Employment Standards TRIBUNAL

An appeal

- by -

Tsunami Technologies Inc.
("Tsunami")

- 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: James E. Wolfgang

FILE No.: 2002/063

DATE OF DECISION: May 7, 2002

DECISION

OVERVIEW

This is a continuation of an appeal by Tsunami Technologies Inc. ("Tsunami") from a Determination by the Director of Employment Standards (the "Director").

The original appeal by Tsunami, formerly Island Pacific Business Products Ltd., pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") related to a Determination issued by the Director on February 5, 2001. The Determination found Tsunami owed Raelle Johnson ("Johnson") $16,051.71 for minimum wages, statutory holidays, vacation pay, commissions, expenses and compensation for length of service. Tsunami claimed the amount of the award in the Determination was grossly overstated and were prepared to pay Johnson $338.00.

An appeal hearing was heard by the Tribunal on June 26, 2001 and the calculations were referred back to the Director for re-calculation of the proper commissions to be paid Johnson. The Order included "the payment of commissions, the 2% commission on sales in the Nanaimo territory as provided for in the February 28, 2000 employment contract and the 10% reorder commission". There was also the commission on the large contract in Port Alberni that was cancelled when Johnson was terminated and the calculation of statutory holiday and vacation pay. The remainder of the Determination had been confirmed.

According to the Delegate there was a delay in making a final recalculation because the employer did not receive a copy of the Decision and the file had changed from one Delegate to another. The final recalculation found Johnson was not entitled to any commission on the large contract in Port Alberni and the Delegate changed the amount of earnings and commissions.

The recalculation was transmitted to the parties on December 21, 2001. The parties were requested to review the new calculations and respond by January 25, 2002. There were a number of changes in the December 21, 2001 document. The previous Delegate had applied both the minimum wage and commissions to the pay periods. The recalculation found Johnson was entitled to minimum wage or commission, whichever was the greater, but not both. It also found a number of deductions from Johnson's commissions that were not identified in the January, February, March, April and July pay statements. There were no pay statements provided for May or June 2000. As no explanation was provided by Tsunami the deductions were considered unauthorized and in violation of the *Act*. The submission stated if Tsunami could provide information that justified the deduction the Delegate would review his position. The new calculation awarded $14,681.44 to Johnson.

Johnson did not respond by January 25, 2002 thus the Delegate assumed she had accepted the revised calculations.

Tsunami claimed they contacted the Delegate by telephone on January 24, 2002 advising they would not accept the decision or the payout amounts. This information was contained in an e-mail sent to the Delegate dated February 12, 2002. The e-mail stated:

> This note will confirm as per telephone conversation on January 24th That (sic) I will not accept the decision or payout amounts detailed in your letter to me December 21, 2001, I understand that at this point it will get referred back to the tribunal.

The Delegate stated Tsunami contacted him on January 25, 2002 indicating they were not prepared to accept the calculations and were not prepared to make a reasonable offer of settlement. The Delegate waited for two weeks for Tsunami to respond in writing setting out the reasons for disagreeing with the calculations, when nothing was received he submitted his report to the Tribunal.

ISSUE

Should the Determination be varied or confirmed?

THE FACTS

In a letter dated February 26, 2002, Johnson advised the Tribunal, although she believed she was entitled to some commission on the Port Alberni contract, she was prepared to accept the December 21, 2001 recalculation.

Tsunami wrote to the Tribunal on April 5, 2002 stating:

> In response to Raelle Johnson's letter, I think this process is very flawed for a number of reasons:
>
> 1.) Hours worked
>
> 2.) Determination of Resignation
>
> On the first point, Raelle Johnson claimed to have worked in excess of 55 hours per week; this fact was supported by other employees. However, the tribunal did not even mention the four affidavits from current staff noting that they worked no more than 35 hours per week. The fact that the tribunal did not even take into account the current staff hours makes me question the fairness of this process.
>
> On the second point, Raelle suggests that she was unjustly let go, however Raelle did resign; I have enclosed her letter of resignation for your perusal.
>
> I would also like to have this issue solved expediently, however I feel that the Tsunami Technologies company has not been adequately heard or represented by the Employment Standards or the Tribunal.

ANALYSIS

I will first address the question of hours worked by Johnson. Tsunami claims the Tribunal did not mention the four affidavits from current staff submitted by them. My records indicate there were five letters submitted. The fact they were not mentioned does not mean they were not given consideration in reaching a decision on the appeal. That evidence was considered along with all of the evidence either presented at the hearing or submitted to the Tribunal. A review of that evidence may be beneficial.

Ronni Johnson, who submitted one of the letters, was hired on September 12, 2000, three weeks before Johnson left the company. She was not in a sales position and worked as the Office Manager in Victoria. She would have limited knowledge of the hours worked by Johnson.

In the letter from Shawn Nagurny she indicates she is the Nanaimo Accounts Manager and sets her own hours. We do not know what those hours are except she indicates they are driven by "results". As there was no Accounts Manager in Nanaimo during Johnson's employment we must assume she would not have any direct knowledge of the hours worked by Johnson.

The letter from Ray Palmer indicates he works about 36 hours per week. We have no information if those were the hours worked by Palmer during the time Johnson was employed or if he had any direct knowledge of the hours worked by Johnson.

The letter from Amberlyn Taylor would indicate she was employed during the time of Johnson's employment and her evidence is she works between 6 and 8 hours per day. She does indicate there are times when she will work beyond the regular workday to meet her sales quota.

Charly Cardilicchia was not hired until several months after Johnson left and can only give evidence of the current hours worked by her.

Contrasting with that we have the evidence of several people who worked for Tsunami during the time Johnson was employed. Their evidence, as indicated in the Determination, was the expected hours of work during that period were approximately 11 hours per day.

In the email to Johnson dated March 20, 2001, Alex Fraser ("Fraser"), the Sales Manager during part of the time Johnson was employed as an accounts manager, indicated, in part, "A regular 55-60 hour work week is what is required and expected if you want to learn and excel,"……

This evidence was similar to that presented at the hearing by Fraser, as a witness for Tsunami, and the witness called by Johnson who also supported the position a 55-60 hour week was expected. Further evidence at the hearing stated a change had been made in the hours of work after Johnson left Tsunami.

We must recognize that written submissions cannot be given the same weight as evidence given at a hearing where there is an opportunity to cross-examine the witness.

The Record of Employment for Louisa Horler, who was terminated by Tsunami, stated:

> Louisa was not willing to work the required hours to manage the territory, a commission job like this requires a few hours in the evening to prepare for the next day.

I am satisfied, based on all the evidence including the statement above that during the time Johnson was employed by Tsunami there was an expectation of extra hours to be worked by the account managers. As indicated in the original decision, as there was no record of hours worked by Johnson kept by Tsunami, we must rely on the records of the employee, even if flawed.

It must also be remembered that Tsunami never indicated during the original appeal that Johnson did not work extra hours. As stated in their appeal to the Tribunal dated February 26, 2001:

> It is important to note this is a commissions based job. If one chooses to work over 40 hours it is because they see the opportunity to make more money. I have on numerous occasions told my reps that the more you put in the more you will get and suggested if they want to make over $60,000 per year they would have to put in the extra effort. However under no circumstances was the employee ever asked to work a 55-hour week.

Later in the same appeal, Tsunami stated:

> In regard to overtime pay none will be calculated as it was only expected that Raelle work a 40-hour week if she chose to work more hours it was because she desired to earn more commissions.

The evidence at the hearing and before the Tribunal clearly indicated Tsunami was aware the account managers were working in excess of 40 hours. Under the *Act*, employees, including commission sales employees, are entitled to overtime if working in excess of *40* hours per week.

In dealing with the second question raised by Tsunami, whether Johnson resigned or was terminated, again we must look to the record. In his testimony before the hearing, Fraser, when referring to the Port Alberni contract, stated that "after Raelle was terminated" the order was cancelled.

There was also the evidence of Johnson who indicated she was prepared to work in Parksville for Tsunami, however a forced move to Victoria as a result of the company's reorganization was not an option. She gave notice she would leave on October 31 if she could not be accommodated. This change in the employment relationship was of sufficient importance to be considered constructive dismissal. Even if this were not the case, according to Johnson, following her meeting in Victoria with Brett Diana ("Diana"), President and General Manager of Tsunami, on October 4, 2000 she was terminated. The Tribunal did not receive a copy of the Record of Employment for Johnson, however Johnson's termination date is indicated as October 4, 2000, which would suggest she left before her notice expired.

Finally, in the original appeal to the Tribunal, Tsunami offered to pay Johnson $338.00 as compensation for length of service. It seems they now are seeking to change that position. It is my opinion Johnson was terminated following her meeting with Diana and is entitled to compensation for length of service.

ORDER

In accordance with Section 115 of the *Act* I vary the Determination to award an amount of $14,681.44 to Johnson, which confirms the recalculation by the Delegate of the Director dated December 21, 2001. Additional interest is to be calculated in accordance with Section 88 of the Act.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal