Employment Standards TRIBUNAL

An appeal

- by -

Vici Interactive Multimedia Solutions Corporation
("the Appellant")

- 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

ADJUDICATOR: W. Grant Sheard

FILE No.: 2002/27

DATE OF DECISION: April 19, 2002

DECISION

OVERVIEW

This is an appeal based on written submissions by Vici Interactive Multimedia Solutions Corporation (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on January 7, 2002 wherein the delegate ruled that the Appellant had contravened Sections 8, 18, 58 and 63 of the *Act* by failing to pay wages, annual vacation pay and compensation for length of service and ordering the Appellant to pay the Employees a sum total of $13,552.88.

ISSUE

Was the Director's delegate correct in finding that the Appellant owed the complainants for wages, compensation under Section 8 of the *Act* (for wages or other conditions promised on employment) and annual vacation pay?

ARGUMENT

The Position of the Appellant

In an appeal form and written submissions dated January 28, 2002 and filed on the same day the Appellant asserts an error in the facts and that there is a different explanation of the facts. Further, the Appellant seeks to change or vary the determination with a recalculation of it, subtracting $2,000.00 for each claimant and adjusting for monies the Appellant asserts the Employees already received.

In the supplementary written submission filed the Appellant asserts that there are three fundamental points which were overlooked or misinterpreted in the determination. First, the Appellant asserts that, although the stop payments of each of the Employees' last cheques to their accounts will be paid for Mr. Hewko and Mr. Underwood, the sum of $2,900.00 was only paid to Mr. Arsenault to recover a $3,500.00 laptop computer which was the property of the Appellant and which Arsenault took with him when he left the Appellant's employ. Secondly the $2,000.00 each claimant seeks was in fact to be a signing bonus for a contract which the employees never signed. Further, it is noted Hewko and Underwood did not even claim this amount in their Complaint and Information Forms when they initiated their claims. Third and finally, the Appellant notes each claimant was reimbursed for airfare to Vancouver and that Underwood and Hewko each cashed in ski passes they had received for over $1,000.00 in refund cash.

The Position of the Employee, Scott Underwood

In a written submission dated February 22, 2002 and filed with the Tribunal February 26, 2002 Mr. Underwood objects to the Appellant's appeal on the basis that the Appellant is simply disagreeing with the Determination. Mr. Underwood takes the position that the Appellant has submitted no new evidence to contradict any of the originally submitted evidence and as such asserts that the Appellant's claim should be dismissed. Nonetheless, Mr. Underwood goes on to make various submissions with respect to the merits of the appeal asserted by the Appellant.

In response to the issue of a $2,000.00 bonus as a "offer of employment" which was attached to page 29 of the delegate's Determination, Mr. Underwood notes that the company verbally agreed to all points of the employment agreement which did not get signed except for point 7 which dealt with confidentiality and non-competition. He notes that the ski pass which he received was meant as a signing bonus even though the agreement was not signed. He submits that this strengthens his position that the company felt bound by the agreement nonetheless. He also asserts that, in his letter of termination, Mr. Shokar stated to him on behalf of the Appellant "Vici Solutions has adhered to the conditions of the contract even though you have not yet signed it."

Lastly, with respect to the miscalculation asserted by the Appellant in the Determination, Mr. Underwood says that he received $866.00 for a refund for the unused portion of his ski pass, but he asserts that this was his property to do with as he wished.

Mr. Underwood maintains that the determination should be upheld.

The Position of the Employee, Mike Arsenault

In a written submission dated February 20, 2002 filed electronically with the Tribunal on February 25, 2002 Mr. Arsenault asserts that the Appellant has provided absolutely no evidence to substantiate their claims. He says that the Appellant's assertion that he was "extorting the company" in holding their laptop computer is simply untrue and that he gladly returned the laptop at his own expense. He further asserts that he was "promised to $2,000.00 plus $900.00 to move my life and go to work for Vici Solutions". Mr. Arsenault states that the Appellant made it clear at a company meeting that the employment contract would stand with the exception of a clause dealing with confidentiality and non-competition, notwithstanding that it was not signed.

Mr. Arsenault maintains that the Determination should be upheld.

The Position of the Employee, Jason Hewko

In a written submission dated February 20, 2002 and filed with the Tribunal February 27, 2002 Mr. Hewko submits that the arguments made by the Appellant in its appeal material "are not new and were voiced before the Determination was made" suggesting that the appeal should be dismissed.

Mr. Hewko further says that he was told over the telephone there would be a $2,000.00 bonus as well as ski passes for joining the company. Shortly after his arrival in Whistler for employment he was presented with an employment agreement which included a clause requiring employees not to compete with the Appellant after leaving its employment. He says that the Appellant agreed that this clause was not reasonable and that it would be redrafted to exclude this clause stating that, in the meantime, the company and the employees should feel bound by the balance of the agreement. He says that over the ensuing months he and other employees continuously asked the Appellant about this agreement and were assured each time that it would be ready soon. He notes that the Appellant did issue the health benefits and ski passes to employees in accordance with the employment agreement even though it was not signed.

Responding to the Appellant's argument regarding the reimbursement for his ski pass which was refunded, he acknowledges that he did return the pass for this unused portion of it. He notes he did this after the Appellant put a "stop payment" on his last paycheque and he needed the money to cover his living expenses. In any event, he asserts the ski pass was a bonus and, as such, was his property to do with as he wished. He says that the Whistler-Blackcombe customer service had to contact the Appellant for clearance to issue the refund as it had been purchased with their credit card and that this permission was given in any event.

Mr. Hewko maintains that the Determination should be upheld.

THE FACTS

The Appellant operates an internet development company in Whistler, B.C. Arsenault worked for the Appellant as a project leader from May 2000 to September 2000 at $40,000.00 per annum. He resigned from his employment. Hewko worked as a graphic designer from May 2000 to February 2001 initially at $35,000.00 per annum, later increased to $40,000.00 per annum. He was dismissed from employment. Underwood worked as a senior programmer analyst from May 2000 to February 2001 at $40,000.00 per annum. He was dismissed from employment.

At the commencement of their employment, each of the Employees received a letter from the Appellant titled "Offer of Employment" confirming their salary, health and dental coverage, air and ground transportation to Whistler and paid accommodation along with a direction that they agree not to disclose any confidential information learned in the course of their employment. These letters did not include any representation of bonuses. However, the Employees all indicated in the investigation conducted by the delegate that they received an employment

agreement which provided under clause 4 for a $2,000.00 bonus, purchase of a ski pass, and choice of skis or a mountain bike as signing bonuses and a clause 7 which required confidentiality of the Employers business and non-competition with the Employer. They indicate that these agreements were presented to them after they arrived to commence their employment but acknowledged they were never signed. In the case of Arsenault, he also received an e-mail from the Appellant prior to commencing his employment on May 2, 2000 saying in part, "the offer is the same as what we have told you….signing bonus (skis, snowboard, bike) first two weeks on arrival $2,000.00 cash." Also in the case of Arsenault, after he terminated his employment, the Employer sent a cheque to him for this claim, the $2,000.00 (bonus) and then issued a stop payment on that cheque.

Each of the Employees initiated their complaints with the Branch by filing a "Complaint & Information Form". In the case of Underwood that form was dated February 12, 2001 and he claimed the following:

Regular Wages	$ 488.00
Vacation Pay	$1,200.00
Recovery of Last Pay Cheque	$1,220.93
N.S.F. Charges	$ 75.00
Total	$2,983.93
	(which the complainant estimated at $2975.00)

In the case of Arsenault, his form was dated February 26, 2001 and he claimed the following:

Vacation Pay	$ 393.33
Relocation/Compensation Incentive	$2,000.00
Total	$2,393.33

In the case of Hewko, his form was dated February 12, 2001 and he claimed the following:

Regular Wages	$ 488.00
Annual Vacation Pay	$1,200.00
Estimated Total	$1,688.00

In the calculation schedules attached to the Determination the delegate awarded $5,284.96 to Underwood, $2,495.00 to Arsenault and $5,772.43 to Hewko. Thus, in the case of Underwood and Hewko the amounts of their claims were increased significantly in the award, primarily by $2,000.00 each for the "bonus" referred to in the unsigned employment agreement.

Each of the Employees gave evidence to the delegate in his investigation which was reiterated in their written submissions on this appeal that it was agreed between them and the Employer in a meeting shortly after they had already begun their employment that they would receive these $2,000.00 "signing bonuses".

After Underwood and Hewko were terminated by the Appellant they cashed in the ski passes which the Appellant had purchased for them receiving $866.00 or more each for them. In the case of Mr. Arsenault the Appellant paid him $2,900.00 representing the $2,000.0 "signing bonus" and $900.00 relocation expenses after Arsenault resigned but later stopped payment on these amounts. Arsenault subsequently returned to the Appellant a laptop computer belonging to it. The Employer failed to produce to the delegate records as required under Section 28 of the *Act*.

ANALYSIS

The onus is on the Appellant to demonstrate an error in the facts found or law applied by the delegate.

The allegation of theft of a laptop by Mr. Arsenault does not appear to have been dealt with by the delegate. However, it is apparent that this laptop was taken by Mr. Arsenault after he resigned his employment but subsequently returned to the Appellant. It does not appear therefore, to serve as any proper setoff for the $2,900.00 which the Appellant subsequently stopped payment of representing the signing bonus and relocation expenses for Mr. Arsenault.

Although Mr. Underwood and Mr. Hewko did not initially claim this $2,000.00 "signing bonus" in their initial Complaint and Information forms, it is apparent that they all gave evidence of the agreement in this regard to the delegate and reiterated, each one corroborating the other, with respect to this agreement in their written submissions. Further, it is apparent that the Appellant made a payment to Mr. Arsenault for this amount (then stopping payment) and as each of the Employees note in their submissions, paid or made available to each of the Employees other benefits which were referred to in the unsigned employment agreement, as the delegate notes in his determination, allowing each Employee to begin working under those terms without the agreement being signed. Notwithstanding that two of the Employees did not claim this amount in their initial forms I can find nothing which indicates the delegate was in error finding the evidence in the investigation supported payments of these amounts. The Appellant has not met the onus upon it to demonstrate on a balance of probabilities that no such agreement was made.

Lastly, dealing with the Appellant's final argument, that each claimant was reimbursed for airfare to Vancouver and that Underwood and Hewko cashed their ski passes receiving approximately $1,000.00 each in refunds, it is apparent these amounts were paid by the Appellant to the Employees pursuant to the unsigned employment agreement. They do not appear to be payments for wages, annual vacation pay or compensation for length of service for which the Appellant is entitled to a deduction.

I find that the Appellant has not met the onus upon it to establish on a balance of probabilities an error in the finding of the delegate.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated January 7, 2002 and filed under number 106-076, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal