

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Consumer Direct Contact Ltd.
(" Consumer Direct ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/689

DATE OF DECISION: February 18, 2000

DECISION

OVERVIEW

This is an application filed by Consumer Direct Contact Ltd. (“Consumer Direct”) on November 15th, 1999 pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision issued on July 23rd, 1999 (B.C.E.S.T. Decision No. 316/99).

On March 4th, 1999 a delegate of the Director of Employment Standards issued a Determination in which she held that Consumer Direct had “just cause” to terminate its former employee, Rhonda Bennett (“Bennett”), on Friday, October 4th, 1996. Further, the delegate also held that Bennett had not provided sufficient evidence to prove her claim for unpaid wages allegedly earned during the period September 24th to October 4th, 1996.

Bennett appealed the Determination on the grounds that the delegate erred in finding that she was discharged for cause and in rejecting her claim for unpaid wages. Bennett’s appeal was heard on July 5th, 1999 and in a written decision issued on July 23rd the adjudicator confirmed the delegate’s finding that Consumer Direct had just cause to terminate Bennett on October 4th, 1996 but overturned the delegate’s finding with respect to Bennett’s unpaid wage claim. Accordingly, the Determination was varied by awarding Bennett the sum of \$880 in unpaid wages (2 weeks x 40 hours per week x \$11 per hour) plus accrued interest payable pursuant to section 88 of the *Act*.

THE APPLICATION FOR RECONSIDERATION

Consumer Direct’s request for reconsideration is contained in a letter to the Tribunal dated November 12th and filed on November 15th, 1999. In its November 12th letter, Consumer Direct raised four “Issues To Be Decided” which are set out below:

“Question 1: Is [Bennett’s] complaint properly within the jurisdiction of the Employment Standards Tribunal?

Question 2: ...is Bennett entitled to wages from [Consumer Direct] for the period from September 24, 1996 to October 4, 1996?

Question 3: ...how much wages is [sic] owed to Bennett by [Consumer Direct]?

Question 4: Is the advance paid by [Consumer Direct] to Bennett, in the amount of \$1,200, claimed by Bennett in her last reporting sheet for unspecified “extra wages”, and unsubstantiated by any documentary evidence, sufficient to satisfy any requirement pursuant to the answer to Question 2?”

ANALYSIS

Jurisdiction

With respect to the first “issue” noted above, Consumer Direct says that Bennett was not entitled to file a complaint because she was an “employer” as defined in the *Act*. While it is true that Bennett, in her capacity as a Consumer Direct employee, did exercise some measure of control and supervision over other Consumer Direct employees, Bennett did so at the behest of, and under the supervision and direction of, Consumer Direct’s principal, Ms. Leslie Green. In short, there is absolutely no question but that Bennett was employed by Consumer Direct, that this employment relationship was governed by the *Act* and, accordingly, Bennett was thus entitled to file a complaint with the Employment Standards Branch.

I might add, simply for the sake of completeness, that this particular argument was not, apparently, advanced during either the delegate’s investigation or at the appeal hearing. Quite apart from the fact that this argument lacks merit, it is not appropriate, in my view, except in the most unusual circumstances, for a party to raise arguments for the very first time in an application for reconsideration.

Bennett’s Unpaid Wage Claim

As previously noted, the delegate determined that Bennett had failed to prove her unpaid wage claim, however, the adjudicator overturned that finding and awarded Bennett \$880 plus interest. Although it is the employer’s burden of proving just cause for termination, the burden of proof in an unpaid wage complaint rests with the complainant employee. However, regardless of who bears the burden of proof, the decision-maker is entitled to consider all relevant evidence (irrespective of its source) in determining whether a party’s burden of proof has been discharged. The delegate, in dismissing Bennett’s claim for unpaid wages, noted several salient facts:

- Bennett claimed two full weeks’ pay but, *on her own evidence*, did not work the entire 80 hours claimed;
- Bennett did not provide any records which would show the actual hours worked during the period in question;
- Bennett’s subordinate’s evidence was that he had a difficult time making contact with Bennett and was of the view that she could not possibly have been working full-time hours (as she claimed) during her last 2 weeks of employment (the subordinate was of the view that Bennett likely worked no more than 20 hours each week); and
- Bennett’s subordinate also gave evidence to the effect that Bennett was “off-loading” certain of her duties onto the subordinate.

The key finding with respect to Bennett's unpaid wage claim is set out at page 3 of the Determination as follows:

“An employee is required to provide sufficient evidence to prove the claim. Bennett has not provided any information to show what hours she worked for [Consumer Direct] during the period in question. Without such evidence, it is impossible to determine the hours that she worked or what amount she is entitled to for wages”.

The adjudicator's findings with respect to the wage claim (found at page 5 of his decision) are reproduced below:

“I turn now to the delegate's decision concerning the hours worked by Bennett between September 24, 1996 and October 4, 1996. *I accept the delegate's finding that Bennett did not provide sufficient evidence to show the hours that she worked.* The evidence showed, however, that Bennett had never been required to keep a formal record of time worked. The evidence showed that Bennett would work at her home as well as a variety of locations. In these circumstances, Green's vague concerns and comments from other employees are not sufficient to conclude that Bennett was not continuing to work a full work week.” (*italics added*)

In my view, the adjudicator, having determined that Bennett failed to provide sufficient evidence to corroborate her claim regarding the hours worked during the last 2 weeks of employment was not entitled to then, in effect, reverse the burden of proof so that the *employer* was obliged to show that Bennett had not worked the hours she claimed to have worked during her last 2 weeks of employment. On the other hand, it seems clear that Bennett worked at least *some* hours during her last 2 weeks of employment. For example, the uncontradicted evidence is that Bennett met with her employer on October 3rd and spoke with her employer on October 4th; her subordinate acknowledged that Bennett was working (albeit no more than half-time) during the period in question--surely those acknowledged hours are compensable.

On the other hand, Bennett only claimed wages for nine working days and admits to having been terminated at around 9:00 A.M. on the morning of October 4th. Given these latter facts, I do not believe that an unpaid wage award based on Bennett having worked ten 8-hour days can be sustained based on the available evidence. Given the employer's testimony as to the number of hours worked, coupled with Bennett's inability to prove the number of hours she actually worked, I am of the view that a fair and reasonable assessment of Bennett's wage claim for the period in question (and recognizing that the evidence before me does not permit a precise estimate) is 40 hours at \$11 per hour.

The \$1200 "Advance"

As noted in the Determination, Consumer Direct originally asserted that Bennett was improperly paid some \$1,200 in wages or expenses. Bennett, for her part, maintained that this latter sum

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was properly paid to her as reimbursement for certain expenses. The delegate did not make any findings regarding the disputed \$1,200 nor did the adjudicator.

The Employment Standards Branch does not have the statutory authority to act as a collection agency for employers. If Consumer Direct is now of the view that it ought not to have paid out some \$1,200 in expenses or wages to Ms. Bennett, then it should to file a claim against her in the Small Claims Court. In effect, Consumer Direct asks that the \$1,200 be “set-off” against any liability for unpaid wages that it might otherwise have. However, the only permissible wage deductions are those set out in section 22 of the *Act*, none of which has any application here--no other deductions from wages are permitted (see section 21).

ORDER

Consumer Direct’s application to vary the decision of the adjudicator in this matter is granted. Accordingly, pursuant to section 116(1)(b) of the *Act*, B.C.E.S.T. Decision No. 316/99, issued July 23rd, 1999, is varied to such that Consumer Direct is ordered to pay Rhonda Bennett the sum **\$440** on account of unpaid wages as well as additional interest on that amount to be calculated by the Director in accordance with the provisions of section 88 of the *Act*. In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal