

An appeal

- by -

Wiremix Media Inc.
("Wiremix")

- 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: Carol Roberts

FILE No.: 2001/737

DATE OF DECISION: December 13, 2001



DECISION

This is a decision based on written submissions by an unidentified writer on behalf of Wiremix Media Inc., Pablo Gosse, and Ruth Atterton for the Director of Employment Standards.

OVERVIEW

This is an appeal by Wiremix Media Inc. ("Wiremix"), a division of NextLevel.com Inc. ("NextLevel"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 15, 2001. A delegate of the Director found that Wiremix contravened Sections 63(1)(2)(a) of the Act in failing to pay Robin Badr, Anne Cuthbert, Richard Fowler, Pablo Gosse, Susan Ironside, Michelle Kuhn, Jennifer Lee, Catherine McLellan, Marcel Tancre and Sam Zipursky (collectively, "the complainants") compensation for length of service, and Ordered that Wiremix pay \$12,544.08 in wages, vacation pay and interest to the Director on their behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining the complainants were entitled to compensation for length of service.

FACTS

The delegate found that the complainants worked for Wiremix, a full service Internet company. In February, 2001, Wiremix merged operations with NextLevel.com, a US based company. Following the merger, Wiremix operated as the Canadian division of NextLevel.

The complainants contended that they had been terminated from NextLevel without compensation for length of service. The delegate determined that Wiremix had agreed that the complainants were temporarily laid off from their employment and were not recalled. NextLevel advised the delegate that it was encountering financial difficulties however, and was unable to pay the compensation owed.

On the basis of the submissions, the delegate concluded that the sole issue to be determined was the amount of compensation owing for length of service.

The delegate contacted Kevin Jamieson, the general manager and contact person for NextLevel, who advised her in an email that "the companies had every intention to pay past employees when we have the funds". The delegate then advised Mr. Jamieson the number of weeks each complainant claimed compensation for, and Jamieson agreed with the amounts owing determined by the delegate.



Although most of the complainants indicated they were entitled to compensation for length of service in an amount greater than provided for under the *Act* pursuant to a contract of employment, the delegate was unable to make a determination on that aspect of the claims, since none of the complainants provided the delegate with a copy of the contract. The delegate dismissed that aspect of each complaint.

The complainants also advised the delegate that NextLevel had merged with Moshpit Entertainment (a division of Cyops). The delegate determined that if the assets of NextLevel did not cover the debt owing to the complainants, an investigation would have to be undertaken with respect to the disposition of its assets, pursuant to section 97 of the *Act*.

ARGUMENT

In its notice of appeal dated October 19, 2001, Wiremix argued that the determination should be cancelled based on factual errors made by the delegate. Those errors were outlined as follows.

Wiremix contended that Robin Badr has never been an employee of NextLevel, and that, although the delegate initially identified 10 complainants, later suggested that nine employees had filed complaints.

Wiremix also contended that the delegate's determination that both Wiremix and NextLevel are located at the same Vancouver address to be in error. It states that NextLevel.com Inc. is a Colorado registered company with a head office in Nevada, and that Wiremix has its head office in Vancouver. It states that NextLevel.com Internet Productions Inc., which is a subsidiary of NextLevel.com Inc, has its head office in Vancouver.

Wiremix further contended that Kevin Jamieson is not the general manager of NextLevel, and that he has never been an employee, officer or director of NextLevel. Further, it contended that he had no authority to make decisions nor comment on legal issues pertaining to NextLevel. Therefore, NextLevel contended that it was given no opportunity to respond to the Director's investigation, and that Mr. Jamieson's comments should not be considered in arriving at a determination.

Wiremix argued that NextLevel had no formal agreement with Moshpit Entertainment (a division of Cyops), and that there had been no merger of the companies.

Finally, Wiremix disputed the identification of two individuals noted by the delegate as being directors of NextLevel and Wiremix, and the address of a third.

In her reply to the appeal submissions, the delegate contended that Robin Badr's complaint indicated that she was employed by NextLevel from January 1, 2000 until March 21, 2001, as a concept artist, and that her employment was confirmed by Mr. Jamieson. The delegate indicated that her reference to nine complainants rather than ten was a typographical error.



The delegate also submitted that Kevin Jamieson identified himself in a conversation with her as a human resource person for both Moshpit and NextLevel, and that he responded to a fax to NextLevel.com aka Moshpit Entertainment aka Cyops regarding outstanding wages and compensation for length of service. She contends that Mr. Jamieson advised her which employees were associated with NextLevel, and which were associated with Moshpit. She contended that he provided her with start dates of each of the employees, and how much compensation was owed. She submits that, in an email to her dated September 6, 2001, Mr. Jamieson advised the delegate that "I will read the old contracts that the NextLevel employees had with NextLevel and get back to you by Wen. (sic) on it. NextLevel is a company all on its own that we share office space and knowledge with. As I have stated before.(sic) The companies have every intention to pay." a The delegate submitted that Jamieson held himself out as having the authority to respond to the allegations against NextLevel. Further, the delegate submitted, no one from NextLevel responded to her phone calls and emails in respect of the complaints.

In his submission, Pablo Gosse indicated that, during the time he worked for NextLevel, he never encountered anyone by the name of Robin Badr working in any capacity, nor did any of his colleagues.

Mr. Gosse contended that, when he and other employees showed up for work on Friday, April 27, 2001, they were told they were laid off. He said they were not permitted to collect their personal belongings, were given a letter informing them they were laid off, and told to leave immediately. When contacted to retrieve their paycheques and personal effects, Mr. Gosse said that they were made aware that employees of Moshpit Entertainment had moved their equipment into the offices of NextLevel, and were working in the same office. He also stated that the employees were greeted by Mr. Jamieson, who told them he was to be the point of contact for all disputes about this matter, and were given his business card, which identified him as an employee of Moshpit. Mr. Gosse contended that this arrangement strongly suggests a relationship between Moshpit and NextLevel.

On November 22, 2001, the Tribunal received a further submission from Wiremix indicating that it was no longer affiliated with NextLevel.com. It stated that the Board of Directors of NextLevel had withdrawn its offer to purchase Wiremix, and that the Tribunal "take out any references to NextLevel when making its determination."

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Wiremix provided no evidence in support of its arguments that the delegate erred. I accept that, while the delegate may have used imprecise language, and made some typographical errors, those errors are not fundamental, or going to the substance of the decision, and I decline to cancel the Determination.



While the references in the Determination relating to the relationship of each of the companies to each other and the comments regarding their head offices may be imprecise, I accept that NextLevel.com Inc. is a US registered company. Further, I accept that Wiremix merged with NextLevel.com Inc., and operated as the Canadian operations of that company as NextLevel.com, with a registered office in Vancouver. Indeed, Wiremix's letter of appeal states as follows: "Wiremix Media Inc., a division of NextLevel.com, would like to enter the following reasons for appealing...."

The erroneous references to the addresses and names of companies in the Determination is of minor consequence. The fact is that the Determination has been issued against Wiremix Media Inc.. It has the same Vancouver office as NextLevel.com Internet Productions Inc., which is the subsidiary of NextLevel.com Inc.

Although Wiremix did not dispute the finding that it merged with NextLevel in February, 2001, in its submission of November 22, 2001, it asserts that NextLevel's intended purchase of Wiremix had been cancelled. There is no evidence as to the contract termination or any other issues relating to the obligations of each of the parties.

While there is some evidence to support the argument that Robin Badr did not work for NextLevel, Mr Jamieson did not deny that. Indeed, he provided information to support her claim.

Although there is no evidence with respect to NextLevel's relationship with Moshpit Entertainment, I accept, based on Mr. Gosse's submissions, that Moshpit assumed control of NextLevel's operations in April, 2001. All of the delegates' communications to Wiremix and NextLevel were responded to by Mr. Jamieson, who held himself out as the General Manager of Moshpit. Whether or not Mr. Jamieson was employed by, or was an officer or director of NextLevel, I accept that he held himself out to both the complainant employees and the delegate as an agent of NextLevel, and had access to its personnel records and other sensitive information. Therefore, in the absence of any evidence to the contrary, I find the delegate did not err in concluding that Mr. Jamieson had ostensible authority to represent NextLevel, and thus also Wiremix, and was entitled to rely on his representations. I decline to set the Determination aside on this ground.

Finally, even if the identification of Officers/Directors of NextLevel and Wiremix are in error, that is not fundamental to issue of whether compensation for length of service is owed to the complainants, and if so, the amounts. Therefore, I find no basis to cancel the Determination on this ground.

I am unable to find that the delegate's errors are fundamental to the Determination, and deny the appeal.

**ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination dated October 15, 2001 be confirmed in the amount of \$12,544.08, plus whatever interest might have accrued since the date of issuance.

Carol Roberts
Adjudicator
Employment Standards Tribunal