

An appeal

- by -

Peter Z. Colak

- 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:** Carol L. Roberts

**FILE No.:** 2003/37

**DATE OF DECISION:** August 12, 2003

## DECISION

### OVERVIEW

This is an appeal by Peter Z. Colak, pursuant to Section 112 of the *Employment Standards Act (Act)*, against a decision of the Director of Employment Standards (Director) issued June 17, 2003. The decision followed a referral back to the Director on a number of issues (Tribunal decision BC EST #D527/02).

Mr. Colak alleged that UV Systems Technology Inc. (UVST) owed him wages and expenses. The Director's delegate concluded that Mr. Colak failed to provide her with information supporting his claim, determined that he was not owed any wages, and closed the file. I concluded that the delegate erred in dismissing Mr. Colak's complaint and I referred the matter back for investigation. On the referral back, I made the following findings of fact and directions:

- Mr. Colak's employment was terminated on April 5, 2002. He is entitled to compensation for length of service.
- Mr. Colak is entitled to unpaid salary of at least \$10,384.61, and unpaid commissions in the amount of at least \$3080. The delegate is to investigate whether additional amounts are owed, and if so, in what amount. In particular, the delegate is to determine whether commissions are owed based on sales contracts being entered into, or invoices paid.
- Mr. Colak is entitled to a minimum of three weeks vacation pay. The delegate is to determine whether he is owed additional weeks.
- The delegate is to address the issues noted above, and any incidental issues arising from them. In addition, the delegate is directed to investigate and make a determination as to whether UVST and SSI (now UltraGuard) are associated companies pursuant to s. 95, given that Mr. Colak's remuneration package included shares in SSI, UVST's parent company, and the shared directorships of both companies.
- The delegate is also to investigate whether the directors of UVST are jointly and severally liable for the recovery of wages owed to Mr. Colak. In addition, the delegate is to turn her mind to whether the directors of UVST are personally liable for any unpaid wages owed to Mr. Colak pursuant to s. 96.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. This decision is based on written submissions by Peter Colak and John R. Gaetz, Vice President of UltraGuard.

### ISSUE TO BE DECIDED

Whether the Director's delegate correctly determined the amounts owing to Mr. Colak.

## FACTS

After conducting a conference call with the parties on May 15, 2003, the delegate made the following findings and determinations on each of the following issues:

### Is Service Systems International Ltd. (now Ultraguard Water Systems Corp.) associated with UV Systems Technology Inc. pursuant to s. 95 of the Act?

The delegate found that both Service Systems International Ltd., now Ultraguard Water Systems Corp. (UWSC), and UV Systems Technology Inc. (UVST) were involved in the research, development and marketing of water purification systems. He also found that they were interdependent, since UVST was owned by UWSC, and that Ken Fielding and John Gaetz exercised common control and direction over both companies. He concluded that UWSC and UVST were associated companies pursuant to s. 95 of the act, and that UWSC was jointly and separately liable for wages owing to Mr. Colak.

In his submission, Mr. Gaetz refers to UV Systems Technology Inc. and UltraGuard Water Systems Corp. as “the Company”. In light of this position, and in the absence of any further submissions to the delegate’s finding that the companies are associated for the purpose of s. 95 of the Act, I infer that this finding is not disputed. Therefore, I have used the term “the Company” to refer to UVST and UWSC in this decision.

### What amount of compensation for length of service was Mr. Colak entitled to?

The delegate found that the parties agreed that Mr. Colak was employed from April 1, 1998 to April 5, 2002, that his salary was \$90,000 per annum, and that he was entitled to 4 week’s wages as compensation for length of service. He further found that the parties agreed that the total owing was \$6,923.08. He further found that the parties agreed that Mr. Colak was contractually entitled to vacation pay in the amount of 7.69%, or \$532.38, bringing the total compensation owed for length of service to \$7,455.46.

### Unpaid salary

The delegate found that the parties agreed that Mr. Colak was entitled to \$10,384.61 in outstanding wages for the pay period February 25, 2002 to April 5, 2002, plus \$798.82 in vacation pay for a total of \$11,183.43.

The delegate further noted that the Company also agreed that Mr. Colak was owed expenses of \$12,591.00, although that was not a matter over which the Branch had any jurisdiction.

### Unpaid Commissions

The delegate noted that the parties agreed that Mr. Colak was entitled to commissions under clause 2 B) of his employment contract only upon the payment of invoices.

The delegate found that an additional 0.5% commission was payable on sales bookings in place at the time Mr. Colak’s employment was terminated.

The delegate noted that the Company acknowledged that commissions of \$3,271.43 were still owed to Mr. Colak, and that “an additional \$3,845.80 may be payable in the future assuming all the remaining

project accounts receivable are collected.” He further noted that the parties agreed that an additional commission of \$1,000 was payable from one specific project.

In addition to the outstanding commissions, the delegate determined that Mr. Colak was entitled to vacation pay of 7.69%, or \$624.21.

The delegate determined that Mr. Colak was entitled to \$8,741.44 in unpaid commissions for sales bookings in place when Mr. Colak’s employment was terminated, based on the employment contract.

#### Vacation pay

The delegate noted that the parties agreed that Mr. Colak was entitled to three weeks vacation pay, or \$5,192.31.

### **ARGUMENT**

The Company does not dispute the delegate’s findings and determination on the issues of unpaid salary, unpaid commissions and vacation pay on that in the total amount of \$4,895.64, and vacation pay.

The Company agrees with the delegate’s calculation of length of service compensation, but, notwithstanding the delegate’s finding that there was an agreement between the parties, denies that it is applicable. The Company submits that Mr. Colak cannot recover both compensation for length of service and termination pay. It submits that termination pay was payable either under the contract or under the Act, not both. It refers to the contract clause relating to commissions payable on sales bookings in place at the termination of Mr. Colak’s employment and submits “Our interpretation is that this condition became the applicable condition to establish that termination pay was provided for within the contract therefore the termination conditions imposed by the Employment Standards Act would not be applicable.”

The Company also argues that Mr. Colak is not entitled to any amount as “additional commissions”, contending that no sales bookings were in place at the time of termination. It says that all projects had been shipped by January 25, 2002, and invoiced.

Mr. Colak agrees with the delegate’s calculation of his unpaid salary. He submits however that he was obliged to incur financial obligations on the Company’s behalf and that he is entitled to salary of \$12,951.61 in addition to the amount determined by the delegate.

Mr. Colak agrees with the delegate’s determination on the issue of when commissions are paid. However, as I understand his position, he contends that the items payable on termination have not been reported accurately. He alleges that the Company’s directors “chose to assign certain revenues to third parties, for considerations judged by them to be in their best interest”, and that these assignments should not operate to diminish the Company’s indebtedness to him. Mr. Colak alleges he is entitled to unpaid commissions and vacation pay on those commissions in the total amount of \$12,922.00.

Mr. Colak further submits that he is entitled to both compensation for length of service as well as compensation upon termination. He argues that the additional commissions payable at time of termination are, as the employment contract suggests, compensation for sales, not for length of service.

## ANALYSIS

I find no error in the delegate's findings and determinations.

Section 63 of the *Act* sets out an employer's liability to pay an employee length of service compensation upon termination of employment. It is a minimum statutory standard, and is an obligation, or right, which the parties cannot contract out of. Commission payments for sales bookings in place at the time of termination reflect the company's contractual obligation to pay Mr. Colak "for sales which may be received in the future due to Employee efforts during the term of his employment..." (clause 6(c) of the employment contract).

The Company's contractual obligation under clause 6(c) is distinct from its statutory liability to pay Mr. Colak length of service compensation. That obligation can only be discharged if an employee is given the appropriate written notice, a combination of notice and compensation equivalent to the employer's statutory liability, or the employee retires from employment or dismissed for cause. The Company cannot avoid its statutory obligation by payment of commissions that Mr. Colak was contractually entitled to in any event.

I am unable to conclude that the delegate erred in finding that Mr. Colak's entitlement to commissions on sales bookings in place was \$8,741.77. The Company says that no sales bookings were in place as of the date of the termination of Mr. Colak's employment. The evidence simply does not support that submission. Likewise, I am unable to conclude, on the evidence presented, that the Company has undertaken some 'creative accounting' to avoid payment of commissions to Mr. Colak.

## ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated June 17, 2003, be confirmed in the amount of \$32,572.64, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**