

**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-

Terry A. Kvam & Associates Ltd.

( the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 98/719

**DATE OF DECISION:** February 2, 1999

## DECISION

### OVERVIEW

This is an appeal brought by Terry A. Kvam & Associates (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 October 26th, 1998 under file number 91-511 (the “Determination”).

The Director determined that the employer owed its former employee, Barton J. Bourassa (“Bourassa”), the sum of \$2,701.47 on account of unpaid vacation pay (see sections 57 and 58 of the *Act*) and accrued interest (see section 88). The employer’s position, rejected by the Director’s delegate, was that vacation pay was included in Bourassa’s commission earnings as a real estate appraiser. Further, by way of the Determination, a penalty in the amount of \$0 was levied pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

### ISSUES TO BE DECIDED

In a letter dated November 17th, 1998, appended to its notice of appeal, the employer seemingly raises two grounds of appeal, namely, that the investigation was conducted in a biased manner and that the Determination is incorrect as a matter of law.

### FACTS AND ANALYSIS

There is no evidence before me to suggest that the delegate was biased by reason of some past or present relationship with the complainant employee or was, in any way, financially interested in the outcome. Nor do I find any evidence that the delegate prejudged the employee’s claim for vacation pay. The evidence does show that the delegate made a conscientious effort to ensure that the employer was given a reasonable opportunity to respond to Bourassa’s complaint (see section 77).

As noted above, the employer’s position is that Bourassa’s vacation pay was included in his commission earnings. The employer’s payroll records relating to Bourassa do not show a separate entry for any vacation pay allegedly paid to Bourassa. Section 58 of the *Act* provides that an employer and employee may agree to have the employee’s vacation pay “paid to an employee on the employee’s scheduled pay day” but there is no evidence before me of any such agreement in this case.

The employer and Bourassa entered into written employment agreement on April 30th, 1997 which provided that “remuneration is by commission as agreed to from time to time”; the agreement is

silent as to the matter of vacation pay. The employer bears the burden of proving that an employee has been paid vacation pay; in this case, that evidentiary burden has simply not been satisfied.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$2,701.47** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance. Inasmuch as I have found that the employer

violated the Act by failing to pay vacation pay, the \$0 penalty levied by way of the Determination is also confirmed.

---

**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**