

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Brotten Management Group Inc.  
("Brotten")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 96/217

**DATE OF HEARING:** August 14 1996

**DATE OF DECISION:** August 19, 1996

**DECISION**

**OVERVIEW**

The appeal is by Broten Management Group Inc. ("Broten") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*") against Determination # CDET 001438 issued by the Director of Employment Standards (the "Director") on March 6, 1996. The Determination, issued as a result of a complaint by Paul Samonig ("Samonig"), is a finding that the employer did not contravene Section 58(1) of the *Act*, a requirement to pay vacation pay, but did contravene the *Act* in other respects and that Samonig was owed \$1,232.60. The Appellant claims that the Determination is in error, that Samonig was hired on a commission only basis and earned no commissions, that it is owed money, and that even accepting the reasons for the Determination, the calculation is wrong in that it does not take into account moneys already paid Samonig.

**APPEARANCES**

Phillip Johnson	Accountant for Royce Everest, a member company of the Broten Management Group
Paul Samonig	On His Own Behalf
Ken White	For the Director

**FACTS**

Paul Samonig was employed by Sun Water Systems (B.C.) Ltd. ("Sun Water"), a Broten company, from November 1, 1994 to August 26, 1995.

Broten says that Samonig was hired as a salesman "on a commission basis only". Samonig claims that he was hired as the Sales Manager of Sun Water and that as such he was to sell various devices for treating water as well as assume responsibility for marketing, sales development, the provision of technical assistance to various Broten companies and distributors, and the preparation of budgets, business plans and sales forecasts, in short, work for which he could not expect to earn a commission.

Samonig submits documents with a view to showing the sort of work that he did. His business card has him listed as "Sales Manager". A job description of the Manager of Sun Water lists the responsibilities of the position as including "marketing, sales development, technical assistance to personnel and distributors, budgeting and profitability". There is a sales forecast/marketing plan that is 23 pages in length and a business plan, 15 pages in length.

Samonig says that at the outset of his employment it was agreed that he would be paid \$2,000 per month as salary with commissions and expenses on top of that. On January 1, 1995, Samonig began receiving \$2,500 a month. He says that he got a raise just like other Broten managers.

Broten claims that Samonig was not paid a salary but a draw against commissions earned and that the paying of another \$500 a month to Samonig was an error, one which led to his being overpaid by \$3,500 over a seven month period. Broten argues in the alternative that, even if one accepts that Samonig was paid a salary, as the Determination does, on the basis of a document which set out a new commission structure for 1995 in part, it remains that it is owed the \$3,500. Broten argues that if one accepts part of the document one must accept all of it if one is to be consistent and just, including the part that says "base salary will remain the same". Broten argues that it is a reference to the \$2,000 figure. Draw or salary, it says, the \$2,500 was paid in error, it is owed \$3,500, and it "has the right to off-set any severance determination accordingly".

Various documents refer to a salary being paid. The document setting out the new commission structure, an undated, unsigned memo headed "SUNWater Systems (BC) Ltd.", refers to a base salary. The manager's job description mentioned above sets out management compensation as, "salary, bonuses, auto expense and benefits (\$50,000 - \$60,000)". Computer printouts showing pay and deductions for 28/02/95, 31/03/95, 4/30/95 and 8/31/95 show an amount under a heading "salary" and in each case there is an entry. In the case of that dated 4/30/95, \$2,500.00 is entered as salary. Broten says that the reason for that is that it was using software called "*Simply Accounting*" and that the software does not allow for use of anything like 'draw against commissions', all remuneration has to be entered as if it is salary.

Samonig was never paid any commissions. Broten says he never earned any. Samonig says that he was not paid commissions due him and that he lost out on two large commissions because Broten just couldn't handle its end of the two deals given its financial constraints at the time.

The Broten group of companies was forced to lay off staff in August of 1995. By letter dated August 11, 1995 employees were advised by Lorne Broten that there would be major staff reductions. He gave as reasons the delay in getting a soymilk plant into production and no sales from the commercial division of Water Mart.

In a letter on Sun Water letterhead, dated August 10, 1995 and signed by Metro Bayda, Samonig was advised that his employment would end August 25, 1995. In the letter Bayda states, "Your present draw is against commission. To date you have not covered your draw from commission. Effective today, your hours of work are restricted to four hours a day. You will be paid minimum wage for those four hours or commission earned, whichever is greater."

Samonig testifies that Bayda handed him the letter in the morning of August 14, 1995, a Monday.

Samonig worked to Saturday, August 26, 1995. His final cheque was for \$130 minus deductions, or \$127.17. Broten argues that the calculation of severance in the Determination is at least wrong in that \$130 was not taken into account.

In proceeding to the Employment Standards Branch, Samonig claimed vacation pay and severance pay. His claim led to the Determination # CDET 001438. The Determination rejects Samonig's claim for vacation pay but awards him two weeks severance pay, \$1,232.60, that amount being calculated on the basis of a salary of \$2,500 per month. The Director's delegate noted that on giving Samonig notice of termination, Broten reduced his hours and pay to the point where he is properly considered laid off, his earnings being less than 50 percent of his regular wages.

Samonig remains of the view that he has not been paid the vacation pay to which he is entitled and he came to the hearing believing that he could pursue the issue as part of the Broten appeal. On being questioned on the point Samonig said that he did not appeal the Determination.

### **ISSUES TO BE DECIDED**

The main issue before me is, What amount of severance pay is owed Samonig, if any? Subordinate questions are, Was Samonig paid a salary or just a draw against commissions? If he was being paid a salary, what was he being paid? And finally, in the event that severance pay is found to be owed Samonig, Should the amount of his final cheque be deducted as severance moneys already paid?

Not before me is that part of the Determination that rejects Samonig's claim for vacation pay. I view that as a separate issue. It is an issue in respect to which Broten was not advised to prepare, the Registrar of the Tribunal giving no notice in that respect, no appeal having been filed by Samonig.

### **ANALYSIS**

Consideration of the appeal falls under the transitional provisions of the *Act*. Section 128 of the *Act* states:

- (3) If, before the repeal of the former *Act*, no decision was made by the director, an authorised representative of the director or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint made under this *Act*.

Section 128 (4) of the *Act* applies to an employee whose employment began before section 63 comes into force and is terminated after that section comes into force. Samonig's employment was terminated on August 26, 1995, in other words, before the new *Act* came into force. As such it is the old *Employment Standards Act* (S.B.C. Chapter 10) that is governing in this case (the "old *Act*").

Section 42 (1) of the old *Act* calls for two weeks written notice of termination where an employee had completed just six months of employment. Samonig was employed by Broten for nearly 10 months. He was entitled to two weeks notice.

Notice of a sort was given. But on giving the notice the employer altered the terms of Samonig's employment, substantially, that is clear, and in doing so Broten contravened section 45 of the old *Act*. That section provides and I quote, "where the notice referred to in section 42 (1) has been given, the employer shall not, without the consent of the employee, alter his rate of wages or any other term or condition of his employment". Broten greatly altered the terms of Samonig's employment and it did so without his consent, contrary to Section 45.

Section 41 of the old *Act* is also of relevance. It defines a week of layoff as "a week in which an employee earns less than 50% of his weekly wages at his regular wage as defined in section 26, averaged over the previous 8 weeks". In earning only \$65 per week, Samonig earned far less than 50% of his regular weekly wages (\$616.30) in his last two weeks of work. The Director's Delegate viewed those two weeks as two weeks of layoff. I agree.

As Broten went about terminating Samonig's employment, it in effect terminated him when it cut back his pay and his hours on giving him what it thought was notice of termination. As Samonig had no notice of that layoff, and as it was of a permanent nature, he is entitled to severance pay.

Having found that Samonig is owed severance pay, I now turn to the matter of whether the amount of Samonig's last pay cheque, \$130, should be deducted from that amount of severance pay found owing. Again it is the old *Act* that applies. Section 42 (3) states, "when an employer terminates an employee and fails to comply with subsection (1) the employer shall pay the employee severance pay equal to the period of notice required, whether or not the employee has obtained other employment or has otherwise realized or recovered any amount of money in respect of the period of notice" (emphasis added). Samonig earned \$130 as result of working part time for Broten but I consider that \$130 to be money otherwise realized or recovered in respect to the period of notice. I find that Samonig is owed two weeks pay.

Turning to the matter of Samonig's pay, on hearing from the parties, and in view of submitted documents, I conclude that Samonig was paid a salary. I reach that conclusion on the basis of Samonig's testimony, I find him a credible witness, and on hearing from Broten and Mr. Johnson, neither offering any solid support for a conclusion that Samonig was only to be paid a draw against commissions, there is no contract of employment, no letter setting out the basis on which Samonig was hired. The documents to which I refer are the job description which calls for work for which commissions cannot be earned and its mention of a salary and the document which set out the new commission structure for Sun Water and its reference to a base salary. I note that my conclusion that Samonig was paid a salary is not contradicted by the *Simply Accounting* pay statements. Whatever the reason, they do use the word salary even though that could have been corrected.

On the balance of probabilities, I conclude that Samonig's salary began at \$2,000 per month but went to \$2,500 per month at the beginning in 1995. That conclusion is not contradicted by the reference in the document setting out the new commission structure, that base salary was to remain the same. The same as what? The uncontradicted evidence before me is that the new commission structure came well after Samonig's pay had gone to \$2,500 per month. I view the document as stating that salary would remain at \$2,500.

I find that Samonig was being paid a salary of \$2,500 for the months he worked for Broten in 1995, that he was terminated on being laid off on August 14, 1995, his pay and his hours of work being reduced as they were, and that he is owed two weeks severance pay as a result, section 42 of the old *Act* governing. Samonig is owed the amount calculated by the Director's Delegate, \$1,232.60.

**ORDER**

I order, as Section 115 of the *Act* provides, that Determination # CDET 001438 be varied as to reasons, in particular the legislation found governing. Samonig is found to be owed severance pay in the amount calculated in the Determination, \$1,232.60, and I order that the Determination be confirmed in that respect.

---

**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**

LDC;jel