

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 -

i2i Advertising & Marketing Ltd.
("i2i")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 98/278

DATE OF DECISION: July 2,1998

DECISION

OVERVIEW

This is an appeal by i2i Advertising & Marketing Ltd. (“i2i”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated April 8, 1998 issued by a delegate of the Director of Employment Standards (the “Director”). i2i alleges that the delegate of the Director erred in the Determination by concluding that Sarah Kirby (“Kirby”) was owed vacation pay plus interest in the total amount of \$311.11.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Kirby is owed vacation pay ?

FACTS

The following facts are not in dispute:

- Kirby was employed by i2i as an Account Executive from May 12, 1997 until December 4, 1997;
- Kirby’s salary was based on the rate of \$40,000 per annum;
- Kirby’s wages for the total period of her employment was \$22,878.87 ;
- The written contract of employment dated April 2, 1997 and signed by the partners of i2i stipulates with respect to vacations “*Vacation will be 3 weeks in any one calendar year plus statutory holidays. Please let us know what your 1997 holiday plans are.*”;
- The contract of employment was silent on the matter of sick leave;
- i2i had paid Kirby for sick leave during her period of employment prior to her notice period;
- Kirby was sick for 2 - 2 1/2 days during her notice period;
- i2i deducted from Kirby’s final pay, which included her outstanding vacation pay, the amount of wages they calculated to represent 2 1/2 days wages for the period of sick leave.

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with i2i.

The written contract of employment with Kirby clearly sets forth the vacation entitlement of “3 weeks in any one calendar year” .

The written contract is however, silent on the matter of payment for sick days.

The contention of i2i is that the payment for sick leave was a matter of discretion by i2i. In support of this contention, i2i submitted, as an example, a contract of employment dated March 25, 1998 which contains provisions with respect to vacation entitlement and also contains a provision with respect to paid sick leave. This example is different from the contract of employment signed with Kirby as the vacation entitlement provision now reads “ 3 weeks paid leave after one year’s full employment”. The example also contains the provision that “sick days are not normally paid but at are at the discretion of the Company”, a provision which was not a part of Kirby’s contract of employment. This example is dated well after the time of the events which gave rise to Kirby’s complaint and is of little value to this panel other than it does indicate that i2i have amended their contracts of employment to encompass changes to the vacation entitlement and to include a provision on sick leave pay.

There has been no evidence provided by i2i that the understanding of Kirby that sick days would be paid for was incorrect, in fact, i2i had paid Kirby for a previous sick leave.

Based on the evidence and on the balance of probabilities, I conclude that the contract of employment between Kirby and i2i included the understanding, albeit unwritten but confirmed by the prior practice between the parties, that sick leave would be paid for.

I further conclude that Kirby is entitled to the vacation pay as calculated by the delegate of the Director and set forth in the Determination.

I finally conclude, based on the evidence and the balance of probabilities, that i2i has not established that the delegate of the Director erred in the Determination dated April 8, 1998.

The appeal by i2i is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 8, 1998 be confirmed in the amount of **\$311.11** together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal