

An appeal

- by -

Scopeset Technology Inc.
("Scopeset")

- 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: Cindy J. Lombard

FILE No.: 2003A/164

DATE OF HEARING: September 23, 2003

DATE OF DECISION: November 17, 2003

DECISION

APPEARANCES

The appellant, Scopeset, was represented by its principal owner, Marcus Winkler, and counsel, Blair Forrest. An email dated November 15, 2003, from Schlesinger to Winkler is marked as Exhibit #1 and an email dated March 13, 2003, addressed to Saleus and submitted by the appellant is marked as Exhibit #2.

Submissions were made by both the appellant, Scopeset Technologies Inc. (“Scopeset”) and the Respondent, Andreas Bergmaier.

OVERVIEW

This is an appeal filed by Scopeset. Scopeset appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 9, 2003, which found that Scopeset owed the Respondent, Andrews Bergmaier (“Bergmaier”) wages, vacation pay and interest accrued pursuant to the Act in the sum of \$7,270.56 (the “Determination”).

ISSUES TO BE DECIDED

Scopeset is a technology company whose business is to organize all the technology required by a company. It is agreed that Bergmaier entered in an employment contract with Scopeset on March 22, 2001 and began working on August 1, 2001. Bergmaier had relocated from Germany to Kelowna and was hired to manage the technology department of Scopeset. According to the terms of the contract Bergmaier was to receive an annual salary of \$81,600.00 paid monthly in the sum of \$6,800.00. Bergmaier received that salary from the date he started work on August 1, 2001 until November 30, 2001. At that time the company was struggling financially and Bergmaier agreed to a reduced salary of \$2500.00 for the months of January and February, 2002. Beginning in March, 2002 Bergmaier received, with his consent, a reduced monthly salary of \$5,000.00 which continued until October 31, 2002.

Bergmaier gave written notice of his resignation on November 15, 2002 which was to be effective one month later on December 15, 2002. Bergmaier did not work the one month notice period as he says that Scopeset owed him one month of vacation pay pursuant to his employment contract which is annexed hereto as Schedule “B” and which provides:

“You shall be entitled to 24 working days paid vacation, after 6 months of service, to be taken at times that fit in with your work program and subject to the prior approval of the Supervisor, provided that you shall have no entitlement to unused vacation from prior years unless approved in writing by the Supervisor.”

In his letter of resignation Bergmaier requested the one month vacation. Winkler on behalf of Scopeset denied the request by letter dated November 21, 2002 on the basis that the company needed his services at that time.

The wages and vacation pay calculated by the Director as owing to by Scopeset to Bergmaier include the following:

1. Wages due for the period November 1 to 15, 2002 \$2,500.00
Scopeset admits that wages were not paid for this period but argues that the appellant did not work during this period.
2. Annual vacation pay pursuant to the terms of the employment contract \$4,615.20
Scopeset says that any vacation entitlement is due pursuant to the Act and not the contract as the appellant had repudiated the contract by his actions.

The issue before the Tribunal is therefore whether the Appellant is due the wages and vacation pay as determined by the Director. The onus is on the Appellant to show on a balance of probabilities that the Director made a reviewable error. Section 112 of the Act sets out the renewable grounds of appeal, namely:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made

THE FACTS AND ANALYSIS

1. Are wages owing by Scopeset to Bergmaier for the period November 1 to November 15, 2002?

There is much acrimony here because following Bergmaier's departure from Scopeset he went to work for Scopeset's major client at the time, Astaro. The Tribunal was advised by the Appellant that it has brought a civil action against Bergmaier.

We found the evidence of both Winkler for Scopeset and Bergmaier to be credible.

Bergmaier says that he did perform his job duties for Scopeset up until his departure; while Scopeset says that he did not, that he was already working for Astaro.

Scopeset says that if Bergmaier did perform work during this period it was for Scopeset's major client at that time, Astaro. Scopeset says that Astaro did not pay Scopeset for work during this period of time and that is one of the claims in the civil suit but is not of course within the purview of the Act for consideration by this Tribunal.

Scopeset says up until his departure, Bergmaier was responsible for providing services to Astaro and had been doing so since December, 2002. This work involved traveling to Astaro's offices in the United States and to trade shows.

Bergmaier says that during the period in question he worked as follows:

Friday, November 1st he was in Scopeset's Kelowna office doing work related to clients other than Astaro.

Sunday, November 3rd Bergmaier flew to Boston to a technical meeting at Astaro's office and traveled from there to Philadelphia for a trade show (the Lisa Show) for the balance of that week.

On Friday, November 8th Bergmaier went back to Boston for the weekend and then traveled to Chicago for another trade show.

On Friday, November 13th Bergmaier flew back to Kelowna.

Winkler for Scopeset says that on November 13th or 14th he received a call from Astaro saying that Steve Schlesinger and Ernest Kelting of that company would be coming to Kelowna on November 15th for a meeting with Scopeset. The two men did arrive and Kelting stayed at Bergmaier's home the night before. On the morning of November 15th the two men told Winkler that Bergmaier would no longer be working for Scopeset and that Astaro no longer required the services of Scopeset. After lunch on that same date Bergmaier tendered his letter of resignation.

Scopeset believes that its trust in Bergmaier was breached including, in part, that during this period he was arranging his new employment with Astaro and not working for Scopeset.

After hearing the parties and reviewing all of the material available to the Director we find that the Director made no reviewable error in finding that Bergmaier is owed wages for this period of time.

There is no new evidence put forward by the appellant which contradicts the finding of the Delegate, based on the evidence before her, that Bergmaier was performing his normal job duties during the period November 1 to 15, 2003. Bergmaier's normal job duties included performing tasks for Astaro.

The appellant alleges that Bergmaier destroyed contradictory evidence in his lap top. Based on the evidence heard there is no evidence on which to draw such a conclusion.

The appellant has not discharged its onus on this appeal to show on a balance of probabilities that the Determination was wrong due to an error of law, a breach of natural justice or based on new evidence that was not available at the time of the Determination.

2. Is Bergmaier due vacation pay and if so is it due pursuant to the contract of employment or pursuant to the Act?

The appellant says that Bergmaier is not due vacation pay as he was not working on a number of days that he says that he was.

Pursuant to section 28 of the Act the onus is on the appellant to keep records of vacation days taken by its employees. The appellant did not keep records. In absence of proper record keeping the Determination was correct in supporting Bergmaier's evidence that he took no holidays. Bergmaier says in addition to taking no holiday time, that he often worked both US and Canadian statutory holidays and spent his weekend traveling to and from business meetings.

Turning to the question whether vacation pay is payable under the contract of employment or under the provisions of the Act, Scopeset says that Bergmaier repudiated the contract of employment in such a

fundamental way (by conspiring with its customer at the time, Astaro, to become employed with Astaro, by taking the customer list, and keeping the company car, laptop and computer) that there is no contract ab initio or, in the alternative, that it ended due to Bergmaier's breach prior to November 1, 2002. Consequently vacation pay is payable pursuant to the provisions of the Act.

Bergmaier denies Scopeset's assertion and says simply that he worked for Scopeset until November 15, 2002 and properly discharged his duties including when Scopeset was in obvious financial difficulties during which time he had voluntarily taken a substantial reduction in his pay. When Scopeset continued in financial difficulties with no end in sight, Bergmaier did what most would do in that position, that is, he found more secure employment. Unfortunately it was with Scopeset's biggest customer at the time who ended their contract with Scopeset on the same date that Bergmaier gave notice that he was ending his employment contract.

In these proceedings the appellant has not discharged its onus of showing on a balance of probabilities that the delegate erred in law, failed to observe the rules of natural justice nor is there any evidence submitted that was not available at the time of the Determination which would lead to a conclusion that the appellant is not entitled to vacation pay pursuant to the contract of employment.

Based on all of the evidence before me the parties appear to be in agreement that from August 1, 2001 when the appellant commenced his employment until sometime shortly before his departure that the appellant was satisfactorily discharging his employment duties and doing whatever it took to make the relationship work, including voluntarily accepting a reduction in salary. The contract provided that after six months the appellant was entitled to 24 working days of paid vacation. The appellant was employed for more than one year and took no holidays. The appellant earned his vacation pay pursuant to the terms of the contract.

The Tribunal was made aware repeatedly by the appellant that its assertions against Bergmaier are the subject of a civil claim for damages. Perhaps in that forum with the mechanisms of discovery of persons and documents that are not available under the Act the outcome might be different. This comment is made only because the appellant's counsel had some difficulty understanding the difference between the statutory powers of the Tribunal and remedies available under the Act as opposed to the powers of a civil court in the case of a claim for damages.

For the foregoing reasons the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal