

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.: 2001/166

DATE OF HEARING: June 26, 2001

DATE OF DECISION: July 18, 2001

DECISION

APPEARANCES:

Brett Diana	representing Tsunami Technologies Inc.
Raelle Johnson	representing herself
Ian MacNeill	representing the Director of Employment Standards

OVERVIEW

This is an appeal by Tsunami Technologies Inc. (“Tsunami”) formerly Island Pacific Business Products Ltd., pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination by the Director of Employment Standards (the “Director”) dated February 5, 2001. The Determination found Tsunami owed Raelle Johnson (“Johnson”) \$16,051.71 for minimum wages and overtime, statutory holidays, vacation pay, commissions, expenses and compensation for length of service. Tsunami claim the amount of the award in the Determination is grossly overstated and are prepared to pay Johnson \$338.00.

The delegate of the Director who originally conducted the investigation had left the Branch and another delegate completed the file.

The appeal was heard by way of an oral hearing on June 26, 2001. I took evidence under oath from the parties. The witnesses who testified for Johnson were:

- Denise Andrews, former employee of the Employer
- Alex Fraser, former Sales Manager of the Employer

An offer to mediate was rejected by the parties.

ISSUE

Does Tsunami owe Johnson any money for minimum wages including overtime, statutory holidays, vacation pay, commissions, expenses and compensation for length of service?

ARGUMENT

Prior to being employed by Tsunami, Johnson had worked for Xerox Canada Ltd. for 13 years, as an employee, as an agency with employees and as a contractor. She had also worked for the previous agent/owner on Vancouver Island in an administrative capacity. When she was hired

January 1, 2000 she was to leave Victoria and move to Parksville as an Account Manager. She claims she started sales training in September 1999 while still employed by Xerox Canada Ltd.

Johnson was employed by Tsunami as a Xerox Representative/Account Manager from January 1, 2000 until October 13, 2000. She was to receive a base salary of \$500.00 per month, \$1,000.00 advance per month plus commissions. She also received \$200.00 per month expenses.

Johnson is claiming the base salary and monthly advance are not offset against commissions earned in the month. She claims there was nothing in her employment contract indicating any deduction for her advance would be made from her commissions.

Tsunami agrees the base salary is not affected by commissions earned but claims the advance is just that, an advance against future commissions earned in that month. No commission was paid until the commissions earned exceeded the amount of the advance or draw.

There were two employment contracts signed between Tsunami and Johnson. One was dated December 31, 1999 and a second dated February 28, 2000. It appears only the signature page of each contract was supplied to the Tribunal therefore we do not know all of the contents of the contracts.

Johnson claims she was expected to work in excess of 8 hours per day as a sales person. During the day she was expected to make up to 30 cold calls and visit potential and existing customers. In the evening she would be expected to do reports, orders and prepare for the following day. Johnson claims this took from 10 to 12 hours per day and in some cases longer and extended into the weekends. In July changes were made and the day started with two conference calls per day between the sales staff, one at 8:00 a.m. and the other at 5:00 p.m.

There was supporting evidence from Denise Andrews and written submissions from other former employees indicating the work week would average at least 55 hours during the time they were employed. No payroll records were kept by Tsunami.

Johnson claims from January 1, 2000 until July 15, 2000 the sales staff did not receive detailed payroll and commission records or statements of earnings as there was no office staff in Victoria. This made it very difficult to reconcile their orders with their cheque stubs or territory lists. Johnson claims she still has not received a detailed Statement of Earnings for May and June.

There was an elaborate commission system for the sales staff to be paid. 3.5% was to be paid when the customer signed the order. The remainder of the commission would be paid following installation of the equipment. Commissions were based on "net achieved price" which may have allowed discounts to be offered customers.

There was also a commission split for sales where an order would be signed in one Account Manager's territory but installed in another Account Manager's territory. Finally, there was a "Value Added Reseller" commission on products sold after the initial sale.

In addition to her own territory Johnson claims she was to receive a 2% commission on sales in the Nanaimo area effective April 1, 2000 as there was no Account Manager in that area. This provision is contained on the signatory page of the employment contract dated February 28, 2000. However, Johnson claims she never received any commission for sales made in the Nanaimo territory.

Johnson also claims she was to receive 10% commission on supply re-orders in her territory which was never paid. At the hearing Tsunami indicated they were prepared to pay the commission on any re-orders that were sold by Johnson.

Tsunami had not paid Johnson commissions for several contracts claiming there was no signature indicating Johnson had made the sale. At the hearing Johnson presented several unpaid contracts, which bore her signature. Tsunami stated they were prepared to pay Johnson commissions for these and any other signed contract.

There was a large order in Port Alberni that was signed by Johnson that was subsequently cancelled when the company became aware that Johnson had been terminated. The commission on that sale was not paid as the delivery and installation did not take place. Johnson feels she should be paid at least the selling portion of the commission as a lot of work went into the sale and she was not responsible for it being cancelled.

Alexander Fraser, ("Fraser") presented evidence that he was hired as Sales Manager working under the agent/owner Brett Diana ("Diana") from July 01, 2000 until December 05, 2000 to assist in "growing the business". The sales program from Xerox developed by Tsunami provided contact and sales targets for the sales staff. His job was to ensure the sales staff met their targets. He provided one-on-one training and motivation to the staff. His evidence supported the contention by Johnson that the work day would extend beyond the 8:00 a.m. to 5:00 p.m. hours. He admitted it was a tough competitive business with a high turnover of staff. (Johnson claims only one of the 14 people she worked with remain employed by Tsunami.)

Tsunami claimed Johnston was always under her sales targets and probably should have been terminated earlier for non-production. They claim the current Account Manager in the territory is meeting and exceeding sales targets which are the same ones Johnson worked under.

Tsunami stated the current sales staff now works 40 hours per week or less and the company has changed the Compensation Plan. They now pay a \$1,500.00 draw on the 15th of the month, \$200.00 expenses and no salary. As before, commissions earned in one cycle would be paid in the next cycle.

In early October Fraser met with Johnson and told her she was to move back to Victoria. In an e-mail the following day Johnson advised Fraser if that was her only option she was tendering her notice of resignation effective October 31, 2000.

Johnson had a subsequent meeting with Diana in Victoria. When Johnson requested the amount she felt she was owed by Tsunami, Diana told her to leave immediately as she was terminated. She claims she was required to turn over all her files and daily call information sheets to the company. She kept no copies and now Tsunami are stating they have no records of Johnson's call activity.

Tsunami claim the amount prescribed in the Determination is excessive. No payroll records were kept and no overtime was authorized, as this is a "commission based" job. They claim the sales employees, including Johnson, were never told the number of hours they were expected to work each day other than be available from 8:00 a.m. to 5:00 p.m. Monday to Friday. The more time worked the more one was expected to earn however no one was told to work 55 hours per week.

They further claim Johnson received each statutory holiday as a day off and no deductions were made. She also took 3 days vacation and her commission or salary was not deducted.

Tsunami argue no money is owed Johnson and in actuality she owes them money as she was paid for sales she did not sign. They contend an Account Manager is only paid if they actually sign the order. Tsunami state she was required to have sales above her draw before she would receive any commissions. Finally, if orders were cancelled no commission would be paid.

Tsunami indicated they would not pay Johnson for the expense of a cellular telephone, as it was not "recommended" by them. Tsunami had a toll free line where sales staff could pick up messages but Johnson claims she could not use it to call customers.

The only money Tsunami would be prepared to pay is \$338.00 as compensation for length of service, which includes vacation pay.

THE FACTS AND ANALYSIS

We only have what appears to be the last page of each of the two employment contracts and therefore do not know all of their terms. Without being provided any specific terms to the contrary, I agree with the Determinations at page 3 that states:

Minimum wage applies whenever paid commissions are less than what the employee would have earned for hours worked at minimum wage. If an employee paid on a commission basis earns commissions in one pay period, and this commission is paid in the subsequent pay period, at least the minimum wage must be paid in the first pay period. When the employer pays commission in a subsequent pay period, none of it can be deducted to offset the minimum wage paid in the previous pay period. The requirement to pay minimum wage when no earnings take place cannot be related to any commission that becomes payable in subsequent pay periods.

Again, unless the employment contract has specific terms to the contrary I agree with Tsunami that the commissions earned in the pay period can be offset against the \$1,000.00 advance and Johnson should receive all commissions earned in the pay period less her advance. If there are insufficient commissions in a pay period minimum wage applies. As the advance of \$1,000.00 is in excess of minimum wage in the second pay period no minimum wage is required. However, I agree with Johnson the salary of \$500.00 per month is not affected by commissions earned.

There are some discrepancies in the wage calculation however I believe the Determination has correctly addressed the minimum wage complaint. When you consider the way Tsunami paid Johnson there is little room to manoeuvre. She received a \$500.00 basic salary on the first of the month. The minimum wage, as calculated by the delegate, amounts to \$893.80 per pay period therefore she is owed an additional \$398.80 for the first pay period. There was a \$1000.00 advance paid on the 15th of the month. Recovery from commissions for the advance can only take place after the minimum wage of \$893.80 has been exceeded in the second pay period. We do not know how the delegate applied the sales to the payroll for the purpose of determining if minimum wage was payable. It may have been at the time of signing the order when ½ of the commission became payable or when the equipment was installed and the other ½ of the commission became payable or when the actual commission was paid, which I understand was in the month following the sale. It would appear from the language in the Determination the delegate used the latter method although we have no evidence of that.

As the method of how the requirement for minimum wage relates to the payment of commissions is not available to me, 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% re-order commissions are referred back to the Director for further investigation to determine the proper commissions owed Johnson. The investigation may determine there were more sales in the Nanaimo area than had been reported.

While neither Tsunami nor Johnson kept any records of hours worked I also accept the finding in the Determination in that respect. The investigation by the delegate and the evidence at the hearing points to the expectation by Tsunami that their Account Managers were expected to work well in excess of the 8 a.m. to 5 p.m. Monday to Friday work week. The 11 hour day used in the calculation seems excessive, however, based on the evidence, it appears to be appropriate. That triggered the requirement for the minimum wage and overtime calculation. There have been several Tribunal decisions in which the records of the employee were accepted, even if flawed, in cases where the employer kept no records.

For example, in *Hi-Rise Salvage Ltd.* BC EST#D 293/97 states, in part:

In several previous decisions this Tribunal has found that where the employer has not kept accurate records of the hours worked the evidence of the employee should be preferred and that any partial records should be accepted unless there is

substantial credible evidence to establish the facts alleged by the employer.
(emphasis added)

I have found no such credible evidence from the employer to indicate the hours claimed had not been worked. On the contrary, we have considerable evidence to indicate the work week was much longer than 40 hours.

Tsunami indicated they did not deduct any money from Johnson for taking statutory holidays or vacations. The provisions of the *Act* require employees be paid for statutory holidays and vacations and not be deducted. Johnson is entitled to statutory holiday pay for any holidays that occurred during her employment with Tsunami. The actual amount of statutory holiday and vacation pay as outlined in the Determination may vary depending on the outcome of the investigation.

The calculation in the Determination for expenses is confirmed. The compensation for length of service may vary as a result of the investigation into commissions payable.

The question of whether Johnson is entitled to the 3.5% commission for making the sale of the large order in Port Alberni depends on the terms of her employment contract. The order was cancelled before the equipment was installed when the company became aware Johnson had been terminated. Tsunami take the position if the contract is cancelled for any reason no commission is payable however their commissions system has two components. One half the commission is payable for making the sale and one half when the equipment is installed. That matter is referred back to the Director for investigation.

As an observation, the Compensation Plan now in effect, as presented by Tsunami, appears to be in violation of the *Act*. With no salary component at the beginning of the month and one advance at mid-month the provisions of Section 16 and 17(1) are not met.

ORDER

In accordance with Section 115 of the *Act* I refer the Determination by the Director dated February 05, 2001 back to the Director to calculate the proper commissions owed Johnson. The remainder of the Determination is confirmed except where amended above. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal