Employment Standards TRIBUNAL

An appeal

\- by -

Narayan Vikas
(“Vikas”)

\- 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: David B. Stevenson

FILE No.: 2002/152

DATE OF DECISION: June 4, 2002

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DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Narayan Vikas ("Vikas") of a Determination that was issued on February 28, 2002 by a Delegate of the Director of Employment Standards (the "Director").

Vikas had filed a complaint with the Director under the *Act* alleging he was owed wages, including vacation pay, an unpaid salary increase and an unpaid bonus, earned during his employment with Mercury Scheduling Systems Ltd. ("Mercury"). He also made complaints to the Director on matters that were not directly related to the non-payment of wages, including a claim that Mercury had failed to issue stock options, his Record of Employment not providing him with the work for which he was hired and e-mail privacy. The Determination concluded that some of the matters of complaint were beyond the jurisdiction of the Director acting under the *Act* and, relating to the wages claims, that the *Act* had not been contravened, ceased the investigation of the complaint and closed the file.

The appeal takes issue with aspects of the Director's reasoning on four matters: the claim for vacation pay, the claim for the unpaid salary increase, the claim that Mercury had not provided him with the work for which he was hired and the claim related to the failure to issue stock options.

ISSUE

The issue in this appeal is whether Vikas has shown an error in the Determination sufficient to persuade the Tribunal to exercise its authority under Section 115 of the *Act* and vary it as requested.

FACTS

Mercury is a company that builds computer software used in scheduling crew members for the airline industry. Vikas began working for Mercury on August 30, 1999, was given written notice of termination on August 23, 2000 and ceased his employment with Mercury on October 6, 2000.

Vikas' employment was governed in some respects by Section 37.8 of the Employment Standards Regulations, which states in subsection (2):

> (2) The following provisions do not apply to high technology professionals:
>
> (a) Part 4, other than section 39, of the Act;
>
> (b) Part 5 of the Act.

The Determination dealt with each of the matters raised in this appeal. On the matter of vacation pay, the Determination calculated Vikas was owed annual vacation pay in an amount of $4496.41 and concluded that Vikas had taken ten days paid vacation time off in January, 2000. The findings of the Director in regard to this conclusion are instructive:

The records provided by the employer indicate Vikas took some vacation for a trip to India in January, 2000. The employer states Vikas originally requested vacation time until January 17, 2000, returning to work on January 18, 2000. This request, according to Whitmarsh, was denied. Vikas was told he could take some vacation but was required to return to work on January 12, 2000.

Vikas did not return to work on January 12, 2000. Instead he returned to work on January 18, 2000. Vikas stated he faxed a letter and medical certificate to Mercury on January 11, 2000. Vikas did not have a fax confirmation that the fax was received by Mercury. Mercury stated they received no such fax from Vikas.

The Director calculated the days for which Vikas was paid at $277.78 a day. That amount was determined by dividing the monthly salary by the number of working days in the month of January, 2000, when the vacation occurred. The result of the calculations done by the Director left an amount owing to Vikas of $1574.82 and that was paid by Mercury during the investigation.

The Determination found no evidence to support a conclusion that Mercury had agreed to give Vikas a salary increase. The Director did not accept that Vikas had a claim against Mercury for failing to provide him with work for which he was hired, noting that Vikas raised no complaint with Mercury during the time he was employed about the work he was doing. Finally, the Director found that Vikas had not proven his claim to be entitled to the stock options he claimed in his complaint.

ARGUMENT AND ANALYSIS

I can find no merit in any aspect of this appeal.

The burden is on Vikas, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. Placing the burden on the appellant is consistent with the scheme of the Act, which contemplates that the procedure under Section 112 of the Act is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the Act, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST # D134/97 (Reconsideration of BC EST # D325/96)).

No error in the calculation of annual vacation pay has been shown. Vikas may take a different view of how his annual vacation entitlement should have been calculated, but the method applied in the Determination was neither unfair, unreasonable nor inconsistent with the provisions of the *Act*. Nor has Vikas shown any error in the Director treating the ten day period in January 2000 as paid vacation time off. Vikas was unable to persuade the Director that the last four days of that period should have been considered sick time and he has had no greater success in this appeal.

I find that Vikas is a High Technology Professional as that term is defined in Section 37.8 of the Regulations and, pursuant to subsection (2) (reproduced above), Part 5 of the *Act* is not applicable, even if he did work on the Canada Day statutory holiday as he claims.

On the matter of the salary increase, Vikas has not shown the conclusion reached in the Determination was wrong. The appeal does not add anything to the information that was relied on by the Director in denying that claim. Vikas only reiterates the position he took during the investigation. In any event, it is

highly improbable that having given Vikas notice of termination, Mercury would then undertake a wage review for him and provide him with a salary increase of up to $20,000.00 on his existing salary.

On the matter of failing to provide work for which he was hired, I agree with the analysis in the Determination, that it is much too late to complain about that, even if there was any basis in fact for doing so. I add that the only possible provision of the *Act* that could apply to a complaint of this nature is Section 8, which prohibits false representations inducing or persuading a person to becaome an employee. Pursuant to subsection 74(4) a complaint alleging a contravention of Section 8 must be brought within 6 months of the date of the contravention. In Vikas' case, there was no complaint about this alleged misrepresentation for more than one year after he was hired.

Finally, on the matter of the stock options, the Determination found that Vikas was not entitled to the stock options he claimed. The Determination noted that his employment agreement allowed him to participate in the employee stock option program after he was six months into the job and that he did so. In December, 1999, Vikas was only in his fourth month in the job and could claim no entitlement to participate in the stock option program. Vikas says there were other employees who started about the same time as he did who were offered stock options in December, 1999. The Director found that to be irrelevant and I agree. Mercury was under no obligation to offer him stock options even if such an offer was made to other employees. There is no evidence that the conclusion of the Director was wrong.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 28, 2002 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal