

An appeal

- by -

Ragnar Jewellers Ltd.  
("Ragnar")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2001/892

**DATE OF HEARING:** April 2, 2002

**DATE OF DECISION:** April 11, 2002

## DECISION

### APPEARANCES

Ragnar Bertelsen, President/Director	for Ragnar Jewellers Ltd.
Lazar Fainberg	on his own behalf

### INTRODUCTION

This is an appeal filed by Ragnar Jewellers Ltd. (“Ragnar”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Ragnar appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on December 12th, 2001 (the “Determination”).

The Director’s delegate determined that Ragnar did not have just cause [see section 63(3)(c) of the *Act*] to terminate Lazar Fainberg (“Fainberg”) and, accordingly, was obliged to pay Fainberg the sum of \$3,565.50 on account of 5 weeks’ wages as compensation for length of service payable pursuant to section 63(2)(b) of the *Act*.

This appeal was heard at the Tribunal’s offices in Vancouver on April 2nd, 2002 at which time I heard the testimony of Ragnar Bertelsen and Jim Kerr, on behalf of Ragnar, and Fainberg on his own behalf. No one appeared at the appeal hearing on behalf of the Director. In addition to the witnesses’ testimony, I have also considered the various documents and submissions the parties have filed with the Tribunal.

### ISSUE ON APPEAL

Ragnar terminated Fainberg on the basis that it had just cause, namely, theft. This allegation was rejected by the delegate. Ragnar says that the delegate ought to have found, based on the evidence presented, that it had just cause for termination.

### FINDINGS

An allegation of theft is perhaps the most serious allegation that can be made against an employee. Although an employer need not prove such an allegation beyond a reasonable doubt in a “wrongful dismissal” case (since this is not a criminal proceeding), the employer is nonetheless obliged to show by clear and cogent evidence that the probabilities suggest that the employee is a thief--mere suspicion is not enough. I am not satisfied that the employer in this case has met its evidentiary burden.

Ragnar is in the jewellery business, both as a retailer and as a designer/manufacturer. Fainberg worked for Ragnar as a bench jeweller in the firm’s design studio. Ragnar alleges that Fainberg stole 7.4 grams of 14k yellow gold during the period from January 23rd to March 1st, 2001.

Ragnar became suspicious of Fainberg when another employee stated that Fainberg was making jewellery at his home--this allegation, by the way, is nothing more than an allegation; there is absolutely no proof

before me that such was the case. In any event, Mr. Bertelsen (Ragnar's principal) and Mr. Jim Kerr (the studio foreman) concocted a scheme to "trap" Fainberg.

The production process proceeds as follows. Mr. Kerr weighs the raw gold before it enters the production line and then records the weight on an envelope within which the gold is placed. The envelope containing the gold is then given to Fainberg for purposes of casting. Fainberg then melts the gold and pours it into a mould (there are over 1500 such moulds)--the finished mould is referred to as a "tree". There is no loss of gold during the casting process. The various raw jewellery components (say, for rings or earrings) are cut from the "tree" and then placed into separate "job" bags along with other materials (say, precious stones) needed to complete the particular jewellery items.

No one ever observed Fainberg taking the gold. The missing gold was never found on his person. The police were not involved in any sort of investigation and no charges were ever filed. Ragnar says that Fainberg had the opportunity to take the gold and that the firm's records suggest that he must have done so. When confronted, Fainberg denied that he was taking gold and even offered to have the police search his residence, however, as previously mentioned, there was no police involvement in this matter.

During the January 23rd to March 1st investigation period, Mr. Kerr kept a separate log in which he subsequently re-weighed the "trees" and the raw jewellery items after the same had been returned to Kerr by Fainberg. There should be no loss of gold during the casting process--*i.e.*, the "before" and "after" weights should be identical. For the most part, there was no differential but on three separate occasions there were shortfalls of 14k yellow gold. This latter point is significant, says Ragnar, because Fainberg was working with different types of gold and silver and the fact that the missing gold was only 14k yellow gold suggests that Fainberg was taking the gold to be used in a particular jewellery item that he was making "on the side".

Fainberg was one of 7 bench jewellers in the design studio but, apparently, the only one who did the castings that produced the jewellery "trees". Once Fainberg fell under suspicion, Mr. Kerr (who initially weighed and recorded the amount of gold given to Fainberg) requested that Fainberg, after doing the casting, return the "tree" and the raw gold components to Mr. Kerr. All of the gold material was placed in a box which was put on top of (but, surprisingly, not inside) a safe in the general work area. After work was concluded for the day, Mr. Kerr weighed the all of the gold in the box and compared it with the weight of the material initially given to Fainberg. As previously noted, on three separate occasions, shortfalls (totalling 7.4 grams of 14k yellow gold) were discovered.

In my view, the above circumstances fall well short of proof--even on a balance or probabilities--that the missing gold can be attributed to a theft by Fainberg. I say this for several reasons. First, the gold in the box that was placed on the top of the safe was accessible to anyone in the design studio (typically, 10 to 12 employees). Second, Mr. Kerr says he was able to "keep an eye" on the box during working hours but, obviously, he did not have the box under constant observation. Third, Mr. Kerr, alone, weighed the gold after the shop had closed. While I do not suggest that Mr. Kerr is the thief, given the absence of any independent witness, it is entirely possible that Mr. Kerr removed the gold in question. Fourth, the initial weighing was also done by Mr. Kerr--again, without any independent witness to corroborate the weight recorded. How can we be sure that the initial weight, or for that matter, the post-casting weight, was accurate?

Ragnar may well have had a *bona fide* suspicion about Fainberg. Nevertheless, there is no satisfactory proof that Fainberg is a thief. The appeal is dismissed.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$3,565.50** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**