

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Jeff Schechter operating as Catalyst Communications Inc.
operating as Kootenay Business Journal
("Schechter")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 96/541

DATE OF HEARING: December 10, 1996

DATE OF DECISION: December 20, 1996

DECISION

APEARANCES:

for the Appellant:	Jeff Schecter
for the Complainant/Respondent:	on her own behalf
for the Director:	Ed Wall

OVERVIEW

This is an appeal filed by Jeff Schecter, operating as Catalyst Communications Inc. operating as the Kootenay Business Journal (“Schecter”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination of a delegate of the Director of the Employment Standards Branch (the “director”), number CDET 003793, dated August 23, 1996. That Determination found Schecter failed to pay all wages owing to the complainant, contrary to Section 18(2) of the *Act*, and required him to pay \$378.55 to the complainant, Donna Sproule (“Sproule”). The amount represents commission earned by Sproule up to July 31, 1995 when she left the employ of the the Appellant. Schecter says the Determination is wrong in three respects:

1. He should not be required to pay Sproule commission on accounts where she failed to have the customer sign an “insertion order”, which represents confirmation the client had authorized the advertisement placed in the publication;
2. He should not have to pay Sproule commission on advertisements placed in the publication with fundamental typographical errors which caused the client to refuse to pay for the advertisement; and
3. He should not have to pay Sproule for days not worked nor pay eight hours wages for less than eight hours of work.

ISSUE TO BE DECIDED

The issue is whether, in the circumstances of this case, there were wages earned by Sproule which, pursuant to Section 18 of the *Act*, must be paid to her by Schecter.

FACTS

There are few facts in dispute.

Schechter owns Catalyst Communications Inc. From 1988 to the spring of 1996 Catalyst published the Kootenay Business Journal and performed other publishing services. Schechter ran the business. He was manager, editorial writer, salesperson and layout designer. He organised production, collected overdue accounts and oversaw the layout of the publication.

Sproule commenced her employment on April 10, 1995. She was employed to sell advertising. She and Schechter signed a contract of employment setting out the basic terms of her employment. There were four paragraphs to the contract, which I will briefly summarize:

1. Sproule was to work 40 hours per week, was expected to hand in daily time sheets and was to coordinate and cooperate with other departments of the magazine.
2. Sproule was to be paid a salary plus commission. She was to be paid a salary of \$1200.00 per month for 160 hours of work. Salary was to be paid on the 15th and at the end of the month. A quota of \$5000.00 in sales revenue was set and a commission structure on the sales revenue was outlined. Commissions were only to be paid on signed insertion sheets, unless otherwise agreed. Sproule had some responsibility for prejudging collectability of the account from the potential client and had the responsibility to verify the placement of the advertisement in the publication.
3. She could be terminated without notice for just cause.
4. If she was terminated for any reason other than just cause, provision for notice or pay in lieu of notice were set out.

On July 15, 1995 Sproule gave written notice of her intention to leave her employment on July 31, 1995. She continued to work until the end of the month, but conceded she worked less than 8 hours a day for the last week. Based on the evidence and the material on file, I conclude she worked 24 hours in the last week of her employment.

Sproule was absent June 2, 1995 and July 4, 1995. She was paid her full salary for June. There was no adjustment made for the day she was absent.

One of the aspects of the Kootenay Business Journal involved focussing on segments of the regional economy in editorial articles and marketing advertising around the editorial. In her first month of employment Sproule marketed advertising to businesses in the transportation sector and to coffee houses and cappucino bars in the region. In her second

month of employment the focus was on the equestrian sector and businesses in that sector, such as riding stables, saddle shops, western clothing and footwear. When Sproule left her employment some of the accounts from the equestrian sector editorial were still outstanding. To date Schechter has been unable to collect on four of the accounts: The Winner's Circle Equestrian Supply, Eddy Custom Saddle, Bryan's Saddle Shop and Aspengrove Equestrian Academy. The total potential revenue generated from those four accounts is \$428.00. The commission payable on those accounts would be \$42.80. Schechter claims Sproule failed to get signed insertion sheets for these accounts. Sproule says the insertion sheets were signed by the client.

Two other clients sold advertising by Sproule have refused to pay their accounts: Scott National Fax and Rocky Mountain Jaintors' Supplies. The former claims the advertisement was not authorized and the latter refuses to pay because the advertisement was incorrect in key aspects. The printer apparently failed to make certain changes to the content of the advertisement even after he received the corrected insertion order from Sproule. The potential revenue from the two accounts would be \$214.00 and the commission payable to Sproule would be \$21.40.

ANALYSIS

I will address the issue in this case in two parts: first, I will address the question of whether Schechter should pay Sproule for either the two days she was absent or the hours not worked at the end of her employment; second, I will address the question of whether Schechter is required to pay commission to Sproule on the six accounts.

The contract of employment says Sproule must work 40 hours per week. Over the course of her employment she appears to have fallen short of that obligation on the three occasions identified. However, the contract does not establish any monetary consequence to the apparent breach. Nor did Schechter attach any monetary consequence to the apparent breach when it occurred in June. He paid Sproule her full salary for the month. Even though it has been paid Schechter says I should reassess his obligation to pay it in the context of the apparent failure of Sproule to meet the obligations contained in the employment contract. In the peculiar circumstances of this case, I intend to do that. It does not however support Schechter's argument.

The contract of employment says Sproule would receive a salary of \$1200.00 per month **for 160 hours of work**, which represents 20 working days based on the hours of work Sproule was required to perform each week. There is undoubtedly some ambiguity in the contract about what Sproule might be entitled to when she worked more than 160 hours in a month. It is Schechter's contract and on that basis I would resolve any ambiguity in the contract in favour of Sproule. I interpret the contract to mean Sproule would receive full monthly salary once she had worked 160 hours and she would be compensated at an hourly rate for any hours over 160 in a month. That interpretation is consistent with the scheme of the *Act*. An employee must be paid wages for work. Her hourly salary was

\$7.50 per hour and hours of work over the 160 hours should have been compensated at that rate.

In the three months she was employed, May, June and July, 1995, there were 66 working days. Accounting for the days absent and the less than full hours in the final week, Sproule still contributed 61 working days, or an average of 162.67 hours per month, to her employer. If looked at on a monthly basis, Sproule worked an additional 24 hours in May and 8 hours in June for which she received no compensation.

The 32 hours which Schecter says she failed to provide to him over the course of her employment does nothing more than wash his obligation to compensate her for the hours she worked but received no compensation. He cannot argue for the application of the contract where it supports his argument but ignore it where it operates against him. One of the purposes of the *Act* directs a consideration of the fairness of the treatment of employers and employees. It would be manifestly unfair to address only the obligations of one party to the employment contract when that contract is being held up in support of a claim or an appeal and I will not do so.

That part of the appeal is dismissed.

Even if I am wrong in the above analysis, I would not have allowed Schecter to recover wages already paid for the days absent in June and July. Further, the practice of the parties under the contract supports the conclusion it was a term of her contract Sproule was allowed to take a reasonable amount of time off in without that affecting her salary.

Turning to the second part of the appeal, I note the burden in an appeal before the Tribunal lies upon the Appellant to demonstrate some reviewable error in the Determination of the director. In this case, a factual conclusion had to be reached by the delegate in respect of the issue of entitlement to commission about whether Sproule had acquired the signatures of the clients on the insertion sheets. The delegate found, on a balance of probabilities, signatures had been obtained. Schecter has not been able to demonstrate this conclusion was wrong. Sproule testified she acquired the necessary signatures on the insertion sheets. She said she was careful to get an authorizing signature because she was new to the job, and she was particularly careful for those potential clients in the equestrian sector because this sector was one in which the publication had little or no previous experience.

She was not to blame for the errors made in the Rocky Mountain Janitors' Supplies advertisement and she should have received her commission on that.

The fact Schecter is unable to collect these accounts is not relevant to the obligation to pay. The *Act* prohibits an employer requiring an employee to participate in the cost of doing business (see Section 21). The collection of unpaid accounts and the refusal or failure of an client to pay their account is a cost of doing business and Schecter cannot

pass the cost, either directly or indirectly, to Sproule. While I do not need to finally decide the point for the purpose of reaching my decision in this case, it is doubtful the contractual provision requiring the employee to prejudge the collectability of a potential account would survive scrutiny under the *Act* if that provision resulted in a withholding of wages by an employer.

This aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order Determination number CDET 003793 be confirmed.

.....
David Stevenson
Adjudicator
Employment Standards Tribunal