



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: December 16, 2015

DECISION

SUBMISSIONS

Karen Blok	on behalf of Blok Printing Ltd.
William J. Smith	on his own behalf
Michael Thompson	on behalf of the Director of Employment Standards

OVERVIEW

1. 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 Printing Ltd. (“Blok”) – owed him \$3,725.20 representing unpaid commission earnings for the month of November 2014.
2. 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.
3. Blok appealed the Determination on the ground that the delegate erred in law (subsection 112(1)(a) of the *Act*); however, its appeal submission also raised a natural justice issue.
4. On July 24, 2015, and based solely on Blok’s submissions, I issued reasons for decision (see BC EST # D078/15) and the following interim under subsection 114(2)(a) of the *Act*:

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.

5. On October 23, 2015, the delegate submitted his report to the Tribunal. The parties have now been afforded the opportunity to respond to the delegate’s report and, by way of these reasons, I am now issuing a final decision with respect to Blok’s appeal.
6. In addition to the parties’ submissions, I have also reviewed the complete subsection 112(5) record that was before the delegate when he issued the Determination.

FACTUAL BACKGROUND

7. Blok operates a print shop in Burnaby and 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). 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).

8. As noted above, following his resignation, Mr. Smith filed an unpaid wage complaint and this, in turn, resulted in the Determination now before me. The delegate awarded Mr. Smith \$729.80 representing the balance of his salary due for November 2014 and a further \$1,972.49 for vacation pay. The delegate’s finding with respect to vacation pay is reproduced below (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.

9. As noted above, and including section 88 interest, the unpaid wage award issued in Mr. Smith’s favour totalled \$2,746.93. Blok’s position, on appeal, is that “Mr. Smith has been paid in full”.
10. Mr. Smith’s complaint was exclusively a claim for unpaid commissions. The delegate wholly rejected this claim. Mr. Smith never advanced a vacation pay claim in his complaint. Further, he never raised a vacation pay claim in his “Request for Payment” delivered to Blok prior to filing his unpaid wage complaint (part of the Employment Standards Branch’s “self-help kit” that, in general, must be utilized before filing a complaint). In light of Blok’s seemingly credible position that this issue was never raised prior to, or during, the complaint hearing, I referred the entire matter back to the delegate for further investigation.

THE REFERRAL BACK REPORT

11. The delegate’s report, dated October 23, 2015, may be summarized as follows:
- An oral hearing was convened, by teleconference, on September 17, 2015, to address the matter.
 - “Mr. Smith did not have any specific recollection of taking annual vacation in 2013, due largely to the amount of time that had passed since then.”
 - Mr. Smith’s evidence was that “[h]e did not taken any long period of time off in 2013”; he normally took two or three Fridays off each year to attend sporting events and did not take any time off for medical reasons in 2013.
 - Blok’s evidence was that Mr. Smith regularly took sick days during 2013 (at least one per month); Mr. Smith booked a 2-week vacation in December 2013 but this was cancelled because Mr. Smith had already taken his full vacation allotment as paid sick days; and took further paid days off following his son’s injury in a motor vehicle accident.
 - The delegate made the following findings: i) “Mr. Smith was or should have been aware that Blok Printing did not provide paid sick leave, and that sick time would be taken as annual vacation”; ii) Blok’s “[vacation] tracker does not record any days taken as vacation by Mr. Smith

in 2013, while it does record numerous days taken by other employees”; iii) “Mr. Smith’s evidence regarding his annual vacation taken in 2013 is more credible than that of the Employer [and] I find that there is insufficient evidence to indicate that Mr. Smith had taken any paid vacation days in 2013”; and iv) “Mr. Smith took at least one-half of a day off work to attend to his injured son” (see section 52 of the *Act*) but since Mr. Smith never requested that this time be taken as vacation pay (see section 59 of the *Act*), “I find that it cannot be counted as annual vacation.”

12. The delegate concluded that the original vacation pay award for 8.55 days should be confirmed.

THE PARTIES’ POSITIONS

13. Blok says that the delegate’s report is “biased and misleading”, based on “false assumptions” and that the entire matter “is a travesty of justice”. In particular, Blok says Mr. Smith was “well aware” that its policy manual provided for unpaid sick leave; that Mr. Smith was away two or three Fridays per month; and, in addition, was away at other times “often without notice”; Mr. Smith was away for the all of May 10 and the following May 13, 2013, following his son’s accident.
14. Blok says that while it does keep vacation records, “pertinent records showing Mr. Smith’s sick time and Absent Without Leave records have gone missing”. Somewhat inconsistently, Blok also says that since Mr. Smith “was management and as such his time off and sick days, etc. were not recorded on the employees’ vacation’s schedule” [*sic*].
15. The delegate stated in his report that he was not prepared to give any credence “to the hearsay evidence of the unnamed secretary’s statement to Ms. Blok regarding Mr. Smith’s attendance.” By way of reply, Blok says that the statement is not “heresay” [*sic*] and that it is now prepared to “provide her as a witness if so desired” and that “I just never realized, as vacation time was never an issue, that this would be needed”. Blok also says that “our secretary said he would often not show up when we weren’t there”.
16. Mr. Smith now says that he should have been awarded 12 vacation days but otherwise appears to be generally satisfied with the delegate’s findings as set out in the Determination and his later report.

FINDINGS AND ANALYSIS

17. As noted at the outset of these reasons, Blok’s appeal raises two broad issues. First, Blok alleges that the delegate erred in law and, in essence, asserts that the delegate misconceived the evidence before him or otherwise erred in making certain findings of fact. Second, and although Blok did not mark the “natural justice” ground of appeal on its Appeal Form, its materials clearly raise a natural justice issue and, accordingly, I have decided to address that issue as well (see *Triple S Transmission Inc.*, BC EST # D141/03).
18. I referred the matter back to the delegate so that, principally, the issues relating to Mr. Smith’s vacation pay claim could be addressed since Blok maintained that this claim was not advanced at the original complaint hearing. Without affirmatively deciding that the delegate’s vacation pay award was made in breach of the principles of natural justice, I am satisfied that the referral back procedure – one that afforded both parties a full and fair opportunity to address all of the issues arising from the Determination – cured any natural justice breach that might have arisen in relation to the vacation pay award.
19. The alleged “errors of law” exclusively concern the delegate’s findings of fact. A finding of fact may constitute an error of law but only where the impugned finding is made without supporting evidence. In this

case, the parties clearly have almost diametrically opposing views about what actually transpired. Blok's position is, to a degree, undermined because it failed to provide the requisite records that it was mandated to keep and maintain under the *Act*. In essence, this dispute is a "(s)he said, he said" dispute (Ms. and Mr. Blok versus Mr. Smith).

20. The delegate generally found Mr. Smith's evidence to be more credible and the delegate was entitled to make that finding. The delegate explained why he preferred Mr. Smith's evidence over Blok's evidence and I am unable to say that his reasons were frivolous, specious or otherwise unreasonable. It should also be noted that the delegate did not simply accept all of Mr. Smith's evidence while rejecting all of Blok's evidence. For example, the delegate rejected Mr. Smith's claim for unpaid commissions and held that he was aware – or should have been aware – of Blok's policy manual relating to unpaid sick days. With these comments in mind, I now turn to the specific allegations raised by Blok in support of its appeal.

21. The delegate made the following findings with respect to Mr. Smith's \$729.80 regular wage award (at page R5):

Mr. Smith received his regular salary for the pay period ending October 31, 2014. He was entitled to his regular salary for the pay period ending November 14 (\$2,307.00), and to his regular salary less one day's pay for the pay period ending November 28 (\$2,307.00/10 days x 9 days = \$2,076.30). Mr. Smith was paid \$1,153.50 in salary on November 14, and \$2,500.00 which I have found to be regular wages, on December 5. This leaves a balance \$729.80 owing for regular wages.

22. Blok, other than generally asserting that Mr. Blok "has been paid in full", has not expressly challenged this "regular wage" award. There is nothing in the material before me indicating that Blok paid Mr. Smith all of his regular wages for November 2014. Accordingly, there is no basis for setting aside this aspect of the Determination.

23. Blok has raised more specific objections regarding Mr. Smith's vacation pay award. However, I am not persuaded that the vacation pay award should be cancelled or varied. As previously noted, the delegate was entitled to make a finding with respect to the vacation time actually taken by Mr. Smith during the relevant time frame and I cannot say that the delegate's factual finding in this regard was wholly unsupported by any evidentiary foundation. Whatever the reason, Blok did not do itself any favours by failing to maintain proper payroll records and to ensure that such records were securely maintained.

24. The delegate did not err in rejecting Blok's evidence that took the form of some sort of unsworn hearsay statement from an unnamed office secretary regarding Mr. Smith's time away from work. If Blok wished to present this evidence as part of its case, the time to do so was at the original complaint hearing – such evidence is not admissible in these proceedings (see subsection 112(1)(c) of the *Act* and *Davies et al.*, BC EST # D171/03). Further, even if the statement had been tendered in a timely fashion, the hearsay document would appear to have absolutely no probative value.

25. With respect to the matter of "sick time", while it is clear that Blok's policy manual required employees to either take such time as unpaid leave (there is no provision in the *Act* requiring paid sick leave) or as a paid vacation day, such a policy must comply with the *Act* or it is void (see section 4). In this latter regard, section 59 of the *Act* provides as follows:

- (1) An employer must not reduce an employee's annual vacation or vacation pay because the employee
 - (a) was paid a bonus or sick pay, or

- (b) was previously given a longer annual vacation than the minimum required under section 57.
- (2) Despite subsection (1)(b), an employer may reduce an employee's annual vacation or vacation pay because at the written request of the employee the employer allowed the employee to take an annual vacation in advance.
26. In light of this provision, Blok was not entitled to reduce Mr. Smith's vacation allotment unless there was a "written request" from the employee to do so and there is no such document here. Thus, whether Mr. Smith took half a day, one or even two full days' leave to attend to his injured son is simply not relevant. Since family responsibility leave is unpaid leave under the *Act*, Blok would have been fully entitled to refuse to pay Mr. Smith for the time that he was away from work on this account, but having apparently paid him for the time, section 59 prohibited Blok from deducting the amount in question from his annual vacation entitlement unless it had Mr. Smith's written authority to do so.
27. Finally, I wish to briefly address Mr. Smith's claim, seemingly raised for the first time in his submission filed in response to the delegate's referral back report, that he should have been awarded 12 days' paid vacation. The short answer to this assertion is to note that if Mr. Smith believed the delegate erred in calculating his vacation pay entitlement, he should have filed an appeal raising that issue directly. He never did so and the time for filing such an appeal expired on July 27, 2015.

ORDER

28. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed in the total amount (including \$1,000 representing two \$500 monetary penalties) of \$3,746.93 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal