

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 -

National Cheese Company (Western) Limited
("National")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/370

DATE OF DECISION: September 25, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by National Cheese (Western) Limited (“National”) of a Determination which was issued on May 20, 1998 by a delegate of the Director of Employment Standards (the “Director”). In that Determination the Director found National had contravened Sections 17(1), 18(1), 21(1), 58(3) and 63(2) of the *Act* in respect of the employment of Ramzi (Ramsay) H. Ataya (“Ataya”) and, pursuant to Section 79 of the *Act*, ordered National to pay an amount of \$6171.11

National says the Determination is wrong because the Director failed to give effect to what is described as a “written assignment of wages to meet a credit obligation” of Ataya to National.

ISSUE TO BE DECIDED

The issue is whether the Director erred in failing to give effect to a written assignment of wages by Ataya to meet a credit obligation. This issue involves two questions, both of which must be answered in the affirmative if this appeal is to be successful. The first question is whether there was an assignment of wages by Ataya and second whether it is an assignment of wages to which the *Act* would give effect.

FACTS

Ataya was employed by National from May 18, 1996 to June 24, 1997. He claimed he was not paid commissions and annual vacation pay earned during that period nor was he paid length of service compensation upon termination of employment.

The appeal submission of National sets out the factual circumstances on which the appeal is based. They are as follows:

1. The company is in the business of manufacturing and selling cheese and importing and distributing deli products. The company distributes its products to re-distributors and retailers across Canada.
2. In or about 1991, the Company entered into a standard distributor contract with Atvic Trading Limited (“Atvic”). Under the contract, Atvic purchased products from the Company which Atvic sold on Vancouver Island. Atvic was wholly owned and operated by the Complainant.

3. Atvic accumulated a deficit account with the Company which by July 1995 had grown to \$13,299.83. To address this deficit account, the Company and Atvic entered into a series of modified distributorship agreements under which Atvic continued to distribute the Company's products on Vancouver Island while paying down its account deficit with the Company.
4. In or about May 1996, the Company and the Complainant entered into an employment contract (the "Employment Contract") under which the Company hired the Complainant as a sales representative. The Employment Contract provided that the Company would pay the Complainant a commission based on orders received.
5. In or about September 1996, the Complainant provided the Company with a written assignment of his wages to honour Atvic's credit obligation to the Company. By letter dated September 17, 1996, the Complainant agreed to pay to the Company \$350 per month on account of the outstanding balance owed by Atvic. Copies of these letters are attached.
6. The Company terminated the Complainant's employment on June 24, 1997.

ANALYSIS

The provisions of *Act* which are relevant to this appeal are Section 21 and subsection 22(4). Section 21 of the *Act* reads:

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 part of the employer's business costs except as permitted by this 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.*

Subsection 22(4) reads:

22. (4) *An employer may honour an employee's written assignment of wages to meet a credit obligation.*

National argues the written assignment of wages is found in three documents: the first is a letter from Ataya to National dated September 17, 1996; the second is a letter from National to Ataya, also dated September 17, 1996, confirming the terms of the first letter; the third is a letter dated August 5, 1995, which, on its face, contains a proposal for a continuing business relationship between National and Atvic. Counsel for national says the "written assignment" is found principally in the first letter and confirmed in the second. He says the written assignment found in those two documents was a continuation of a long standing written assignment, which is outlined in the third document. Further, he says this last document was never cancelled in writing in accordance with Section 24 of the *Act* or otherwise.

I do not accept the third document can be considered as a "written assignment of wages" by an employee for the purposes of the *Act*. The letter was written and given to National more than eight months before any employment relationship existed between National and Ataya. It may, as Counsel for National says, have been a written assignment, but it was not a written assignment of *wages* by an employee. It would, therefore be unnecessary for Ataya to cancel it. There is nothing in either of the first two documents that incorporate the obligations contained in the third letter. In fact, the third document seems to have been replaced by the mutual obligations recognized in the first two. The portion of the third document upon which National seeks to rely says:

Commissions Earned only, will be reimbursed for the outstanding balance of Atvic Trading with National Cheese Co. Ltd.

However, in the September 17, 1996 letter from National, accepting the terms of repayment proposed by Ataya, National writes:

All commissions for direct sales on behalf of National Cheese Co. as well as expense allowance will be forwarded if your \$350.00 monthly payment is paid as promised.

Additionally, National refers to a statement of account dated December 13, 1996 which contained a hand written notation from Ataya indicating National could "apply [an amount shown on the invoice] to old Atvic balance". Far from re-enforcing what National says was the August, 1995 obligation, the document confirms that such an obligation no longer existed. The statement of account set out an amount owed to Ataya and next to the amount placed the following statement:

We can apply this to account #0109 to further reduce your outstanding balance now standing at \$5,853.38.

Above that statement were references to two other invoice amounts payable to Ataya, that pre-dated the September 7 exchange of letters, which were applied to the outstanding balance of Atvic.

The terms of the September agreement and the above statement confirm the terms of the August, 1995 letter had been replaced and were no longer in effect.

This appeal will consider, then, only whether the documents of September 17 should be given considered to be a “written assignment of wages” by an employee to meet a credit obligation. I am not satisfied that they should, for two reasons.

First, the Tribunal has taken the position in a number of decisions that an agreement which purports to be a written assignment of wages under subsection 22(4) will not be given effect if it is vague or equivocal. The two letters of September 17, 1996 are not only vague and equivocal, but on their face are inconsistent with a conclusion they constitute a written assignment of wages to meet a credit obligation. The letter from Ataya includes the following paragraph:

All commissions and expense allowances from direct sales to National Cheese Co. are to be mailed on date of issue to Ramsay Ataya, . . .

National replied to that point in their letter as follows:

All commissions for direct sales on behalf of National Cheese Co. as well as expense allowance will be forwarded if your \$350.00 monthly payment is paid as promised.

The two letters indicate Ataya’s wages are to be paid to him, not assigned to National. Even the response of National does not indicate that the consequences of non-payment of the monthly amount will result in an assignment of Ataya’s wages to them. It is silent on that and, in any event, the written assignment must come from the employee and there is no sense of that in the letter from Ataya to National.

The second reason for refusing to give effect to the letters as constituting a written assignment of wages by Ataya is found in s. 21(2) of the *Act*. That provision does not allow an employer to require an employee to pay any of the employer’s business costs. The Tribunal has concluded that the failure of a customer to pay an account is a cost of doing business and cannot be passed on to an employee: see *Schechter*, BC EST #D 374/96. In this case, Atvic has failed to pay its account to National. That is a cost of doing business and under the *Act* National may not require one of its employees to bear that cost. Even if the employee agreed to do so, Section 4 of the *Act* renders such an agreement of no effect.

This decision does not affect the right of National to commence a Court action against Atvic, and possibly Ataya, on the debt. This decision only confirms that the *Act* does not allow National to deduct the debt from the wages owed by them to Ataya.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 20, 1998 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal