

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Automation One Business Systems Inc.
("Automation")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/114

DATE OF HEARING: June 5, 1998

DATE OF DECISION: June 18, 1998

Automation sells and services office equipment such as photocopiers and fax machines. A substantial portion of its business is derived from selling or leasing one manufacturer's products.

The calculation schedule appended to the Determination contains the following explanation of the total amount of wages to which the Director's delegate determined Mr. Simmons is entitled:

Minimum Wage (36 working days x 8 hours x \$7.00 per hour)		\$2,016.00
Vacation Pay (\$2,016.00 x 4%)		\$ 80.64
Statutory Holiday Pay		
Labour Day (8 hours x \$7.00 per hour)		\$ 56.00
BC Day (8 hours x \$7.00 per hour)		\$ 56.00
Vacation Pay: (\$14,247.26 x 4%)	\$569.89	
Less: Vacation pay amounts received	\$319.89	<u>\$ 250.00</u>
	Sub-total	\$2,458.64
Interest on \$2,458.64 from September 5, 1997 to January 28, 1998		<u>\$ 48.67</u>
Total		<u>\$2,507.31</u>

In summary, the Director's delegate gave the following reasons for determining that Mr. Simmons is entitled to the wage amounts shown above:

- Mr. Simmons provided copies of correspondence sent by fax to potential customers on July 16, 18, and 26, 1997;
- Mr. Simmons tendered his resignation in writing on September 8, 1997;
- Automation did not issue an ROE to Mr. Simmons until September 26, 1997;
- Automation did not provide any documents to establish that it terminated Mr. Simmons' employment or that he resigned his employment on July 15, 1997;
- Section 16 of the *Act* requires an employer to pay an employee at least the minimum wage; and
- Automation did not provide documents to establish that it had paid vacation pay or statutory holiday pay as required by the *Act*.

One of the reasons given by Automation for making an appeal is that it was not given a proper opportunity to explain or respond to the "...confusion as to the date of Randy Simmons' departure from Automation One..." Neil Achtem is the General Manager of

Automation. He testified that after an initial telephone discussion with the Director's delegate concerning the date on which Mr. Simmons' employment terminated, he understood that she would contact him again as part of her investigation of Mr. Simmons' complaint. He was very surprised, he testified, that he had no further communication with the Director's delegate until he received the Determination dated January 28, 1998.

Consistent with its usual procedures, the Tribunal provided a copy of Automation's written appeal submission to the Director's delegate and to Mr. Simmons. The Director's delegate did not make a reply submission.

Jody Findlay has been employed as a Sales Representative by Automation since November 1996. He testified that he had not seen Mr. Simmons at the office since May, 1997. He also testified that a week-long training seminar was held during the last week of May and Mr. Simmons did not attend it. Attendance at that seminar was "mandatory" for all employees as it provided a comprehensive introduction to a new line of "digital" office machines which the manufacturer believed would give it a significant competitive advantage over its competitors. According to Mr. Findlay, it would be impossible to sell the new products without the knowledge acquired at the training seminar as "digital" machines have substantially different technology and offer different features than "analog" machines.

Automation's sales staff are required to meet with the President and the General Manager on Monday morning each week. The purpose of these meetings is to discuss marketing strategies and to forecast sales volumes. According to Mr. Findlay, Mr. Simmons did not attend these meetings regularly during May 1997 and he "...never saw Randy again after early June 1997." While the sales representatives did not have scheduled office hours, they visited the office regularly to prepare price quotations, to obtain product information brochures for customers, to make calls to customers or potential customers, and to pick up or return machines which were loaned to customers for demonstrations.

Neil Achtem testified that despite attaining a satisfactory volume of sales during his initial months of employment, Mr. Simmons made no sales in April 1997 and June 1997 and only one sale in May 1997. These sales volumes were reflective of what Mr. Achtem saw as a gradual withdrawal by Mr. Simmons from any real sales efforts due to personal or marital problems, intermittent attendance at weekly sales meetings and a complete absence from the office after early June 1997. It was in that context, Mr. Achtem testified, that effective 1 May 1997 Mr. Simmons' compensation was changed from \$2,000 monthly salary plus 10% commission to \$1,000 salary plus 10% commission.

Automation paid Mr. Simmons \$1,000 each month in May, June, and July 1997. During that period of time, Mr. Achtem testified, he spoke with Mr. Simmons by telephone each each week and on July 15, 1997 they met to discuss the situation. That meeting ended, Mr. Achtem testified, when "...we shook hands and agreed that Randy would quit and get another job."

John Achtem is President of Automation One Business Systems Inc. His testimony concerning Mr. Simmons' sales volumes and pattern of behaviour after April 1997 confirmed Neil Achtem's testimony. John Achtem also testified that he told Mr. Simmons that he was required to attend the "Ricoh" training seminar at the end of May 1997 but he (Simmons) did not attend. He testified further, that he instructed Mr. Simmons not to send "fax blasts" to potential customers as it was not an effective sales technique and generated complaints about "junk faxes." According to John Achtem, it is impossible to sell office equipment such as photocopier or fax machines unless the equipment is demonstrated to potential customers. Mr. Simmons did not visit the office and did not take any equipment to demonstrate to potential customers. After he and Neil Achtem met with Mr. Simmons on July 15, 1997, he removed Mr. Simmons from the "sales production" chart and told the staff that "...Randy was no longer with Automation One."

Mr. Simmons did not make any written submission to the Tribunal in reply to Automation's appeal and did not attend the Hearing on June 5, 1998. The Director's delegate provided a copy of the documents which she obtained from Mr. Simmons during the course of her investigation but did not make any submission to the Tribunal. Those documents include: a one-page announcement (known colloquially as a "fax blast"); two fax machine transmission reports which show several one-page fax transmissions in the very early hours (between midnight and 3:30am) of July 16 and 28, 1997; and two letters from Mr. Simmons to the Director's delegate (December 8, 1997 and November 27, 1997).

ANALYSIS

The central factual dispute in this appeal is the date on which Mr. Simmons' employment with Automation terminated. Automation submits that Mr. Simmons resigned effective July 15, 1997 and did not work after that date. Its reason for appeal contain a clear statement of the facts in dispute as well as its view that it considered the investigation by the Director's delegate to have been incomplete. Both Mr. Simmons and the Director's delegate were provided copies of Automation's written submission, and were given an opportunity to reply but did not make any reply submission. Neither Mr. Simmons nor the Director's delegate appeared at the Hearing on June 5, 1998.

A recent decision of the Tribunal, *Director of Employment Standards* (BCEST#D051/98; Reconsideration of BCEST#D448/97), described the risks associated with non-attendance at a hearing, as follows:

The non-attendance of a party does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, an Employee or the Director's

delegate. In the case of an appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden. (copy from BCEST#D051/98 on page 5)

Those comments are particularly relevant to this appeal. Jody Findlay, Neil Achtem and John Achtem gave evidence which I find was both credible and persuasive.

The “fax blast” and fax transmission documents which Mr. Simmons provided to the Director’s delegate to support his claim of continuing employment after July 15, 1997 are not, in my opinion, sufficient to establish that an employment relationship existed. Similarly, the list of names and telephone numbers contained in Mr. Simmons’ letter of December 8, 1997 does not, in and of itself, establish an employment relationship.

There is nothing in the Determination to indicate that the Director’s delegate contacted any of the persons on that list as part of her investigation. Rather, the reasons given in support of the Determination focus on the lack of documents or records provided by Automation during the investigation. However, as set out in the reasons for appeal and in Neil Achtem’s testimony, he anticipated further communication with the Director’s delegate and believed firmly that “...if she had gotten back to me, I would have been better able to support our position.”

I note that the ROE shows Mr. Simmons’ dates of employment as November 25, 1996 to July 15, 1997 but the Director’s delegate does not comment on what weight, if any, she attributed to statements made by Automation in the ROE.

I find the evidence establishes, on the balance of probabilities, that Mr. Simmons:

- (i) did not attend the weekly sales meetings during May, June and July;
- (ii) was not actively engaged in demonstrating equipment or machines to customers or potential customers during June and July;
- (iii) did not attend the week-long “Ricoh” sales seminar in May 1997;
- and
- (iv) resigned his employment with Automation on July 15, 1997.

Those findings lead me to conclude that the Director’s delegate erred in determining that Mr. Simmons was entitled to “wages” totalling \$2,507.31. However, I agree with her finding that Mr. Simmons is entitled to vacation pay in the amount of \$250.00 (\$569.89 less the amount paid: \$319.89) and would order that the Determination be varied accordingly.

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied to show that Mr. Simmons is entitled to vacation pay in the amount of \$250.00 plus accrued interest in accordance with Section 88 of the *Act*.

Geoffrey Crampton
Chair,
Employment Standards Tribunal

GC/bls