

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 -

Catherine Richard and Dee-Anne Hackett
(“Richard”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE No.: 2000/299

DATE OF DECISION: October 19, 2000

DECISION

APPEARANCES

Blair Christie For Paradigm

Catherine Richard For herself and Dee-Anne Hackett

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Catherine Richard (“Richard”) and Dee-Anne Hackett (“Hackett”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 5, 2000. The Determination addressed a number of issues arising from complaints by Richard and Hackett against Paradigm Management (B. C.) Ltd., operating as Expressions Hair Designs (“Paradigm”). In particular the Determination found that Paradigm owed Catherine Richard (“Richard”) \$713.00 for overtime wages, statutory holiday, wages due from not receiving 32 consecutive hours free from work in a week, vacation pay and interest. The Determination also found that Paradigm owed Dee Anne Hackett \$68.19 for statutory holiday pay and vacation pay, plus interest.

Richard and Hackett appealed the Determination on the grounds first that Paradigm had misrepresented their conditions of employment when it purchased the business where they were employed. Secondly, they appealed the Determination’s conclusion that Paradigm had the right to deduct the costs of various products they used in their work as hair stylists from their commissions.

Paradigm denied that it had changed the conditions of employment for its employees when it purchased the two salons in 1996. It further argued that it was entitled by law determine the structure of commissions by deducting product costs from gross revenues prior to calculating commissions to be paid to Richard and Hackett.

Richards appeared on behalf of herself and Dee-Anne Hackett (“Hackett”). Paradigm also appealed other aspects of the Determination, and that appeal was decided a separate Decision, BC EST #D420/00. Blair Christie (“Christie”) appeared on behalf of Paradigm.

ISSUE TO BE DECIDED

The issues to be decided in this case are: did Paradigm misrepresent the conditions of employment for stylists when it purchased Expressions Hair Design Ltd. and was Paradigm entitled to deduct product costs from gross revenue prior to calculating commissions.

FACTS

Paradigm operates two hair salons in Surrey. Richard began work as a stylist for Paradigm on February 5, 1996, and she was still employed on the date of the hearing. Hackett was employed by Paradigm from February 5, 1996 through January 14, 1999. Richard received wages primarily in the form of commissions, which were 50 per cent of the retail charge for styling services she performed and the minimum wage for time she spent at the front desk and attending staff meetings. The arrangements for Hackett were the same except that she received commissions of 45 per cent of the price of the services she performed.

Paradigm purchased the two salons in January 1996. At that time, it offered employment on the same terms and conditions as the previous owner, Expressions Hair Design Ltd., to all employees. Both Richard and Hackett were employed by Expressions Hair Design Ltd. at the time of the purchase and continued as employees of Paradigm.

The first element of Richard's appeal was the method of payment for various hair care products that she used in her work. Both parties agreed that stylists were required to use products provided by the salon and that Paradigm deducted the cost of salon products from gross revenues before calculating commissions due to employees. Richard stated, without contradiction, that she had never authorized any deduction for these products from her pay. The cost of the salon products was not shown on her pay statements.

Christie testified that this practice was relatively common in the hair styling industry. He introduced evidence from the director of education for a hair products firm. She stated that compensation practices in the industry vary. Some salons offer a lower percentage of gross revenues in compensation, but do not charge for products used. Others offer a higher commission but charge for colours and other products. By contrast, Richard stated that in her experience with other employers, commissions had been based on gross revenues, not net revenues after deductions for products. She also presented statements from other hair salons in British Columbia and New Brunswick stating that they did not deduct the cost of products from commission income.

This issue was linked to the other ground of Richard's appeal, that Paradigm misrepresented her terms of employment. Richard was employed at the salon in 1996, when Paradigm purchased the business. According to Richard, she was promised that her terms of employment would not change under the new ownership. Richard further alleged that, under the previous owner, when she did a permanent, the owner deducted the costs of the products used before calculating her 50 per cent commission. For all other services, she received 50 per cent of the price charged to the client. Richard stated in her complaint that after Paradigm took over the business, the employer deducted for permanents and colouring services prior to calculating her commission. Further, during the period of her employment with Paradigm, the employer added deductions for other products used, such as conditioning hair treatments, highlights and the like. Richard's position was that Paradigm had misrepresented the terms of her employment by adding other deductions for product costs prior to calculating her commission.

In the course of her investigation, the Director's delegate found that the previous owner of the salon could not recall his practice. The former manager of the two locations told the delegate that Paradigm had not made any change in the terms of employment and that she had been responsible for setting up Paradigm's computer system

The Determination found that no misrepresentation had occurred. If a false representation does occur, employees generally file a complaint shortly after their employment begins. In this case, Richard and Hackett continued their employment for three years after Paradigm purchased their employer. Moreover, neither the complainants nor Paradigm were able to produce records to demonstrate any change in the formula for calculating commissions. After Paradigm took over the business, it added product cost deductions to its commission structure, one of the issues Richard raised in her appeal. The delegate found that these changes did not constitute false representation. Nor did the changes constitute a termination under Section 66 of the *Act*.

ANALYSIS

The Determination found that Paradigm had not violated Section 8 of the *Act* by misrepresenting the conditions of employment for stylists when it purchased the salons in 1996.

Section 8 states:

An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting

- (a) *the availability of a position,*
- (b) *the type of work,*
- (c) *the wages, or*
- (d) *the conditions of employment.*

The significant part of this Section is in the preamble, which refers to the act of a person to become an employee or to be available for work or "to work," by misrepresenting an aspect of a position. The evidence in this case did not show that Paradigm induced any employee of the two salons to remain in her position by misrepresenting the conditions of employment. Richard did not prove that Paradigm violated its commitment to maintain terms of employment after it purchased the business. After interviewing both the former owner and manager of the two salons, the Director's delegate concluded that no changes occurred in the period immediately after Paradigm purchased the business. Ultimately, Paradigm did change the conditions of employment by charging for additional products used by stylists in their work. It informed the employees of these changes, and they accepted them, perhaps reluctantly because they reduced employee income. The *Act* does not prohibit an employer from changing conditions of employment unilaterally. If these changes are substantial, then Section 66 gives the Director the authority to "determine

that the employment of an employee has been terminated.” Neither of the two employees in this appeal argued that their employment had been terminated.

Richard argued that deduction of the cost of salon products violated Section 21 of the *Act*.

Section 21 states:

- (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.*
- (2) *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.*

Paradigm argued that it had the right to determine the structure of revenues on which commissions are based, as it did for the stylists. Industry practice admittedly varies, but the practice in this case was not unusual.

Richard presented a previous decision of the Tribunal, *Mega Hair Group Inc.* BC EST #D223/97 in support of her appeal. In that decision, the adjudicator found that the employer made unauthorized deductions from employees’ wages by charging for products used in their work. Unlike this case, the employer in *Mega Hair Group* did not require employees to use these products, although the employer supplied all of the products necessary for their work based on the employees’ choices.

The decision in *Mega Hair Group* does not describe the compensation system used by the employer. It refers only to “wages.” The *Act* defines “wages” to include commissions. However, the structure of compensation is relevant. Compensation in *Mega Hair Group* appears to have been an hourly wage. In those circumstances, deductions for products clearly violates Section 21 of the *Act*. The adjudicator reached a similar conclusion in *Estetica Professional Hair Care Centre Ltd.* BC EST #D473/98, where employees’ wages were a combination of hourly rate plus commissions on goods sold.

The circumstances in this case are different. Compensation is based primarily on commissions, with a small proportion of wages based on an hourly rate. The deductions are taken from gross commission income, not from hourly wages. Paradigm argued that it had the right to determine the basis for calculating commissions, i.e. whether the cost of materials was to be deducted from gross income or not. In the case of this employer, the practice was mixed. For some procedures, the cost of products was deducted from gross income, but for other work, no deductions were made.

The thrust of Richard's argument is that an employer can only pay commissions on the full retail price charged to a customer. The law does not support that position. If the *Act* prohibited deductions of this type from gross income, then an employer would be free to reduce the level of commissions paid as compensation to recover the cost of the products used. According to Paradigm's evidence, that tradeoff occurs in the industry.

ORDER

For these reasons, the Determination of April 5, 2000 is confirmed as it relates to alleged violations of Sections 8 and 21 of the *Act*. The Employer is obligated to pay Richard \$713.00 and Hackett \$68.19, plus any additional interest due under Section 88 of the *Act* from the date of the Determination, as stated in *Paradigm Management Ltd.*, BC EST #D420/00.

Mark Thompson

Mark Thompson
Adjudicator
Employment Standards Tribunal