

An appeal

- by -

Blok Printing Ltd.
(“Blok”)

- 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2015A/90

DATE OF DECISION: July 24, 2015

DECISION

SUBMISSIONS

Karen Blok on behalf of Blok Printing Ltd.

OVERVIEW

1. This is an interim decision concerning an appeal filed by Blok Printing Ltd (“Blok”).
2. On January 6, 2015, William J. Smith (“Mr. Smith”) filed an unpaid wage complaint under section 74 of the *Employment Standards Act* (the “*Act*”). In his complaint, Mr. Smith alleged that his former employer – the present appellant, Blok, owed him \$3,725.20 representing unpaid commission earnings for the month of November 2014.
3. Blok operates a print shop in Burnaby. Mr. Smith was employed as Blok’s “Vice President of Business Development” from the spring of 2013 until his resignation tendered on November 27, 2014 (effective the next day).
4. Mr. Smith’s complaint was the subject of a hearing before a delegate of the Director of Employment Standards (the “delegate”) on May 11, 2015. The delegate issued the Determination now under appeal on June 19, 2015, as well as accompanying “Reasons for the Determination” (the “delegate’s reasons”). By way of the Determination, the delegate ordered Blok to pay Mr. Smith the total sum of \$2,746.93 on account of unpaid wages (regular wages and vacation pay) and section 88 interest. Further, and also by way of the Determination, the delegate levied two separate \$500 monetary penalties against Blok based on the latter’s contraventions of sections 17 (timely payment of wages) and 18 (payment of all earned wages on termination) of the *Act*. Thus, the total amount payable under the Determination is \$3,746.93.
5. Blok appeals the Determination on the ground that the delegate erred in law (subsection 112(1)(a) of the *Act*). However, Blok’s appeal submission also raises a natural justice issue and thus, in accordance with the Tribunal’s decision in *Triple S Transmission Inc.* (BC EST # D141/03), I will also address that matter (subsection 112(1)(b) of the *Act*).
6. At this juncture, I only have before me a submission from Blok. The respondent parties have not been requested to file any submissions. I have also reviewed the Determination, the delegate’s reasons and the section 112(5) record that was before the delegate when he issued the Determination. After having reviewed this material, I am of the view that this matter should be referred back to the Director pursuant to subsection 114(2)(a) of the *Act*:

114 (2) Before considering an appeal, the tribunal may
(a) refer the matter back to the director for further investigation...

7. My reasons for making this interim order now follow.

FINDINGS AND ANALYSIS

8. As determined by the delegate, Mr. Smith’s compensation took the form of a bi-weekly \$2,307 salary, a \$230 vehicle allowance, three weeks’ paid vacation and a 10% commission on sales over \$600,000 “although he

never received any commissions under this agreement as his sales never reached the established threshold” (delegate’s reasons, page R4).

9. Mr. Smith’s evidence was that in the fall of 2014, his compensation was changed to a straight commission basis. “Mr. Smith has claimed outstanding commissions based upon an alleged oral agreement reached with the Employer in late October or early November of 2014” (delegate’s reasons, page R4). It is important to note that Mr. Smith’s claim was *exclusively* for unpaid commissions. In his complaint form, he claimed unpaid commissions in the amount of \$3,725.20. He did not make any other claims. In his November 27, 2014, resignation letter, Mr. Smith requested payment of commissions for November 2014 (and he offered to settle this claim at a lower figure) – he did not advance any other claim.
10. The delegate made the following findings:
 - “Mr. Smith alleges that the parties agreed to change his pay structure to a pure commission basis in November 2014...[but] I find that while both parties made offers regarding a new commission structure for Mr. Smith, no agreement was reached in November.” (delegate’s reasons, page R4);
 - “...I find that the terms of Mr. Smith’s employment were not revised, and that he continued to be entitled to \$2,307.00 as a bi-weekly salary until he quit on November 27, 2014.” (delegate’s reasons, page R5); and
 - “Mr. Smith testified that in the summer of 2014, he reached an agreement with Blok Printing that he would receive a commission of \$0.02 per delivery...I find that there was no agreement to pay a commission to Mr. Smith for these deliveries.” (delegate’s reasons, page R5).
11. Having found that Mr. Smith’s original compensation arrangement did not change, the delegate then found that Mr. Smith was entitled to a further \$729.80, representing the balance of his salary due for the month of November 2014 (delegate’s reasons, page R5).
12. Further, the delegate determined that Mr. Smith was entitled to an additional \$1,972.49 on account of unpaid vacation pay (delegate’s reasons, page R5):

The parties agree that Mr. Smith was entitled to three weeks, or fifteen days, of paid vacation per year. As Mr. Smith worked for 1.57 years (one year and 209 days), he earned 23.55 paid days (1.57 years x 15 days/year) or the equivalent annual vacation pay. The parties agree that Mr. Smith took three days of paid vacation. The Employer stated that Mr. Smith took an additional seven sick days which Mr. Smith agreed would count as annual vacation, as Blok Printing does not provide paid sick leave. Mr. Smith did not contradict the Employer’s evidence in this regard, and I find that Mr. Smith took ten days as annual vacation during his employment. Blok Printing paid an additional five days’ wages to Mr. Smith as annual vacation pay on his paycheque for the pay period ending November 14, 2014. In total, Mr. Smith has taken or been paid for 15 days of annual vacation, leaving a balance of 8.55 days’ pay owing as annual vacation pay. As Mr. Smith was paid \$2,307.00 bi-weekly for ten working days, each day of paid vacation is equivalent to \$230.70. I find that Mr. Smith is owed an additional \$1,972.49 in annual vacation pay.
13. As previously noted, Blok’s appeal is based on the ground that the delegate erred in law. Blok appended a ¾-page memorandum to its Appeal Form prepared by Karen Blok (“Ms. Blok”). Ms. Blok and Henry (Rick) Blok are the company’s only two directors and officers. Ms. Blok and Rick Blok appeared on behalf of the company at the complaint hearing; Mr. Smith appeared as the sole witness on his own behalf. While the information contained in Ms. Blok’s memorandum could be characterized as raising an error of law – factual

findings made without a proper evidentiary foundation – I am of the view that Blok’s stated reasons for appeal more properly fall within the “natural justice” ground of appeal.

14. Ms. Blok says that Mr. Smith never advanced a claim for vacation pay and thus the delegate’s decision to award vacation pay was made in the absence of such a claim and without providing Blok a proper opportunity to respond. More specifically, Ms. Blok says:
- “...Mr. Smith, in his ‘Request for Payment’ and at the hearing, did not ever bring up the issue of Vacation Pay being owed to himself. This was because Mr. Smith knew he had been paid in full or had taken his vacation/sick days for his entire employment with Blok Printing. In fact, he actually stated during the hearing that it was not an issue at all.”
 - [The delegate] created the issue, after the hearing, under a false assumption. [The delegate] assumed that the 7 sick days and 3 vacation days referred to, were for Mr. Smith’s total employment time of 1.57 years with Blok Printing. This is false. The above days referred to were for the year **2014 only.**” (**boldface** in original text)
 - Mr. Smith had already taken and been paid for 2013 vacation. We do not know why [the delegate] made this assumption but we or Mr. Smith never once told him it was for Mr. Smith’s entire employment time. It was the year 2014 that was under discussion in this hearing.”
 - “...if you add up all of Mr. Smith’s wages, whether they say vacation or commission or salary, you will find that Mr. Smith has been paid in full.”
15. As previously noted, Mr. Smith’s complaint referred *exclusively* to a claim to *commissions* based on an oral agreement that had allegedly been concluded in the fall of 2014. Mr. Smith’s complaint makes no mention of vacation pay and, apparently, his “Request for Payment” (part of the Employment Standards Branch’s “self-help kit” that, in general, must be utilized before filing a complaint) similarly did not include a claim for vacation pay. As previously noted, Mr. Smith’s November 27, 2014, resignation letter advanced a claim for unpaid commissions for November 2014 and no other unpaid wage claims. The delegate completely rejected Mr. Smith’s claims for unpaid commissions – the sole claim raised in his original complaint.
16. In my view, the complaint sets out, at least in a general way, the parameters of the delegate’s jurisdiction at a complaint hearing. Where no claim for vacation pay is made in a complaint, the delegate should not make a finding on that issue without first ensuring that the respondent party has had ample prior notice of the claim and has been given a fair opportunity to address the issue. I consider this approach to be mandated by the principles of natural justice.
17. The only reference to any sort of vacation pay claim that I can find in the record is found in Mr. Smith’s March 23, 2015, letter to the Employment Standards Branch – this document was apparently marked as “Exhibit 2” at the complaint hearing. It is not clear whether this document was provided to Blok prior to complaint hearing. The relevant portion of Mr. Smith’s March 23 letter reads as follows:
- Note – Holiday Pay – was suppose [*sic*] to be for 12 days but they only gave me 5 days ??? They owe me 7 days holiday pay + no notice of salary change or options ??
18. The *Act* does not provide for paid sick leave. As noted above, the delegate found that Mr. Smith took seven days (with pay) as sick leave that was, by agreement, charged to his annual vacation entitlement. This would appear to account for Mr. Smith’s claim for an additional “7 days holiday pay” as set out in his March 23 letter to the Employment Standards Branch. I am unable to determine from the material before me whether

Mr. Smith received his full allotment of paid vacation for 2013 but, if he did, then the delegate's award for additional vacation pay provides Mr. Smith with an overpayment on that account.

19. In light of the confusion surrounding the vacation pay issue, coupled with at least a *prima facie* natural justice breach, I am of the view that the most fair and efficient way to proceed in this matter is to refer it back to the Director for further investigation.

ORDER

20. Pursuant to subsections 114(2)(a) and (b) of the *Act*, Mr. Smith's unpaid wage complaint is referred back to the Director for further investigation. Upon completion of this further investigation, the Director shall, pursuant to section 103 of the *Act* and section 14(c) of the *Administrative Tribunals Act*, provide a report to the Tribunal.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal