Employment Standards TRIBUNAL

An appeal

- by -

HLNT Networks (Canada) Inc.
("HLNT" or the "Employer")

- 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: Paul E. Love

FILE No.: 2002/045

DATE OF DECISION: June 17, 2002

DECISION

APPEARANCES:

This is an appeal by an employer, H.L.N.T. Networks (Canada) Inc. ("Employer"), from a Determination dated January 11, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*Act*"), concerning Keith Tom Irving, Darren J. Card, and Gwen M. Montgomery ("the Employees"). In respect of the appeal concerning Mr. Irving, the Delegate ordered that the Employer pay vacation pay, and that the Employer reimburse Mr. Irving for a potential liability arising from an American Express corporate credit card bill for employment related travel expenses, issued to both Mr. Irving and the Employer, which the Employer had undertaken to pay. The Employer had not paid the bill, but at the time of Determination, the credit card company had not taken legal proceedings against Mr. Irving. In my view, in order to engage s. 21 of the *Act* forbidding payment of business costs by an Employee, the Employer must "require" the employee to pay an amount. Here there was no withholding by the Employer, and no requirement by the Employer to pay the debt. In my view it is not a "breach of a requirement of the *Act*" for an Employer to fail to pay its trade debts, and therefore the Delegate has no power under s. 79(1) of the *Act* to require the Employer to pay a credit card debt. There may well be other remedies available to an employee outside of the machinery of the *Act*, to permit an employee to deal with its debtor/creditor relationship to American Express.

With regard to the appeal of Mr. Card, the Employer does not dispute that Mr. Card is entitled to vacation pay. The Employer says that Mr. Card is not entitled to compensation for length of service because he quit. The Employer represented to the Delegate, and on appeal, that Mr. Card had quit. The Employer provided a statement from its Vice President of Corporate Development, indicating that Mr. Card had quit. Mr. Card did not file any submission with the Tribunal. The submission of the Employer did not reconcile, or attempt to reconcile the apparent discrepancy between the record of employment issued by the Delegate showing that it laid off Mr. Card, and the evidence tendered on appeal. In light of the Employer's failure to reconcile this conflict in the evidence, I find that the Employer failed to discharge its burden in this appeal to show an error in the Determination. I, therefore confirmed the Determination of Mr. Card's entitlement, with interest.

With respect to the appeal concerning Ms. Montgomery, the Employer claims that Ms. Montgomery quit. Ms. Montgomery indicated that the Employer was unable to pay her wages, and therefore she considered the employment relationship at an end. The only cogent explanation of the evidence is that by failing to pay wages, the Employer breached a significant term of the relationship, and as a result of the application of s. 69 of the Act, the employment relationship was at an end due to a termination by the Employer. Ms. Montgomery was therefore entitled to receive compensation for length of service, pursuant to s. 63 of the Act.

ISSUES

Did the Delegate err in finding that the Employer required directly or indirectly Keith Tom Irving to pay the business expenses of the company?

Did the Delegate err in determining that Darren J. Card did not quit his employment?

Did the Delegate err in determining that Gwen M. Montgomery did not quit her employment?

FACTS

I determined this appeal on the basis of written submissions from the Employer, Keith Tom Irving, Gwen M. Montgomery, and the Delegate. The Delegate issued a Determination on January 11, 2002 determining that H.L.N.T. Networks (Canada) Inc. ("Employer") was liable for wages, including interest for six employees in the amount of $15,339.68. The Employer filed an appeal with regard to the portion of the Determination relating to Darren J. Card, Keith Tom Irving, Gwen M. Montgomery. From my review of the Determination and the submissions of the parties, this appears to be a case where the Employer's business was failing. The Employer operated an internet/e-commerce business.

The amounts found to be owing in respect of each employee, which are in dispute in this appeal are:

Name	Vac. Pay	CLOS	Sec 21	Interest	Total
Card	$310.44	$1,054.80		$39.20	$1,404.44
Irving	$2,023.35		$2,307.98	$193.57	$4,524.90
Montgomery	$2,048.36	$2,076.92		$152.32	$4,277.60

As the Employer raises different issues with respect to each employee, I will address the facts, and arguments, concerning each employee below.

Keith Tom Irving

Facts

Mr. Irving was employed by the Employer, for the period February 16, 2000 to April 13, 2001, at an annual salary rate of $60,0000. There was an admission by the Employer that it owed vacation pay to Mr. Irving, in the amount of $2,023.35. Mr. Irving was provided with a American Express corporate credit card. He signed the card holder's agreement with American Express. Mr. Irving used the card exclusively for business reasons related to the Employer. The Employer did not pay the outstanding balance on the credit card account. American Express has sought to recover the amount against Mr. Irving. After Mr. Irving received a demand from American Express for payment of the credit card charges, he discussed this with the Employer, and the Employer assured Mr. Irving that it would take care of the bill. The outstanding amount is $2,307.98. In the Determination, the Delegate said:

There is, in my view little difference between an employer paying a bill and then deducting the amount from an employee or an employer failing or refusing to pay a bill knowing that the employee will be required to pay it. The practice of refusing to pay a corporate credit card account and exposing the employee to the liability of that amount is indirectly requiring payment of an employee's wages for the purpose of paying the employer's business expense. Based on the evidence provided and on the balance of probabilities, I conclude that the employer has required Irving to pay some of their business costs in the amount of $2,307.98 contrary to the provisions of section 21 of the Act.

The Delegate found that the Employer's refusal to pay the bill, exposing the Employee to liability for that amount, is an indirect requirement to pay the employer's business costs. At the time of the Determination, American Express had obtained no court order against Mr. Irving requiring him to pay the credit card debt. Mr. Irving had not made any payments on account of the credit card debt.

Employer's Argument

The Employer argues that Mr. Irving has not paid any business expense on the part of the Employer, since he has not paid the American Express credit card account. The Employer says that the Employer has not "required" Mr. Irving to pay a business expenses. The Employer says that unless Irving "pays the expense" he cannot recover from the Employer under s. 21 of the Act. The Employer says that the Tribunal does not have the jurisdiction to deal with the credit relationship - either to order the Employer to pay the bill or to order the Employer to reimburse Mr. Irving for payments.

Employee's Argument

Mr. Irving indicates that in "February of 2001 a collector acting on behalf of American Express was relentlessly harassing both my wife and I", and the harassment ceased after he reported this to the Employer, and the Employer advised him that they would take care of the outstanding balance. Mr. Irving discovered in October of 2001 that the card still had an outstanding balance. The Employee seeks payment for the credit card liability.

Delegate's Argument

The Delegate referred to his analysis in the Determination and indicated that he had nothing further to add.

Darren Card

Facts

Mr. Card was employed by the Employer from October 9, 2000 to July 9, 2001 at an annual salary of $55,000, paid monthly. The Employer supplied the Delegate with a record of employment indicating that Mr. Card was on a temporary layoff. The Employer contended to the Delegate that Mr. Card had resigned, and indicated that the Employer would produce further information to support its position. The Employer did not provide any documentation to the Delegate to support its contention. Mr. Card represented to the Delegate that the Employer owed him one month severance pay, but did not provide the Delegate with any information to support this contention. The Delegate found that Mr. Card was entitled to a weeks pay for compensation for length of service, in the amount of $1,054.80. The Delegate also found that Mr. Card was entitled to vacation pay in the amount of $310.44.

Employer's Argument

The Employer does not dispute that it owes Mr. Card the sum of $ 310.44 for annual vacation pay. The Employer argues that it is not obliged to pay compensation for length of service because Mr. Card Card quit his employment. With its written submission on this appeal, the Employer supplied a written

statement from David Hallonquist, a V.P. of Corporate Development from June 1999 to July 2001 with Healthnet International Inc.. Mr. Hallonquist indicates that Mr. Card left to pursue self employment, including contracting services to Healthnet International Inc..

Delegate's Argument:

The Delegate argues that the Employer has not presented evidence to challenge the validity of the record of employment that it issued to Mr. Card. I note that a copy of the record of employment was not attached to either the Determination or the appeal submission of the Delegate.

Mr. Card did not file a submission.

Gwen Montgomery

Facts

Ms. Montgomery was employed by the Employer at a salary of $54,000 per year, paid semi-monthly, for from October 12, 1999 to May 25, 2001. The Delegate found that as of May 24, 2001 the Employer had paid Ms. Montgomery only $100.00 for the pay period May 1 - 15, 2001, which was less than her full entitlement to wages earned during that period. The Employer issued a record of employment dated May 25, 2001 indicating that Ms. Montgomery was temporarily laid off. The record of employment also indicated that Ms. Montgomery had not received pay for May 15, 2001.

The Delegate considered the record of employment which indicated that Ms. Montgomery was laid off. The Delegate also found that the failure to pay wages to Ms. Montgomery was a "substantial alteration of a condition of employment', and that the Employer therefore had terminated Ms. Montgomery. The Delegate also found that since Ms. Montgomery was not re-hired at the the expiration of the 13 week temporary layoff period, Ms. Montgomery was considered terminated. The Delegate found that Ms. Montgomery was entitled to two weeks compensation for length of service, in the amount of $2,076.92. The Delegate also found that Ms. Montgomery was entitled to annual vacation pay in the amount of $2,048.36.

Employer's Argument

The Employer argues that Ms. Montgomery was advised that the Company would like her to continue with her employment, but that if she determined that she did not wish to continue, they would complete her record of employment as laid off. The Employer says that Ms. Montgomery elected to be laid off, and therefore gave up her entitlement to compensation for length of service. The Employer argues that the Delegate erred and should have found that Ms. Montgomery quit her employment.

Employee's Argument

In her response, Ms. Montgomery indicates that as of May 24, 2001 she had only received $100.00 for pay owing for the pay period May 1 to May 15, 2001. On May 24, 2001, Bret Conkin of the Employer represented to Ms. Montgomery that the Employer was unable to "make payroll", and she was issued a record of employment indicating that she was laid off. The Employer did not pay an $817.86 portion of

wages due and owing as of April 15, 2001 until April 26, 2001, some 11 days late. The Employer did not pay wages owing on May 15, 2001 ($430.00) in full until June 1, 2001. The Employer did pay $100.00 of the amount owing on May 18, 2001. Ms. Montgomery says that she was constructively dismissed, because the Employer did not pay her wages, as required by the Act.

ANALYSIS

In an appeal under the Act, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination. I have set out the analysis for each of the Employees in the sub-sections set out below.

Keith Tom Irving

The issue in this case is whether the neglect or failure of the Employer to pay a credit card debt, incurred by Mr. Irving on a credit card, where he is jointly and severally liable with the Employer, means that the Employer has "required" the Employee to pay a business cost. ection 21 of the *Act* reads as follows:

> 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.

The Employer relies on Bennett, BC EST #RD234/01, for the proposition that there must be a payment by the Employee before s. 21 of the Act is engaged. I note that Bennett was a case where the Employee argued that the Employer should be responsible for "rent" for the portion of the Employee's apartment used by the Employee as a home office for the Employers business. It was not a case that involved credit cards. There was no agreement, express or implied, between Bennett and her employer, that the employer was liable for rent. Further, Bennett was a case where there was no requirement to pay, and s. 21 of the Act was not engaged because there was no payment by the employee.

In order to facilitate the Employer's business the Employee used a credit card. Presumably, there has been a payment from American Express to the merchant. American Express is seeking payment from the Employee. Both the Employee and the Employer are liable to American Express for payment of the statement. If the Employee pays the statement, the Employee pays the business cost of the Employer, and under s. 21 of the Act an Employee is not required to pay the business cost. If the Employer pays the statement, then of course, the Employer has no right to seek payment of the statement from the Employee.

This is not a case where the Employer has withheld, or deducted wages under s. 21(1) of the Act to pay a business cost, nor is it a case where the Employee has sought reimbursement for the cost of a business expense paid by the Employee. The question is whether a failure by the Employer to pay a credit card debt, incurred by the Employee for a business purpose, which at law both parties may be responsible to the card issuer, is a "direct" or "indirect" requirement by the Employer under s. 21(1) or 21(2) of the Act

to pay a part of the Employee's wages for a business purpose. At this point in time s. 21(1) of the Act, cannot be engaged because the employment relationship is at an end, and unless American Express attaches monies under this Determination, the card issuer will not be able to get at the "wages" owing from the Employer to Mr. Irving. At this point in time, there can be no payment of the credit card debt from wages earned by Mr. Irving from this Employer.

Section 21(2) is framed more broadly than 21(1). Under s. 21(2) the Employer must not require an employee to pay any of the employer's business costs. Interestingly, the words "directly or indirectly" which appear with respect to "wages" in s. 21(1) do not appear in 21(2). I accept that the purpose of s. 21 is to prevent an Employer from "requiring" an Employee to pay business costs.

In this case the Employer has apparently undertaken to pay American Express, but has neglected to pay American Express. The Employer's business is apparently a failing business. By failing to pay a card statement is the Employer "requiring" the Employee to pay? I think not. Such an interpretation of the word "require" would be a stretch. It is the credit card company who is seeking to enforce the Employee to pay a contractual liability. As far as the credit card company is concerned, the credit card debt is the joint obligation of both Employee and Employer to the credit card company. At this point, American Express may require payment of the debt, but it has not yet obtained payment from Mr. Irving or obtained a judgement or order against the Employee. I note that s. 21(1) speaks to wages, and wages cannot be withheld, deducted or required for payment by the Employer. In reviewing the facts in this case, it is apparent that there has been no direction, order or compulsion emanating from the Employer which has caused or required Mr. Irving to pay American Express. The Employer therefore has not "required' Mr. Irving to pay a business cost. In my view, "payment" is a trigger for the application of s. 21 of the *Act*. If there has been no payment, s. 21 has no application.

In my view, s. 21, is in the *Act* to deal with the particular problem of the Employer withholding money from an employee's cheque. Section 21, may also give the Employee a right to recover the amount as wages, if a payment is made by the Employee, through an Employer withholding the Employee's pay, or by the Employee making a payment, when the Employee is required to make a payment for a business cost. I do not think that the section is broad enough to provide an indemnity to an Employee in advance of American Express collecting the money from the Employee.

Further, I do not think that there is any power under the Act given to the Director to require an Employer to make a payment to a third party, which would have the effect of indemnifying the Employee from a contractual liability to that third party. The *Act* is not framed broadly enough to give the Delegate power to require an Employer to make a payment to the Employee "in trust for American Express" with an "undertaking" by the Employee to discharge the credit card debt. The Delegate has no power to supervise what Mr. Irving may do with any money received from the Employer if the Determination was enforced as granted by the Delegate. The Delegate has no power to require the Employee to pay the credit card debt, because this would violate s. 21 of the *Act*.

The powers given to the Director are set out in s. 79 of the *Act*, which reads as follows:

> 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.

The obligation to pay the credit card debt by the Employer and by an Employee is an obligation that arises under a contract between the credit card issuer and the Employer and Employee. This Act does not impose any requirement on an Employer to pay its trade debts. The requirement is that an Employer must not withhold pay from an Employee, or require an Employee to pay the Employer's business expenses. In my view, the neglect or failure of the Employer to pay a trade debt is not a "contravention of the Act or the Regulations", which would give the Delegate power under s. 79 of the *Act* to require the Employer to "comply with the requirement" or to "remedy the doing of an act". The Employee may have other rights against the Employer arising out of the debtor creditor relationship, for example under legislation such as Law and Equity Act, s. 53(3) once an order is obtained against an Employee and once payment is made.

The Delegate should have dismissed the Employee's claim for indemnity for possible credit card liability under s. 79(2) of the *Act*. I therefore vary the Determination to allow for the payment of vacation pay of $2023.35, and interest to Mr. Irving, but to cancel the Delegate's finding that the Employer must pay to the Employee the sum of $2,307.98.

Darren Card

The Delegate's Determination appears to have been founded on Mr. Card's information provided to the Delegate, as well as the record of employment. This was a case where no submission was made by Mr. Card. I note that the Employer did not address in its appeal submission the apparent discrepancy between a record of employment issued by it showing a "layoff" by the employer, and the statement of Mr. Hallonquist that Mr. Card left his employment. In the absence of an explanation for this apparent discrepancy, I find that the Employer has not discharged the burden on it to show an error in the Determination. Mr. Card remains entitled to vacation pay of $310.00, plus compensation for length of service in the amount of $1,054.80, plus interest calculated in accordance with s. 88 of the Act.

Gwen M. Montgomery

The Employer bears the burden of establishing a "resignation". The Employer provided no information to the Delegate proving a resignation by Ms. Montgomery. The only rational conclusion which can be drawn from the evidence in this case is that the Employer was unable to pay Ms. Montgomery her wages, and as a result of the non-payment of wages, Ms. Montgomery considered the employment relationship at an end. It appears, from a email dated May 24, 2000, that the company was not in a position to pay wages at the time this "offer" was made as the email refers to May 14th pay being made whole by Mar. 31st. Further the record of employment for Ms. Montgomery, dated May 25, 2001 noted that " employee has not received pay for May 15/01. An advance of $330. was issued May 25/01 as partial payment.

The payment of wages is a fundamental condition of employment. The inability to pay wages, in my view, is a substantial alteration of a condition of employment, which has the affect of terminating the employment relationship, by virtue of s. 66 of the *Act*:

> If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

In this case the Director did apply s. 66 of the *Act*, and determined that Ms. Montgomery was terminated. As a result of the termination, Ms. Montgomery is entitled to compensation for lenght of service. I see no

basis to disturb the finding of the Director under s. 66 of the *Act*. The Employer has not disputed the quantum, and therefore I find that Ms. Montgomery is entitled to compensation for length of service, in the amount of $2,076.92 set out in the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated January 11, 2002 is confirmed, with the exception that I cancel the portion of the Determination requiring the Employer to pay to Mr. Irving the sum of $2,307.98 on account of a potential credit card liability. Mr. Irving remains entitled to vacation pay in the amount of $2,023.35. All the Employees are entitled to interest on the amounts determined to be owing, calculated in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal