

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 -

Robert Hansen a.k.a. Robert Ingvalsen a Director and Officer of R.I.C.H.
Management Systems Ltd. operating as Kaien Computer Solutions

Carla J. Hull a.k.a. Carla Hansen a Director and Officer of R.I.C.H. Management
Systems Ltd. operating as Kaien Computer Solutions

R.I.C.H. Management Systems Ltd. operating as Kaien Computer Solutions
(the "Appellants")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 200/141; 2000/142; 2000/143

DATE OF DECISION: July 24, 2000

DECISION

APPEARANCES

Robert Hansen	for himself
Carla Hansen	for herself
Robert Hansen	for R.I.C.H. Management Systems Ltd.
Tiffany Purdy	for herself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Robert Hansen and Carla Hansen, a.k.a. Carla Hull, in their personal capacities as directors/officers, and R.I.C.H. Management Systems Ltd. operating as Kaien Computer Solutions, (the “employer”), from a Determination dated February 18, 2000. That Determination found the employer and/or the two directors/officers, Robert Hansen and Carla Hansen, liable to the complainant for outstanding wages in the amount of \$318.49, compensation for length of service for the amount of \$377.84 and interest of \$66.84 for a total of \$763.17. The Director's Delegate determined that the employer had breached Sections 34(1) and 63(2) of the *Act*.

ISSUE(S) TO BE DECIDED

1. Is the complainant an employee under the *Act*?
2. If the complainant is found to be an employee does the minimum daily hours section of the *Act* apply to her?
3. Did the complainant resign her employment?
4. Did the employer have just cause to dismiss the complainant?
5. Are Robert Hansen and Carla Hansen liable as directors/officers for the amounts where the corporate employer cannot satisfy the Determination?

FACTS

Tiffany Purdy worked for R.I.C.H Management Systems Ltd. from May 1, 1997 to September 2, 1998 as a clerk. Shortly after she stopped working a sale agreement for R.I.C.H. Management Systems Ltd. was signed. The vendors, Robert Hansen and Carla Hansen, agreed to sell that company to Howard Hood. Legal issues have arisen regarding the sale but those issues are not germane to these proceedings for the following reason.

ANALYSIS

Robert Hansen and Carla Hansen do not deny that they were directors of R.I.C.H. Management Systems Ltd. throughout Tiffany Purdy's time with the company. Section 96 (1) of the *Act* states:

“A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.”

It is clear that Robert Hansen and Carla Hansen were each a director or officer of the corporate employer at the time the complainant earned her wages or that the amounts should have been paid. Therefore the sale of the business after the wages were earned does not relieve them from liability.

However, it does appear that a technical error has been committed. Section 123 of the *Act* reads:

123. Irregularities – A technical irregularity does not invalidate a proceeding under this Act.

The delegate found Robert Hansen and Carla Hansen liable under section 97 of the *Act*. It is clear from the Determination that the delegate meant section 96. Since Robert Hansen and Carla Hansen were directors of the corporation at all material times there is no reason to be concerned with such a technical error. Section 123 provides relief from such technical, in this case typographical, errors.

The second issue to be decided is whether Ms. Purdy was in fact an employee of R.I.C.H. Management Systems Ltd. The employer states, in its original reasons for the appeal dated March 7, 2000, that the relationship between R.I.C.H. Management Systems Ltd. and Ms. Purdy was one not of employer/employee but rather an informal arrangement for the benefit of Ms. Purdy and her parents. The employer further states that Ms. Purdy set her own hours of work and days of work. For these reasons the employer submits that there was never a contract of employment between R.I.C.H. Management Systems Ltd. and Ms. Purdy.

The employer develops this argument further in a response dated April 13, 2000. The employer reiterates that it did not set Ms. Purdy's hours. The employer also states that Ms. Purdy's mother Karen was her manager and that it was Karen who was responsible for assigning duties as well as for discipline.

The definition of employee is found in Section 1 of the *Act*.

Employee includes:

1. a person, including a deceased person, receiving or entitled to wages for work performed by another,
2. a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
3. a person being trained by an employer for the employer's business,

4. a person on leave from an employer, and
5. a person who has a right of recall.

This definition is expansive. The evidence here indicates that Ms. Purdy was performing work normally performed by an employee i.e. counting inventory, checking packing slips, displaying product on the shelves, doing the mail and answering the phone during busy times. As such she fits squarely within this definition. There is nothing in the *Act* that contemplates someone fitting the definition of employee and yet not being an employee. The employer admits that Karen Purdy, Tiffany's mother, was an employee of the employer. As such she was in charge of Tiffany Purdy notwithstanding that Ms. Purdy states that she also took orders from Carla Hansen and/or Robert Hansen. The fact that the directors of a company do not directly manage the employee(s) does not mean that such a person is not an employee, nor does it relieve the directors of their obligation under section 96.

In regards to the scheduling of hours, the employer states that the Hansens did not schedule Ms. Purdy's hours. However, the Hansens state that Ms. Purdy asked if she could work more hours and that they (the employer) allowed it. Since the definition of employee includes a person who the employer allows to perform work normally done by an employee, and the employer accepts that they allowed Ms. Purdy to perform such work, I have no choice but to find that Tiffany Purdy was an employee under the *Act*.

The third issue to be decided is whether Ms. Purdy was owed any money for days where she worked less than the minimum daily hours in the *Act*.

Section 34 of the Act states:

- 1) *If an employee reports for work on any day as required by an employer, the employer must pay the employee for*
 - a) *at least the minimum hours for which the employee is entitled to be paid under this section, or*
 - b) *if longer, the entire period the employee is required to be at the workplace.*
- 2) *An employee is entitled to be paid for a minimum of*
 - a) *4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or*
 - b) *2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with Part 3 of the Workers Compensation Act or a regulation under that Part.*
- 3) *Despite subsection (2)(a), a school student reporting for work on a school day is entitled to be paid for a minimum of 2 hours at the regular wage in the circumstances described in that subsection.*

The employer in the letter of appeal states that Ms. Purdy would often show up late for work thus creating a situation whereby she would work less than the minimum required hours. There is no dispute that Ms. Purdy was not paid the minimum daily pay on many days. While I have some sympathy to the view that an employee cannot claim under this section when it was her own actions that prevented her from working the minimum required hours the fact is that there is no specific evidence of the exact dates this occurred. On appeal the onus is on the appellant to show the error in the original decision. The employer has not met this burden by providing precise information to support its position. The investigation shows that Tiffany Purdy worked less than 2 hours on several days but there is no evidence to show whether this was due to scheduling, tardiness or some other reason. I find that Ms. Purdy was paid for less than the required daily minimum hours.

The fourth issue is whether Ms. Purdy quit her employment. The employer submits that Ms. Purdy told Carla Hansen that “she wasn’t sure when, or even if, she (Purdy) would be coming back to work.” The record of employment states that Ms. Purdy was laid off due to a shortage of work and/or returning to school. The employer submits that this code was filled in by mistake and that Carla Hansen meant to put in the code indicating quit. The employer states that Carla Hansen informed the director’s delegate of her mistake. Ms. Purdy denies saying she was not available for work, or that she quit. The delegate did not put anything in his report to the effect that Carla Hansen had stated that she had erred in filling out the Record of Employment. Even if I were to accept that Ms. Purdy made this statement, I would then have to determine whether this statement was indeed a quit.

The question of whether or not an employee has resigned has both a subjective and an objective element. (see *Burnaby Select Taxi Ltd. v. British Columbia (Director of Employment Standards)* BC EST # D091/96). I am unable to find that, even if I accepted the employer’s submission in its entirety, that this would satisfy the objective element of a quit. The employer filled out a Record of Employment stating that Ms. Purdy was laid off due to shortage of work and/or return to school. This is the best evidence I have before me, and I accept it. I find therefore, that Ms. Purdy did not quit her employment and that she did not receive any notice.

The employer further contends that it had just cause to terminate Ms. Purdy. Even if I were to accept that the employer had just cause the fact of the matter is the employer did not terminate Ms. Purdy for these reasons. There is no evidence that Ms. Purdy was warned about this behavior nor is there any evidence that Ms. Purdy was in any way disciplined for her actions. An employer cannot subsequently justify a termination for actions that were accepted at the time.

In summary, I find that the complainant, Tiffany Purdy, was an employee of R.I.C.H. Management Systems Ltd. under the definition of employee in the *Act*. Since the complainant is an employee the minimum daily hours requirement under the *Act* applies to her. The Director’s Delegate did not err in applying this section of the *Act*. Thirdly, I find that the complainant did not resign her employment for the reasons stated above. Fourthly, I find that the employer did not have just cause to dismiss the complainant and furthermore that the employer cannot raise this argument as a fresh argument on appeal. Finally, since Robert Hansen and Carla Hansen were directors and/or officers of R.I.C.H. Management Systems Ltd. at the time that the wages of the complainant were earned or should have been paid that they are personally liable under

section 96 of the *Act* in as much as R.I.C.H. Management Systems Ltd. is not able to satisfy the Determination.

ORDER

The Determination dated February 18, 2000 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal