

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-

Metrotel Communications Inc.

(“Metrotel”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/697

DATE OF HEARING: February 26th, 1999

DATE OF DECISION: March 5th, 1999

DECISION

APPEARANCES

Jack MacKay & Michael Nesbit	for Metrotel Communications Inc.
David L. Meyers	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Metrotel Communications Inc. (“Metrotel”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 15th, 1998 under file number 077617 (the “Determination”).

The Director’s delegate determined that Metrotel owed its former employee, David L. Meyers (“Meyers”), the sum of \$1,270.65 in unpaid wages earned by Meyers during the period September 16th to October 7th, 1996. The Director’s delegate accepted Meyers’ assertion that he was hired as a Metrotel sales representative at a minimum monthly of \$2,000 and that he worked 95.5 hours for Metrotel before resigning on or about October 7th, 1996.

The appeal was heard at the Tribunal’s offices in Vancouver on February 26th, 1999 at which time I heard the testimony of Jack MacKay (“MacKay”)--a Metrotel officer (president), director and shareholder--and Mr. Victor Tan, a Cantel sales manger, on behalf of the appellant and from Meyers on his own behalf. I have also considered the various written submissions and documents submitted by the parties to the Tribunal.

ISSUES TO BE DECIDED

Metrotel concedes that Meyers is entitled to be paid for a 3-hour training session he attended on September 19th, 1996 conducted by local long-distance supplier, Vancouver Telephone Company Ltd. Beyond that, however, Metrotel maintains that it never actually hired Meyers and, in any event, even if there was an employment relationship, Meyers did not work the hours he claimed to have worked for Metrotel. Metrotel asks that the Determination be varied to reflect only 3 hours worked by Meyers.

FACTS

Metrotel's evidence

Metrotel is a Rogers Cantel Inc. authorized dealer; Metrotel operates a retail outlet in Burnaby and has 4 employees including the company's principal, Jack MacKay. MacKay was the appellant's principal witness. He testified that he received a resumé from Meyers on September 12th, 1996 and interviewed Meyers for a sales representative position on the 16th at which time an offer of employment was extended to, but not accepted by, Meyers.

MacKay stated that he was particularly impressed with Meyers' previous experience as a Cantel sales representative, experience gleaned during Meyers' tenure at two of Cantel's corporate stores. The two sales representatives that were then working for Metrotel were comparatively inexperienced and had yet to complete Cantel's training program. MacKay says that he offered Meyers a position starting at \$1,500 per month, or commission earnings, whichever was higher. Meyers expressed concern about two matters; first, he wanted a higher guaranteed minimum monthly salary, second, he wanted a "demo" cellular phone (which I understand is a "free" telephone--*i.e.*, no airtime charges--provided by Cantel to authorized sales representatives). Meyers indicated that he "would get back" to MacKay regarding Metrotel's employment offer. Metrotel's offer of employment was not reduced to writing; indeed, there is a dearth of documentary records from either party.

In anticipation of Meyers' acceptance of Metrotel's employment offer, Meyers was invited to a training seminar conducted by Vancouver Telephone Company Ltd.; this latter company's long-distance services were to be marketed by Metrotel. This seminar was conducted at Metrotel's premises on September 19th, 1996. Parenthetically, I should note that immediately prior to the seminar, Meyers and Metrotel's accountant, Michael Nesbit, signed a "Profile of Salesperson" form and a "Non-Disclosure and Non-Competition Agreement", both of which were Vancouver Telephone Company forms. On both documents, Meyers was listed as Metrotel employee.

According to MacKay, at the end of the seminar (which ran from 9 A.M. to Noon) Meyers inquired once again about a "demo phone" only to be told that none was yet available; Metrotel's employment offer remained outstanding at this time and still had not been accepted by Meyers. On September 25th, Meyers attended at the Metrotel store and reiterated his position that without a "demo phone" he could not commence working for Metrotel; accordingly, the suggestion was made that Meyers could use, as an interim measure, a pager and, in fact, a pager was provided to him. Meyers left with the pager in hand saying that he "would think about it [the offer] and be back in touch". On October 3rd, MacKay spoke with Meyers by telephone at which time Meyers said that he "still had not made up his mind"; MacKay asked him to come into the store. In the meantime, MacKay had obtained a less than favourable report from one of Meyers' previous employers. Meyers never came into the store on the 3rd so MacKay paged him on the 4th and again on the 7th--Meyers did not respond to either page. On October 8th, Meyers attended the store, spoke with Mr. Nesbit, and then left. Nesbit informed MacKay that Meyers had turned down Metrotel's offer of employment.

On October 16th, Meyers hand delivered a letter to Metrotel in which he demanded payment for 102 hours worked from September 16th to October 7th, 1996. This letter was presented to Mr.

Nesbit who signed the following endorsement: "Upon David Meyer [sic] providing evidence of the hours worked, Metrotel will immediately pay David Meyers for these hours worked."

MacKay, in support of Metrotel's position that it never actually employed Meyers, notes that Meyers:

- never signed any Revenue Canada forms to confirm his appointment;
- was not issued any business cards;
- never attended the regular Monday, Wednesday and Friday 9 A.M. sales meetings;
- never signed, unlike all other employed sales representatives, a "commitment letter" which set out, *inter alia*, the employee's duties and the commission structure;
- never completed or submitted, unlike the other employed sales representatives, daily, weekly and monthly sales reports;
- never was issued a company identification number (used to track commission earnings); and
- never, in fact, consummated a single sale.

MacKay acknowledged that while Metrotel is obliged to pay Meyers for the 3-hour Vancouver Telephone Company training session held on September 19th, it should also be noted that Meyers' attended the sales seminar on the expectation that he *would be* employed, not on the basis that he was *already* a Metrotel employee.

Meyers' evidence

Meyers testified that he responded to a newspaper advertisement placed by Metrotel and was subsequently interviewed by both Nesbit and MacKay, although mainly by the former. Meyers says that he was offered a position as a sales representative at a monthly guaranteed salary of \$2,000 (recall that MacKay's evidence was that the guaranteed minimum was \$1,500 per month), or commissions earned, whichever was higher.

Although he asked for, but did not receive a "demo phone", he was issued a pager on September 16th. He agrees that he never signed a commitment letter, any Revenue Canada forms or any other document that would confirm the fact of, or the terms of, his employment with Metrotel. Meyers testified that the bulk of his time was spent notifying past customers and prospecting for new business. He says that in the short time he worked for Metrotel he had "between 2 and 6 sales" although Meyers was unable to provide any further particulars as to the name of the customer or the type of product or service sold; there is absolutely no documentary record before me of any sale having been effected by Meyers. Further, there are no records to confirm any "prospecting" activity on the part of Meyers--he says he submitted all of his records to Metrotel when he

resigned whereas Metrotel denies ever having received any such records. The only records that are before me pre-date Meyers' relationship with Metrotel.

FINDINGS

On the balance of probabilities, I cannot conclude that an ongoing employment relationship was ever established between Meyers and Metrotel. I accept Metrotel's submission that Meyers' attendance at the Vancouver Telephone Company seminar was based on the expectation that Meyers would be joining Metrotel, however, that employment relationship never came to fruition. While, clearly, Meyers is entitled to be paid for the training that he undertook at Metrotel's behest--by definition, such "training" is compensable time under the *Act*--I am unable to conclude that Meyers has any wage entitlement beyond that 3-hour training period. I am of the view that Metrotel provided Meyers with a pager in order to assuage Meyers' demand for a demo phone; the pager was given to Meyers as a form of inducement to accept the offer of employment; an offer that was, I find, never actually accepted by Meyers.

I am particularly influenced by the complete lack of any documentation that would, in the ordinary course of events, corroborate an employment relationship between these parties--unlike the situation regarding the other two sales representatives, there is no engagement letter; no Revenue Canada TD-1 form; and, of particular importance, not a single sale by Meyers. There is no evidence before me that, upon "termination", a Record of Employment was ever issued to Meyers, nor a T-4 record of earnings, and now, some 2 1/2 years later, Meyers has yet to demand that such forms be provided to him.

I simply cannot accept that an experienced cellular sales representative would not be able to effect even one sale during an alleged 102 hours of active endeavour. Meyers' claim that he had between 2 and 6 sales appears to be a fabrication, being that it is completely unsupported by *any* documentation. *Query*: Why would an experienced sales representative not keep that portion of the order form that is to be retained by the sales representative so that he could confirm his sale and track his commission?

Presumably, during the course of 102 hours of labour, Meyers would have contacted a great number of individuals regarding Cantel's cellular services. I note Mr. Tan's (a Cantel dealer sales manager) evidence that it was, and remains, a Cantel requirement that all authorized sales representatives (a category that would include Meyers if he was employed by Metrotel) prepare daily, weekly and monthly sales reports--including the names of persons contacted by the representative--which, in turn, are submitted to Cantel. The absence of any such forms in this case is, in my view, a telling omission.

Further, even if it could be said that Meyers did accept an offer of employment, the evidence does not establish, to my satisfaction, that he undertook any productive labour on behalf of Metrotel. Certainly, the evidence does not show that any putative sales efforts by Meyers were undertaken by him under the direction and control of Metrotel. While Metrotel, through its accountant Nesbit, offered to pay Meyers for any work that he could prove he undertook on Metrotel's behalf,

Metrotel ultimately rejected Meyers' contention that he had performed any such work. I find that I am driven to the same conclusion.

In the absence of any employment relationship, I need not determine whether the initial employment offer was based on a monthly guarantee of \$1,500 or \$2,000. Regardless of the amount set out in the offer, that offer was not accepted by Meyers. Hence, Meyers is only entitled to be paid for the 3-hour training session at the minimum hourly wage (\$7 in 1996), plus 4% vacation pay, provided for under the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to reflect an amount payable by Metrotel to Meyers of **\$21.84** together with additional interest to be calculated by the Director in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal