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-

Sinolink Enterprises Corporation
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 2000/13

DATE OF HEARING: March 13, 2000

DATE OF DECISION: March 13, 2000

DECISION

APPEARANCES

No one	for Sinolink Enterprises Corporation
No one	for Mr. Y.F. Lam
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the employer, Sinolink Enterprises Corporation, from a Determination dated December 15, 1999. In that Determination the Director's Delegate found that the respondent employer had breached Section 58(1) of the *Act* by failing to pay annual vacation pay and Section 63(2) and 63(3) by failing to provide notice or pay compensation for length of service. The Director's Delegate had determined that Mr. Lam was entitled to $860.14 for annual vacation pay, $648.00 for compensation for length of service and $68.96 interest.

DECISION

A hearing into the Section 112 appeal was scheduled for March 13, 2000. Prior to the commencement of the hearing the parties, with the aid of a Settlement Officer provided by the Tribunal, attempted to negotiate a resolution of the issues on appeal.

Firstly, Mr. Lam agreed to drop his claim to compensation for length of service. Secondly, the parties agreed that Mr. Lam was entitled to payment of the amount of $860.14 in full and final settlement of the appeal. That settlement was set out in a Memorandum of Agreement dated February 25, 2000 which was signed by Mr. Lam. The employer also signed the document but subsequently added an amendment. An additional term of the Memorandum of Agreement was that the payment was to be made by certified cheque or money order.

The Employment Standards Tribunal received a letter from the employer dated February 25, 2000. The letter read in part:

> "We do wish to clarify and confirm that the amount of Holiday Pay claimed is incorrectly represented to the Tribunal. Mr. Lam's salary paid in 1998 of $16,603.44 (as per T-4 1998) already includes payment for 1997 Holiday Pay of $42.00. This is clearly documented in the pay slips which we have provided to him. The amount was paid in October of 1998.

> Therefore we should made (sic) a deduction of $42.00 in order to reflect the proper amount. We herewith confirm our agreement to the payment of the holiday pay claimed in the amount of $818.14 ($860.14 - $42.00)."

On March 10, 2000 the Employment Standards Tribunal received a further letter from the employer dated March 8, 2000 enclosing two cheques. The cheques were postdated. The first cheque submitted by the employer was dated March 13, 2000 in the amount of $68.14. The second cheque was post-dated May 31, 2000 and was a personal cheque in the amount of $750.00 executed by an officer and director of the employer. Neither cheque was certified. Also enclosed was a copy of the Memorandum of Agreement which was amended and initialed by a representative of the employer deleting the reference to $860.14 and substituting, by reference to the February 25, 2000 letter, the amount of $818.14.

On the morning of Monday March 13, 2000 shortly after 8:00 a.m. the Settlement Officer attempted to contact the representative of the employer. A message was left on a voice machine advising the employer that the amendment to the Memorandum of Agreement and the enclosed cheques were not satisfactory. The employer was advised that he should attend the hearing which was scheduled to commence at 9:00 a.m. No one appeared for the employer. Shortly after 9:00 a.m. a further attempt was made to contact the employer. This attempt was also unsuccessful.

In these circumstances I am unable to accept that the matter is settled. The employer has unilaterally amended the Memorandum of Agreement. Furthermore, the employer had tendered post-dated cheques, one on the employer's account and another on a personal account, to satisfy the settlement. It should be noted that the personal cheque is post-dated for May 31, 2000 which is approximately 12 weeks from the date of the March 8, 2000 letter.

The onus rests on the employer in this matter. It is the employer that has appealed the Determination. It is the employer who has unilaterally amended the Memorandum of Agreement. The employer has failed to appear before the Tribunal to explain its actions or offer any evidence that the amended settlement was acceptable to the complainant. For these reasons I am not able to accept that the issue of the vacation pay is settled. I must add that I am not foreclosing the possibility of a settlement in this matter. I am stating that in the face of no evidence to show that the $42.00 in vacation pay was paid for 1997 or that the complainant has agreed to amending the settlement amounts I am unable to accept that the matter is finalized.

For the above reasons I vary the Determination dated December 15, 1999 to show that the complainant has withdrawn the claim for compensation for length of service. However the Determination with respect to the amount owing for vacation pay of $860.14 stands. The matter is to be returned to the Delegate for recalculation of the interest due. This disposition of the appeal does not preclude the parties from negotiating a final conclusion of this matter.

ORDER

I order that the Determination dated December 15, 1999 be varied and confirmed as set out above.

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E. Casey McCabe
Adjudicator
Employment Standards Tribunal