been granted an oral hearing. If there were any deficiencies with the investigation or with the substance with the Determination dated December 18, 2001 the oral hearing will cure those defects. The branch was aware that the appellant was raising this matter in his appeal. The branch chose to respond in writing to the issues raised by the appellant rather than appear in person. The appellant has, through this oral proceeding, been given full opportunity to address the issues in his appeal.

I am satisfied that the investigating officer, in writing the Determination, thoroughly investigated the wage claim of the complainant and the payroll records submitted by the employer. The Determination on its face and the written submission by the investigating officer indicate that she did consider the claim by the appellant that the wage claim of the complainant should be reduced by a ½ hour for those Thursdays on which the complainant left early. I am convinced that the investigating officer took that amount into consideration when she made her calculations of the total pay owing. Therefore I find that this basis for reducing the award as advanced by the employer is unfounded. The pay for the ½ hour was deducted by the officer in her original calculations.

I turn to say at this point that the investigating officer in arriving at the quantum of the amount owing used a common method of determining the gross pay owing to the employee and subtracting from that amount the money that had been paid. The officer's calculations also indicate that she included in her amounts payment for a missed statutory holiday in November 1999 and excluded the employer's claim that the complainant did not work between 9:00 and 10:00 a.m. on certain days between April and July. I turn now to that claim.

The evidence indicates that in April the complainant and the employer agreed that she could attend a fitness club at which the employer held a corporate membership between the hours of 9:00 and 10:00 in the morning. The employer agreed not only that the complainant would be included in the corporate membership but that she would be paid for this hour. The complainant

was to try and promote the sale of vitamins and other supplements at the store with other patrons of the fitness club. The evidence indicates that between April 4, 2000, and June 8, 2000, the complainant attended the fitness club on 16 occasions. It should be mentioned at this point that the complainant worked a regular 4-day week Tuesday through Friday. The complainant testified that the arrangement was not working out for her and that she informed the employer of this in June and ceased going to the club.

The employer testified that he was not informed that she had ceased going to the club. Mr. Morris stated that he did not learn that she was not attending until she gave her termination notice and he began to investigate the payroll records in order to calculate her final pay. The employer testified that although he had agreed that she could attend the fitness club on the corporate membership and that he would pay her for the hour that she spent there each morning he did not learn until she had given her termination notice that she was not attending the fitness club. The employer stated that although he would drive by the store daily and occasionally had called the store between 9:00 and 10:00 a.m. he was not alarmed that the store was not open because he believed the complainant was at the fitness club. When he found out that she was not attending the fitness club but continued to claim the pay he became alarmed. He testified that his investigation revealed that she had been claiming the ½ hour pay on the Thursdays and the 1 hour pay in the mornings particularly in April, May and June, 2000, and he therefore deducted the equivalent pay from her final pay cheque. The employer's investigation included obtaining a computer print out of the times the corporate membership indentification card had been swiped to allow access by the respondent to the club facilities.

He also indicated that he attributed the cost of the opened packages of product to the complainant and, when those costs were entered into his calculation, he concluded that he owed the complainant no further monies beyond the $500.00 draw that she was given in July.

With respect to the employer's claim to offset the cost of the open product I am not prepared to sustain that deduction. Section 21(1) of the Act states:

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

The employer did not call any of the other employees of the store to testify regarding the open product. Nevertheless, even if those other employees had been able to testify that the complainant had opened the product the employer still would not be entitled to deduct these monies, as there had been no written assignment between the employer and the employee. See *Re 550635 B.C. Ltd. c.o.b. Jack's Towing (1997) BCEST # D100/01 and Re Vancouver Police Board 19 B.C.L.R. (2d) 394 (Co.Crt.).*

For these reasons I am not prepared to sustain the employer's claim to deduct the cost of the open bottles of product.

However, I am prepared to sustain the employer's claim to entitlement to deduct from the calculation of gross wages the 1 hour per day for those days in the April to July period that the complainant did not attend the health club. There is a contradiction in the evidence on this point. The respondent did address the matter during her participation in the proceeding. Her evidence and the employer's evidence conflicts. I prefer the evidence of the employer. I accept that he did check his premises on a daily basis prior to 10:00 a.m. on those days that the complainant was not at the health club and determined that the store was not open. I accept his explanation that he was not concerned at the time because he believed that the complainant was attending the health club.

ORDER

The Determination is remitted back to the director's delegate to recalculate the gross wages owing by deducting the 1 hour per day for the 35 days that the employer claims the complainant did not attend the health club.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal