

An appeal

- by -

Athene Acquisitions Ltd.
("Athene")

- 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: Shafik Bhalloo

FILE No.: 2006A/95

DATE OF DECISION: October 2, 2006

THE FACTS

7. Athene employed Toljaga as an office assistant from June 9, 2005 to January 20, 2006.
8. During his employment with Athene, on four occasions, Toljaga took a total of 3.5 days off as sick time and Athene paid him for it.
9. Athene also paid Toljaga for 6 days off during the Christmas season when Athene was closed between December 22 and December 30, 2005.
10. When Athene issued Toljaga his last paycheque on January 24, 2006, the statement accompanying the paycheque showed that Toljaga had earned 6.25 days of vacation but had taken 9.5 days, leaving a deficit of 3.25 days. Athene calculated the value of 3.25 days at \$265.90 and deducted the amount from Toljaga's wages in the last paycheque.
11. Athene's calculation of 9.5 days of "vacation already taken" by Toljaga comprised of 3.5 days of paid sick time off taken by Toljaga and an additional 6 days of paid time off Toljaga (together with other employees of Athene) received during the Christmas period between December 22 and December 30, 2005 when Athene was closed for business.
12. Both Athene and Toljaga agree that there was never a written agreement between the parties authorizing Athene to reduce Toljaga's vacation pay entitlement as a result of time off Toljaga received when Athene's office was closed during the Christmas period during December 22 to December 30, 2005.
13. There is also no written request from Toljaga allowing Athene to later deduct from his wages Athene's previous payment to him for the 3.5 days of sick time he took during his employment with Athene.
14. The Delegate for the Director held a hearing into Toljaga's complaint on June 27, 2006 (the "Hearing"). Toljaga and a representative of Athene, Mr. Sammy Cheng ("Cheng"), were in attendance at the Hearing.
15. Both Toljaga and Athene submitted an Agreed Statement of facts at the Hearing, pertinent parts of which are identified in this section.
16. In addition to the Agreed Statement of Facts submitted by the parties at the Hearing, Cheng gave evidence and made submissions on behalf of Athene, and Toljaga on his own behalf.
17. Prior to the Hearing, both Toljaga and Athene agreed that if Toljaga's complaint was successful then the total amount Athene would owe him is \$777.53 comprising of:
 - i. \$265.90 for the deduction Athene made for what it saw as a deficit of 3.25 days in Toljaga's vacation bank as it counted the previously paid for 3.5 sick days as vacation time; and
 - ii. \$511.63 for annual vacation pay that was not paid or deducted from Toljaga's wages.

18. At the Hearing, Cheng gave evidence on behalf of Athene that he had informed Toljaga when the latter took his first sick day off that he would be paid his full salary for the sick days but that Athene would deduct the paid sick time off at later date from his vacation bank. Cheng submitted that this arrangement was largely for Athene's convenience because Athene's office comprised of only four employees and it was difficult for Cheng or Athene to change the salary at the time sick days were taken but easier to deduct at a later date from the employee's vacation entitlement. Toljaga, however, denied having any such conversation with Mr. Cheng and expected to be paid for his sick days.
19. Cheng also gave evidence at the Hearing that Toljaga and other employees of Athene knew that the paid time off at Christmas (during the period December 22 to December 30, 2005 when Athene's office was closed for business) would be treated similarly to paid sick time and therefore an advance against future vacation entitlement. However, Toljaga unequivocally disagrees with that, as that was not his understanding.
20. The Delegate for the Director in his Determination concludes that even if Toljaga acknowledged that he was told by Athene that his paid sick days off would be deducted from this annual vacation pay, Section 59(1)(a) of the *Act* prohibits this practice. Moreover Athene did not come within the exception to this rule because Athene did not receive any written request from Toljaga to take his annual vacation in advance, which would have allowed Athene to reduce his annual vacation accordingly. Therefore, the Director concluded that Athene was in contravention of Section 59 when it deducted sick days from Toljaga's annual vacation pay entitlement on January 24, 2006.
21. The delegate similarly concluded with respect to the paid time off Toljaga received at Christmas (from December 22 to December 30, 2005) when Athene was closed for business. More specifically, the delegate stated that even if Toljaga (and other staff of Athene) had verbally agreed to take the time off as a vacation advance during the Christmas period such an agreement would be "viewed as null and void under the *Act*" as there was no written request by Toljaga to have paid time off at Christmas to be considered as a vacation in advance of entitlement. Accordingly, Athene was again in breach of Section 59 of the *Act*.
22. The Delegate of the Director also concluded that on January 24, 2006, Athene paid Toljaga annual vacation from which Athene then deducted the previously paid sick days and the paid time off at Christmas contrary to Section 21 of the *Act*.

ARGUMENT

Athene's Submissions

23. In the appeal form, while Athene has checked off two grounds for appeal, namely, that the Director erred in law and failed to observe the principles of natural justice in making the Determination, Athene fails to make any submissions on the first ground of appeal. Athene only makes submission on the second ground of appeal that the Director of Employment Standards failed to observe the principles of natural justice in making the Determination. With respect to the later ground of appeal, Athene largely reiterates the evidence it provided at the Hearing. Athene repeats that Mr. Toljaga was informed in advance that it would not pay for sick leave or the time

off at Christmas. Athene also repeats that all employees were informed of the employer's said position in advance and further, Toljaga had a verbal agreement with Athene on this matter but is now taking unfair advantage as there is no signed or any written agreement in place between the parties. Athene further argues that the "director...failed to look into the material facts and just made the determination based on formality" which, according to Athene, is "absolutely wrong ... and against the principles of natural justice"

Director's Submissions

24. With respect to the first ground of appeal, the Director submits that Athene has failed to provide any evidence or argument to substantiate its claim that the Director erred in law in the Determination.
25. With respect to the second ground of appeal, the Director submits, "the information provided by Athene was taken into consideration at the adjudication hearing and was fully canvassed in the Determination".
26. No submissions were received from Mr. Toljaga.

ANALYSIS

Did the Delegate for the Director err in law in making the Determination?

27. Notwithstanding Athene's clear failure to make any submissions on this ground of appeal, I have reviewed the record presented with a view to determining whether or not the delegate for the Director made any errors of law in making the Determination and I am satisfied that the conclusions arrived at by the delegate were rationally supported by both the law and the evidence. The delegate properly interpreted and applied Sections 21 and 59 of the *Act* in this case and, furthermore, properly placed the onus on Athene to establish that the deductions it made from Toljaga's vacation pay were in compliance with those sections of the *Act*. The finding of the delegate that Athene failed to discharge the said burden is clearly supported in the evidence as well. Accordingly, I find no error of law in the conclusions reached by the delegate for the Director in the Determination.

Did the Delegate for the Director fail to observe the principles of natural justice in making the Determination?

28. Athene advances its claim that the delegate violated the principles of natural justice in arriving at his decision on the basis that the delegate did not accept Athene's evidence that there was an oral agreement between Toljaga and Athene to allow Athene to pay him for his sick days as well as the time off at Christmas as an advance against future vacation entitlement and subsequently deduct same from his vacation bank. In addition, Athene also submits that it was wrong of the delegate to "ma(ke) the Determination based on formality", presumably referring or adverting to the requirement in Section 59(2) of the *Act* which allows an employer to reduce an employee's annual vacation or vacation pay where "at the written request of the employee the employer allows the employee to take an annual vacation in advance".

29. The question that clearly arises upon review of Athene's submissions on this ground of appeal is whether there exists any issue of natural justice at all. In *Moon Arc Interiors Co. Ltd.*, B.C. E.S.T. #D200/04, the Tribunal described the natural justice ground of appeal as follows:
- Such a challenge normally give voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in the appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence.
30. In the case at hand, the delegate issued the Determination following an oral hearing at which Athene, through its representative Cheng, was present, gave evidence and made submissions. In addition, in advance of the Hearing, Athene and Toljaga submitted their Agreed Statement of Facts. Athene does not claim that the proceedings before the delegate were in some manner conducted unfairly or that Athene did not have an opportunity to know the case it was required to meet or did not have an opportunity to be heard in its own defence. Accordingly, I find that there is no denial of natural justice.
31. Based on my review of the Determination, the submissions of the parties, and the record provided to me, I am dismissing Athene's appeal and confirming the Determination together with any further interest that has accrued under section 88 of the *Act*. I also confirm the two administrative penalties for the contraventions of the *Act* in the Determination.

ORDER

32. I order, pursuant to Section 115 of the *Act*, that the Determination be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal