

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Rhonda Bennett
("Bennett")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No: 1999/615

DATE OF DECISION: January 24, 2000

DECISION

OVERVIEW

Rhonda Bennett (“Bennett” or “the Appellant”) appeals a Determination by a delegate of the Director of Employment Standards dated September 21, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The Determination is that what Bennett seeks to charge her former employer, Consumer Direct Contact (CDC) Ltd. (“CDC” or “the employer”), for the inconvenience of a home office, is not wages which are recoverable under the *Act* in that she paid nothing extra.

The appeal is for two reasons. Bennett claims that the Determination is wrong in that CDC promised to pay a portion of her rent, then reneged on that promise. Beyond that, the employee claims that CDC closed its office and forced her to provide her own office. According to Bennett, that left her with no real choice but to set up a home office. She argues that, from that point on, she began to pay part of her employer’s business costs in that only part of her rent was for personal living space, the rest went towards her place of work.

ISSUE TO BE DECIDED

What I must decide in this case is the matter of whether or not the employee shows that the Determination ought to be varied or referred back to the Director for reason of an error in fact or in law.

FACTS

Bennett was employed by CDC. For the 16 months, June, 1995, to October, 1996, the employee worked out of her home.

CDC at one time had its own office but it closed that office. It was at that point that Bennett began to work out of her home, a rented, one bedroom apartment. From what I can see, Bennett was open to the idea of working out of a home office but she really had no choice in that if she wanted to keep her job. The cost of renting separate office space was prohibitive.

Bennett’s home office consisted of a telephone line, a desk, a computer, a fax machine, and a filing cabinet, all provided by CDC. That sat against a wall in the main living space of the apartment.

Bennett, in filing her taxes, claimed a deduction for business use of her car but not for home office expenses. According to Bennett, her employer did not allow her to claim the latter.

According to Bennett, Lesley Green of CDC, in discussing the move to a home office, led her to believe that CDC would pay a part of Bennett's rent. While CDC denies having done so, I find that CDC did lead Bennett to expect that some sort of financial assistance would be forthcoming. That is the most likely explanation for her failure to claim home office expenses on filing income tax returns. But, beyond that, I find that employer and employee never did reach agreement on the amount to be paid. Bennett makes no mention of some particular amount.

ANALYSIS

The Determination rejects Bennett's claim for compensation for the home office for reason of the fact that she did not pay anything extra and the compensation sought is not wages which are recoverable under the *Act*.

Bennett would like the delegate or Tribunal to enforce what is in her view CDC's agreement to pay part of her rent but I see nothing enforceable under the *Act*. That is for reason of the fact that the amount of financial help is left open. And allowances and expenses are not wages under the *Act*.

Section 18 provides for the collection of wages.

- 18 (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
- (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

But as the term "wages" is defined, in section 1 of the *Act*, it does not include allowances and expenses.

"wages" includes

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
- (d) money required to be paid in accordance with a determination or an order of the Tribunal, and
- (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

- (f) gratuities,
- (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

(h) allowances or expenses, and

(i) penalties;

(my emphasis)

Bennett has established that CDC led her to believe that it would pay part of her rent. And no amount of rent was paid. Did CDC falsely represent a condition of employment and, thereby, persuade Bennett to work? If it did, then it contravened section 8 of the *Act*.

8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:

- (a) the availability of a position;
- (b) the type of work;
- (c) the wages;
- (d) the conditions of employment.

And the Director has the power to require a remedy.

79 (1) On completing an investigation, the director may make a determination under this section.

(2) ...

(3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:

- (a) require the person to comply with the requirement;
- (b) require the person to remedy or cease doing an act;
- (c) impose a penalty on the person under section 98.

It may be that it was not for reason of promised help with her rent that Bennett was persuaded to work out of a home office: That she was in fact swayed by the prospect of just working from home, home office tax deductions and/or something else again. She does appear to be ready to settle for use of what are home office tax deduction alone (which is, of course, something which she will want to take up with Revenue Canada). But the matter of whether section 8 of the *Act* has or has not been contravened is a matter which has yet to be determined, as may be the matter of remedy. As the delegate has neither done that, nor offered any explanation for the failure to do so in the Determination, it is referred back to the Director. It is the sort of matter which the Director should decide in the first instance.

The big question in this case is whether Bennett was or was not required to pay any of her employer's business costs.

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.

(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.

(again, my emphasis)

In rejecting Bennett's claim for compensation, the delegate notes that Bennett did not pay anything extra and states that what is claimed is not wages which are recoverable under the *Act*. That is to sidestep the issue. It is not important whether Bennett paid anything extra or not. What the delegate had to decide is only whether CDC did or did not require the employee to pay any of its business costs. If it did, the amount paid is, contrary to what the delegate seems to say, clearly recoverable as if it were wages by virtue of section 21 (3) of the *Act* and/or section 79 (3)(b). And, of course, "*money required to be paid by an employer to an employee under this Act*" and also "*money required to be paid in accordance with a determination*" is "wages" as the term is defined at (c) and (d) of the definition (see above).

Section 81 requires that the Director's Determinations contain the reasons for each and every determination.

- 81** (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:
- (a) the reasons for the determination;
 - (b) if an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or another amount, the amount to be paid and how it was calculated;
 - (c) if a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;
 - (d) the time limit and process for appealing the determination to the tribunal.

(my emphasis)

The Determination fails to address the issue of whether or not section 8 of the *Act* has been violated, even though that is what Bennett complains about in part. It sidesteps the matter of whether or not Bennett ended up paying part of her employer's business costs. It is also misleading in that the delegate seems to say, contrary to sections 21 (3) and 79 (3)(b), that the Director can only recover what is, strictly speaking, 'wages' for work. It may be that once all matters have been investigated and considered, that Bennett's claim will again be rejected but a delegate may not reject her claims for the reasons that are given in the Determination dated September 21, 1999.

The matter of whether or not section 8 of the *Act* has been contravened and the matter of whether or not section 21 has been contravened, and the matter of remedy is referred back to the Director.

ORDER

I order, pursuant to section 115 of the *Act*, that Bennett's complaint be referred back to the Director for the purpose of addressing matters as set out above.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal