Employment Standards TRIBUNAL

An appeal

- by -

Astro Guard Alarms Vancouver Ltd.
- and by -
Peter W. Crowther
- and by -
Kirk A. Pleasants

- 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: Ib S. Petersen

FILE No.: 2001/87, 120, 302 and 356

DATE OF HEARING: August 7, 2001

DATE OF DECISION: August 29, 2001

DECISION

APPEARANCES:

Mr. Robert Gilbertson	on behalf of Astro Guard Vancouver Ltd. ("Astro Guard" or the "Employer")
Mr. Peter Crowther	on behalf of himself (the "Employee")
Mr. Kirk Pleasant	on behalf of himself (the "Employee")

OVERVIEW

This decision deals with two appeals by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director issued on January 15 and 25, 2001. The Determinations concluded that Crowther and Pleasants were owed $2,988.56 and $191.77, respectively, by the Employer. As well, both Employees appeal the Determinations.

FACTS AND ANALYSIS

Astro Guard operates a security alarm business.

a. Crowther

Crowther was employed as a sales representative from January 16, 1995 to March 31, 2000, at the rate of $1,000 per month plus commission.

There were five components to his complaint to the Employment Standards Branch: failure to pay minimum wages, deductions from wages for cell phone, statutory holiday pay based on base salary only, failure to pay vacation pay and to provide compensation for length of service. The Delegate found in favour of Crowther on some of these issues: he awarded him $502.23 on account of unauthorized deductions, $891.44 for statutory holiday pay, and $1,431.88 on account of vacation pay. Crowther was not entitled to compensation for length of service because he quit.

The Employer appeals the deduction and the vacation pay. With respect to the first issue, he says that there was an agreement that Crowther used the cell phone for his other business, the management of a hockey team. This, he says, can be seen from the business cards associated with the hockey team. With respect to the second issue, he says that Crowther took a week off in April 1997, 1998 and 1999 to attend hockey tournaments and that he took a week of in January 2000. These absences were with pay and Crowther was paid $250 in each of those weeks.

Gilbertson also says that he paid Crowther $1,000 in March 2000 and that this payment was on account of vacation pay.

It is fair to say that Crowther vigorously opposes the Employer's appeal and--with one exception--seeks to uphold the Determination. Crowther appeals the conclusion that he is not entitled to compensation for length of service. He says he is entitled to better treatment after five years of employment with the company. He point to changes to the terms and conditions of his employment. In January 1999, the Employer took "away [his] base plus commission pay structure." In January 2000, the Employer incorporated a "meet your draw structure."

The Employer opposes his appeal. It relies on his performance, which, it says, declined over time, as an explanation of the changed terms and conditions. These changes are documented in memoranda from the Employer.

I turn first to the Employer's appeal.

I agree with the Delegate's conclusions with respect to the deductions for cell phone. The employer's evidence was that Crowther used the phone for the hockey team he was managing and coaching. The Employer asserts that there was a verbal agreement that he pay for this use. The Employer stated, among others, that Crowther had the cell phone number on his "business card" for the hockey team. That was incorrect. In any event, even if I accepted the employer's assertions, I would still uphold the Determination on this point. There is no written assignment (Section 22). Section 21 of the Act states, in part:

> 21. (1) Except as permitted by this act or any other enactment of British Columbia or Canada, and employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

The second aspect of the Employer's appeal was based on an assertion that Crowther took a week off from work every April in 1997, 1998 and 1999, to attend hockey tournaments for the team he was involved with. He was paid during these absences. The Employer had little evidence to support these assertions. The Employer relied on local newspaper clippings to show that Crowther's team had been in a tournament in April 1998. George Siegle who testified for the Employer thought he had been absent two or three times, and he was not sure of the dates. Crowther disputed that he had been away from work as stated by the Employer. He agreed, in a written submission to the Tribunal, that he took four days off in April 1998 "with permission" because, as noted in the Employer's appeal, "to make up for any short comings or over sites [sic] on my companies side." It is clear from the Employer appeal submission that, even if the Employer is correct in its factual assertions, and I have grave doubts about that, Gilbertson in effect admitted that he did so with permission. It would not be proper to allow the Employer to characterize this time as vacation time to be deducted form the amount awarded by the Delegate.

On the question of the credibility of the witnesses, I adopt the words of the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

Based on that test, I prefer the testimony of Crowther over that of Gilbertson's where there is a conflict.

As well, the Employer says that Crowther took a week off work in January. Crowther denies that and says that he worked. One of these days he worked with Pleasants canvassing in Port Moody. In the circumstances, I am inclined to accept his testimony. The employer's appeal on this point is rejected.

I now turn to the payment of $1,000 in March, which the Employer says is on account of vacation pay. The payment is characterized in the payroll records as vacation pay. Crowther says that he worked in March. I accept that the Employer had concerns about Crowther's performance. That was the reason for the changes to Crowther's compensation structure. Crowther, on the other hand, was not happy with the "leads" he was getting from the company and his compensation. Gilbertson explains that Crowther came to him in February and said he was unhappy at work. He says that Crowther took "March off to recharge the batteries" and did not come back. Crowther failed to hand in mandatory time and mileage sheets, and did not attend sales meetings. He came in on pay day, March 15. It is clear to me that the relationship in the first quarter of 2000 was heading in the wrong direction. All the same, I am not, on balance, persuaded that the Delegate's conclusion that Crowther worked in March is wrong. Perhaps the most significant evidence are invoices submitted by Crowther for the month of March. While the Employer explains that the invoices are not signed, Crowther says that is common. Gilbertson stated that he was not aware if Astro Guard had, in fact, been paid for these invoices. It seems to me that would have been an obvious way to cast doubt over these invoices.

The employer suggests that there are errors in the Delegate's calculations. It there are, the employer did not explain those errors.

In short, I am not persuaded that the Delegate erred in his award and the calculation of same. In fact, I would like to add that the Determination is well reasoned and balanced. The employer appeal is dismissed.

Crowther appeals the Delegate conclusion that he is not entitled to compensation for length of service. He points to the changes to his compensation structure and suggests that he was constructively dismissed by the Employer.

These changes described by Crowther are well documented in memoranda from the Employer. At the end of January 2000, the Employer put him on notice that he had failed to cover his draw

for December 1999. It stated that he was below his draw in January and gave him notice that if he failed to cover his monthly draw for February and March, he would lose his draw and, thus, be on straight commission. In February the Employer gave him a memorandum much to the same effect. It appears that Crowther failed to cover his draw in March. Finally, on April 3, 2000, the Employer informed him that he was put on straight commissions for failure to cover his draw. I agree with the Employer that Crowther was given ample notice of the changes to his terms and conditions of employment. While it is clear that he did not like those changes, he was given notice of the changes, and, in my view, as found by the Delegate, quit. I am not persuaded that the Delegate erred in his conclusions. In the result, Crowther's appeal is dismissed.

b. Pleasants

Pleasants worked as a sales representative from November 8, 1999 to March 14, 2000. He was compensated at the rate of $650 per month base salary, $350 a month car allowance and commission.

He complained to the Employment Standards Branch that the Employer had failed to pay regular wages, statutory holiday pay and vacation pay. The Delegate found that Pleasants worked 94 hours in January and 96 hours in February for which he was not paid. Wages owing were calculated on the minimum wage rate in effect. The Delegate found that Pleasants had been off sick for three days in March but, because the Employer had paid for short absences due to illness in the past, he was entitled to be paid for a total of 10 days in that month. The Delegate found that while, there was no money owing for statutory holidays, some vacation pay was owing. The total amount awarded was, as mentioned, $191.77.

The Employer appeals the Determination and says that Pleasants was off on certain days, March 7, 8, 9, 14 and 15. The employer takes issue with the calculation.

The Delegate responds to the appeal. First, he says that payroll records indicate that Pleasants was off sick March 7 to 9, that he attended a sales meeting on March 14, but that there is no dispute that he did not work on March 15. Second, the Delegate says that the Employer's issue with calculation simply reflects that it is trying to recover what it paid for the days off sick. The Employer knew at the time that Pleasants was off sick and still paid him.

I agree with the Delegate. At the hearing the Gilbertson's direct testimony was that the Employer paid for absences due to illness in January and February. In the circumstances, I am not persuaded that the Delegate's calculations are wrong. In my view the Determination stands and I dismiss the Employer's appeal.

Pleasants also takes issue with the Determination. He says that his T-4's indicate that his income in 1999 was $1,681.80 and in 2000 was $2,551.63, for a total of $4,233.43 for the two years. The award of vacation pay is based on total earnings of $2,885.84. The Employer's payroll records indicate $1,400 of the $4,233.43 was on account of the car allowance, for net pay of

$2,833.43. Pleasants is not entitled to be paid vacation pay on the car allowance. The Delegate calculations are based on the amount paid based on the amounts paid every pay period and allocated to base salary and car allowance. I am satisfied that his calculations are correct an dismiss the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations dated January 15 and 25, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal