Employment Standards TRIBUNAL

An appeal

- by -

Tri-M Systems Inc.
("Tri-M" or the "Employer")

- 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.: 2000/672

DATE OF HEARING: December 11, 2000

DATE OF DECISION: January 10, 2001

DECISION

APPEARANCES:

Mr. Yasin Amlani and Mr. Doug Stead on behalf of the Employer

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on September 8, 2000. The Determination concluded that Oswald was owed $608.01 by the Employer on account of length of service.

FACTS AND ANALYSIS

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong.

In large measure, the issues on appeal are of a factual nature. At the hearing, the Employer acknowledged that most of the findings of fact in the Determination are correct.

The Employer is a "high-tech" company. Mike Rogozinski worked for the Employer from April 3, 2000 to July 4, 2000 as a salesperson. He was paid on the basis of an annual salary of $30,000. It is not in dispute that Rogozinsky's employment was terminated on July 4. At that time, he had just returned from being away from work for a week due to illness. He worked on July 4 and was terminated at a meeting at the end of that day. According to the Determination, he was given three cheques: one for his pay for the last pay period of June (which included pay for the week away due to illness), a second for the statutory holiday pay and his last day of work (July 4), and a third for his vacation pay.

It is not in dispute that Rogozinsky in law is entitled to compensation for length of service. The issue is whether or not the payment for the week away from work due to illness discharges the employer of the obligation to pay compensation for length of service, as the Employer intended. The Employer stated to the delegate that it was made clear to Rogozinsky that the payment meant that "we are all square." Also, according to the Determination, Rogozinsky acknowledges that he was told, in the termination interview, "that since I was paid for the week I was injured, the pay for that week would be considered to be my severance pay."

In the circumstances, I am persuaded that the delegate erred. There is no provision in the *Act* for sick pay. Accordingly, the entitlement must be founded in the employee's contract of employment. In my opinion, the onus of establishing an entitlement rests on the person

claiming it, in this case the employee, Rogozinsky. However, from my review of the Determination, the delegate appears to have put the onus on the Employer to disprove the claim and, therefore, erred in law. In the absence of a written or verbal employment contract, which provides for the entitlement, at the time of hire, the employee must show that the contract has somehow been modified over time to include the entitlement. The delegate correctly considered whether the Employer had a policy governing sick pay and found that the "Employer has no firm policy on sick leave and whether it is to be paid or not." That, in my view, does not establish the contractual foundation for paid sick leave. In my opinion, the evidence does not establish a contractual entitlement to paid sick leave. At most, the policy is that employees who are paid during brief absences "make" up the absence, either through subsequent overtime--*i.e.*, as an advance--or vacation time. In effect, the employees "pay" for the time off due to illness. That conclusion is not only supported by the evidence at the hearing--and it is to be noted that neither the delegate nor the employee appeared--but also by the information set out on the face of the Determination, including interviews with other employees. In short, I am of the view that Rogozinsky was paid one week's pay that he was otherwise not entitled to and that this discharges the Employer's obligation under Section 63.

As well, there are certain inconsistencies in the Determination. First, the Determination states that the employee did not understand the payment of the one week's wages was to be considered compensation for length of service. Second, the Determination concludes that the decision to consider that payment to be "compensation for length of service was made after the fact." Those conclusions are inconsistent with the statement in the Determination, referred to above, that Rogozinsky acknowledged that he was told, in the termination interview, "that since I was paid for the week I was injured, the pay for that week would be considered to be my severance pay."

In short, I am of the view that the Employer has discharged the burden on the appeal and it is upheld.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 8, 2000, be cancelled.

IB S. PETERSEN

Ib S. Petersen
Adjudicator
Employment Standards Tribunal