

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Steelhead Business Products Ltd.  
("Steelhead")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 96/557

**DATE OF HEARING:** January 7, 1997

**DATE OF DECISION:** January 17, 1997

**DECISION**

**OVERVIEW**

The appeal is by Steelhead Business Products Ltd. (“Steelhead”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against Determination # CDET 003834 of the Director of Employment Standards (the “Director”), a decision dated August 29, 1996. In the Determination Rod Peacock is found to be owed compensation for length of service, vacation pay and wages.

The appeal alleges that Peacock was not dismissed, that he quit, and that Steelhead owes neither vacation pay nor wages given his absence from work, his rate of pay and what has already been paid to him.

**APPEARANCES**

Jennifer Yeager	Representing Steelhead Business Products
Vera Jack	For Steelhead
Rod Peacock	On his own behalf
Shelina Shivji	For the Director

**ISSUES TO BE DECIDED**

At issue is the conclusion of the Director’s delegate that Peacock’s employment was terminated by Steelhead. The appeal alleges that he quit.

At issue as well is her conclusion that wages are owed Peacock. In that respect the appeal alleges that she failed to determine Peacock’s correct rate of pay, failed to consider a \$300 payroll error, and incorrectly awarded wages on days when he was unjustifiably absent. Depending on how many days the employee is found to have been ill, there may also be a need to determine his entitlement to sick pay given Steelhead’s policies.

Finally, the delegate’s calculations in respect to vacation pay are an issue. In that respect the appeal alleges that all vacation pay was paid, indeed that Peacock was overpaid by \$33.67.

**FACTS**

Rod Peacock began working for Steelhead Business Products in November of 1994 as Sales Manager. In June of 1995 he became one of Steelhead’s telemarketers. His last day of work was September 7, 1995.

Both Steelhead and Peacock agree that in the summer of 1995, pay cuts were discussed as a way of getting costs down. But while Peacock says that nothing ever came of it, Steelhead says that it

reduced his pay with his permission, as part of what it says was a temporary cost cutting measure. According to Steelhead, Peacock's pay went from \$3,000 to \$2,400, per month, on the 16<sup>th</sup> of August.

Records reveal that Peacock was still being paid at the higher rate at the time of his departure. According to Steelhead, that was an error which led to his being paid \$300 too much at the end of August. The appeal claims that should have been a part of the delegate's calculations.

According to Steelhead, Peacock was chronically absent and it had begun tracking his attendance as a result. There is agreement that Peacock took the afternoon of August 31 off as vacation, was at work for an hour on the 29<sup>th</sup> of August and also the 30<sup>th</sup>, and was sick on the 5<sup>th</sup> of September by reason of sunburn. But beyond that Steelhead alleges that Peacock was absent from work for the rest of the August days, 29, 30, and 31, and for the whole of August 25 and August 28. According to Steelhead, Peacock's absence was not because he was sick but because of "unscheduled summer fun" and that it is "safe to assume that he also was attending some job interviews". Peacock says that he was at work on the 25<sup>th</sup>, the 28<sup>th</sup> and the morning of the 31<sup>st</sup>, but sick on the 29<sup>th</sup> and 30<sup>th</sup> of August.

On September 6, 1995 Peacock verbally notified Vera Jack of Steelhead that he intended to resign his employment and in doing so he says that he offered "to stay for two weeks and train somebody new". Jack did not accept his notice at that point. Peacock says that he suggested that they meet the next day. They did, late in the morning and as the parties present matters, Jack told Peacock that there was no need for him to train anyone. It is the testimony of Jack that seeing as it was Peacock's plan to quit, she thought that "he should just go". The General Manager of Steelhead at the time, Robert Yeager, affirms that Jack told Peacock that "there was no replacement for him, and as such his services as offered would not be required". According to Peacock, Jack told him that "there is nobody to train so you should leave now", from which he concluded that he was terminated. He immediately left the office. On the next day he was offered a new job and accepted it, telling his new employer that he could start anytime. As events unfolded, he began the job on the 18<sup>th</sup> of September.

On the 8<sup>th</sup> of September, Peacock was telephoned by Robert Yeager and told that if he wanted to be paid for another two weeks that he would have to work that time. Peacock did not return as requested and Steelhead argues that in refusing to do so, Peacock terminated his employment. Peacock says he had already been terminated and that at that point it appeared that he might start his new job as early as September 12.

The calculations of the delegate show Steelhead paying \$451.22 as vacation pay in its final cheque to Peacock. That is an early figure provided by Steelhead during the course of the delegate's investigations. Steelhead now says that it actually paid \$499.26, in issuing him a final cheque for \$571.93 after deductions. I note that his ROE uses a figure of \$484.74.

## **ANALYSIS**

For it to be found that an employee quit there must be clear, unequivocal facts to support such a conclusion. That is because it is widely accepted, and the Tribunal's view, that the right to resign one's employment, to quit, is personal to the employee and that a person can be found to have quit only when he or she does so voluntarily [*Burnaby Select Taxi Ltd. and Zoltan Kiss* BCEST #91/96].

It is further accepted that there is both a subjective and an objective element to quitting. There is the forming of an intent to quit but there must also be the taking of action which is inconsistent with the keeping of one's job.

Peacock intended to quit, that is clear. He expressed that intention to Jack on the 6<sup>th</sup>, in giving two weeks' notice as he did. In giving notice he offered to train someone new which the employer views as an ultimatum. I do not. He merely offered to assist where required.

Steelhead goes on the argue that Peacock quit on failing to report for work on being requested to do so on September 8. An employee's failure to report may be evidence of a quit but it is not in this case. As matters are presented to me, it is clear Peacock's termination occurred on the 7<sup>th</sup>, at the time of his meeting Jack. The question is, Did he quit or was he discharged?

After careful consideration of all evidence before me, I can only conclude that Peacock was dismissed. That is because there are not clear, unequivocal facts to support a conclusion that he quit. I have not been shown that Jack made it clear to Peacock that he was to work his notice, in other words that Steelhead was accepting his offer to work the two weeks, and that he left in the face of that. Indeed, Steelhead does not even suggest it. Moreover, I find it unlikely that Peacock would give notice as he did and then quit the next day with no job to go to. It is also strikes me as unlikely that Peacock would go to the trouble of meeting Jack on the 7<sup>th</sup> if his plan was to quit that day. No, on hearing from Jack and Peacock, I am convinced that Peacock was led to the conclusion that he was dismissed, by the comments of Jack, her talk of there being no need to train someone and that he should go right away, and by her failure to respond positively to his offer. That is not an unreasonable conclusion in my mind.

The Director's delegate has awarded compensation for length of service. I agree with that conclusion and with her conclusion that it is the old *Act* that governs.

Consideration of the appeal falls under the transitional provisions of the *Act*. Section 128 of the *Act* states:

- (3) If, before the repeal of the former Act, no decision was made by the director, an authorised representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

Section 128 (4) of the *Act* applies to an employee whose employment began before section 63 of the current *Act* came into force and effect, as it did on November 1, 1995, and is terminated after that. Peacock's employment was terminated in September of 1995, before the new *Act*. It is the old *Employment Standards Act* (SBC Chapter 10) that applies.

I now turn to the matter of wages owed Peacock and in that regard note that the delegate found his rate of pay to have remained at \$3,000 per month and that he is entitled to pay for the days August 25, 28, 29, 30 and 31. The employer alleges a lower rate of pay and that Peacock was unacceptably absent for a major part of those days but the employer presents no solid evidence in support of that. There is no letter advising Peacock of a cut in pay, no other paper work indicating a cut in pay, indeed there is nothing clearly showing that Peacock's pay was to go to \$2,400 on the 16<sup>th</sup> of August. A similar problem exists with respect to the employer's allegation that Peacock was unjustifiably absent. In the absence of proof of his being unacceptably absent, I am unable to find fault with the delegate's conclusion that he is entitled to pay for the days, August 25, 28, 29, 30 and 31. Nor has it been made clear to me that Peacock was sick for more than his entitlement under Steelhead's sick policy.

The final matter before me is the matter of the amount of vacation pay owed. I note that the delegate uses an early figure supplied by Steelhead in a Summary of Payments Owed and Paid attached to its letter of January 23, 1996. That figure does not appear to be a correct figure however.

I calculate the moneys owed Peacock as follows. Given my finding that the point of termination is noon on the 7<sup>th</sup>, I find that he is owed pay for 16 and ½ days between August 16 and the point of termination, either in the form of wages, sick pay, statutory holiday pay or vacation pay, the latter being for the afternoon of August 31<sup>st</sup> and the day of September 1<sup>st</sup>. To that must be added the commission of \$200 which Steelhead admits is owed Peacock, compensation for length of service of 6 and ½ days, from the 7<sup>th</sup> to the 15<sup>th</sup>, and outstanding vacation pay. The delegate and Steelhead are within a dollar in agreeing that Peacock in total earned \$1,157 in vacation pay and from that I subtract the total amount which has been paid, \$900, a figure which includes the afternoon of August 31<sup>st</sup> and September 1<sup>st</sup>, leaving \$257 still owing. The amount of Peacock's last cheque, \$1,663, must be deducted from the total of the above, leaving \$1,771 as the amount owed Peacock before adding interest.

16 ½ days @ 17.31/hr.	\$2,077
Commission	200
Compensation for length of service	900
Vacation pay not paid	<u>257</u>
Subtotal	\$3,434
Amount of last pay cheque	<u>- 1,663</u>
Subtotal	<u>\$1,771</u>
Interest	106
Total amount owed Peacock	<u>\$1,877</u>

**ORDER**

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 003046 be varied so that it reflects my conclusion that in total, \$1,877 is owed Peacock.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**

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