

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 -

Eagle Self Storage Ltd.
("Eagle" or the "employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/571

DATE OF HEARING: December 17, 1999

DATE OF DECISION: December 23, 1999

DECISION

APPEARANCES:

Jacob Krahn, President for Eagle Self Storage Ltd.
No appearance for Mary T. Selby
No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Eagle Self Storage Ltd. (“Eagle” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 1st, 1999 pursuant to which Eagle’s former employee, Mary T. Selby (“Selby”), was awarded the sum of \$602.72 on account of unpaid commission earnings (see section 18), recovery of an unauthorized wage deduction (see section 21) and accrued interest (see section 88). In addition, by way of the Determination, the Director levied a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

Eagle’s appeal was heard at the Tribunal’s offices in Vancouver on December 17th, 1999; Eagle’s sole witness was Mr. Jacob Krahn, its president and director. Neither the respondent employee, Ms. Selby, nor the Director attended. Ms. Selby’s failure to attend is particularly problematic. Although she currently resides in England, she was offered--on two separate occasions--the option of participating in the appeal hearing by way of a telephone conference call but refused. Thus, in a case that turns on credibility, I have before me only the essentially uncontradicted evidence of Mr. Krahn and no other *viva voce* evidence.

The employer’s position is that Selby was, in fact paid (indeed overpaid) all commissions earned and that the wage deduction was entirely proper since it represented a purely personal expense on Selby’s account.

FACTS AND ANALYSIS

Eagle operates a storage facility where members of the public may store their goods in individually secured storage lockers. Eagle hired Selby to be a resident caretaker/manager of its storage facility in Westbank, B.C.; part of her compensation package included the use of an on-site apartment. Eagle is also a “U-Haul” franchisee--it has a number of trucks and trailers that may be rented out. Selby was paid a \$600 wage every 2 weeks plus 50% of the commissions earned by Eagle through its “U-Haul” business.

Selby, whose employment was terminated in late June 1997 effective July 31st, 1997, claimed unpaid commissions for the period July 21st to 31st, 1997--a total of \$362.64--and this claim was accepted by the delegate.

The employer does not dispute Selby's entitlement to commissions earned from July 21st to 31st, 1997 but says that (subject to a wage deduction) all commissions were paid in full and thus no further monies ought to have been awarded to Selby on account of unpaid commissions.

The employer's records produced at the hearing show that the total "U-Haul" commissions earned by Eagle (calculated by U-Haul, not by Eagle) for July 1997, net of GST, were \$1,428.83. Selby's entitlement was 50% of this latter amount, namely, \$714.42. In fact, Selby was paid \$500 on July 31st and a further \$50 sometime later. The "shortfall" is accounted for by a deduction for a cleaning invoice (for the on-site apartment) that was paid directly by the employer. According to the employer, the service was contracted for by Selby on her own account but was paid for by Eagle upon demand for payment being made by the cleaning company.

Had the employer not deducted the cleaning invoice, Selby would have received her entire commission earnings for the month of July 1997. As previously noted, the employer's evidence is uncontradicted and is corroborated by seemingly credible documentation.

On the other hand, the cleaning invoice was improperly deducted from Selby's wages since the employer did not have Selby's *written* authority (or, indeed, any authority) to do so. Whether or not the expense was a purely personal expenditure by Selby--if so, I query why the employer would pay the invoice directly--or a cost properly chargeable to Eagle as an ordinary cost of business, is irrelevant. Under sections 21 and 22 of the *Act*, the employer had no lawful authority to make the deduction in the absence of written authority.

Thus, taking the foregoing into account, I calculate Selby's entitlement as follows:

Commissions payable for July 1997=	\$714.42
Paid on account of commissions =	<u>\$550.00</u>
Balance due and payable =	<u>\$164.42</u>

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied in accordance with these Reasons for Decision. Accordingly, Eagle is hereby directed to pay Selby the sum of **\$164.42**, together with interest to be calculated by the Director in accordance with section 88 of the *Act*, on account of unpaid wages.

Even though I have varied the Determination in favour of the employer, the employer nonetheless failed to pay Selby all of the wages to which she was entitled under the *Act*. Thus, the \$0 penalty is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal