

**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 -

Ian Russell  
(" Russell ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE No.:** 2000/157

**DATE OF HEARING:** July 26, 2000

**DATE OF DECISION:** August 31, 2000

**DECISION**

**OVERVIEW**

This appeal is pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) and by Ian Russell (“Russell”, also, “the complainant”). Russell appeals a Determination by a delegate of the Director of Employment Standards (the “Director”) which is dated February 16, 2000. The Determination is that Russell is not owed moneys under the *Act*.

The delegate, in the Determination, finds that Russell was paid more than what he earned in commissions. He finds, or at least accepts, that Russell stole moneys from his former employer, B.C. Furnace Service Ltd. (“BC Furnace”, also, “the employer”). And the delegate finds that Russell is owed vacation pay under the *Act* but that the claim is extinguished by judgements which have been issued in Provincial Court (small claims division). Russell, on appeal, claims that he is not a thief and that the Determination must be wrong given his rate of pay and the sales that he made. BC Furnace claims that the Determination is correct and that it should therefore be confirmed.

**APPEARANCES**

Ian Russell (by conference call)	On his own behalf
M. Grant Gayman	Counsel for BC Furnace
Bayne L. Vardy	President of BC Furnace
Lucy Shih	Witness

**ISSUE TO DECIDE**

I must decide whether the employee has or has not shown that the Determination ought to be varied or referred back to the Director for reason of an error or errors in fact or law.

**FACTS AND ANALYSIS**

Russell began working as a commission salesperson for BC Furnace in June of 1997. On May 28, 1998, he turned in his car keys, he removed personal effects from his office, and he left that day with the intention of never returning. On that very day he went to an Employment Standards Branch office and filed out a complaint for wages (“the complaint”). In filling out his complaint form, he at first indicated that he had quit, then he scratched that out and wrote “on vacation leave (until) July 10/98”. I find that Russell resigned. He first formed the intention to quit and, while he may have taken a vacation, he carried out the quit in never going back to work.

Russell in his complaint claims to be entitled to commissions and guaranteed \$5,000 per month. The complaint is for \$9,500 in vacation pay and commissions.

The Determination is that Russell is not owed commissions but that he has in fact been overpaid. The delegate, in explaining that conclusion, states only that,

“The employer’s records show that the complainant was overpaid commissions ... which he had not earned. The complainant compiled a list of the jobs that he claims ... commissions were not paid. The employer countered by showing that some of the jobs had been paid while others were not payable due to the fact that these jobs were left uncompleted by the complainant when he suddenly quit his position on May 28, 1998.

I am convinced that the employer’s record is true and accurate and I accept its explanation that the complaint is not owed any outstanding commissions as alleged.”

I find that the above is to accept the employer in regard to all of the important underlying issues without explanation. It is to accept that Russell’s guarantee is \$1,500 for the length of the employment, as the employer says, not \$5,000 for a period as the employee claims; that any shortfall in commissions against what was paid as a draw is carried forward indefinitely, even though the employer described the draw as being against commissions owing at month-end; and it is to accept that commissions are not owed for sales made by Russell because what was sold was not yet installed when Russell quit. It may be that the delegate has reached what are entirely reasonable conclusions, some anyway, but the delegate neither explains his conclusions, nor does he state what it is that he has decided, if anything, in regard to the issues. I find, moreover, that it is far from obvious why the delegate would accept the employer on all counts. There are almost no records, and what records there are, are inconsistent with one another, and I find the employer to be rather confusing on a number of points.

There is not, at least, the employer has not produced, a written contract of employment which sets out the rate of pay or any other term of employment. I am not shown that there is any letter or even wage statements to show what truly was the agreement on pay. T4’s are produced but they are inconsistent with other documents and show that the employer was not deducting income tax and that the employer remitted almost nothing in the way of CPP and EI (UIC) premiums.

Russell received \$5,000 a month from mid-November to and including February even though, according to the employer’s record of sales, Russell made neither sales, nor commissions. Russell claims that was his guarantee, in part a reward for work for which he would never receive commissions. The employer, on appeal, claims that Russell merely received an advance, “a mid-month draw against month-end earned commission” (letter to the delegate dated September 23, 1999), except for a guarantee of \$1,500 a month.

The employer claims that Russell earned less in commissions than what he was advanced (the draws), \$15,443.12 less. But underlying that figure is the claim that Russell had a guarantee of only \$1,500. I find that much depends on whatever conclusion is reached in regard to amount of the guarantee.

In a September 23, 1999, letter to the delegate, BC Furnace said “remuneration was 100% commission, although he was entitled to a mid-month draw against month-end earned commission”. In that letter, BC Furnace also states that Blayne Vardy decided to increase Russell’s “draw from \$1,500.00 to as much as \$5,000.00 for a number of months”. There is no mention of any guarantee or minimum pay in that letter.

In writing to the delegate on December 11, 1998, the employer begins by restating the above. It says that Russell was “paid 100% commission, with a draw against commission owing at month end”. Yet the employer then goes on to contradict itself, in the same paragraph, by stating that the draw “was always a recoverable draw, save and except for minimum pay pursuant to the *Act*”. In other words, Russell was not paid 100 percent commissions and what is said to be a draw is not simply a draw against commissions earned in a month, but all future earnings. I find all of that rather confusing. First pay is this, then it is that.

The employer does not say what amount of minimum pay was paid in its December letter. However, the employer has produced a table, “Sheet2 IAN’S WAGES”, which has Russell receiving a guarantee of \$1,500 a month. As such, I find that what was said to be a draw in September was then, in December, said to be a guarantee.

In accepting that Russell was overpaid \$15,443.12, and is in debt to BC Furnace by that amount, the delegate accepts that the shortfall in commissions in one month is not against the commissions in any particular month at all but a charge which could be carried over and applied against future commissions. That is also a conclusion on which a great deal depends. Yet there is no explanation of why the delegate chose to ignore the fact that the employer repeatedly said that draws were against commissions for the month, which suggests that it was that which was the agreement on pay and that any shortfall in commissions is a wash.

Russell has all along claimed that his former employer has failed to pay him some of his commissions. He produced a list of twenty jobs for which he says that he was not paid. The employer responded to that list in its December letter and it is for that reason that the delegate concludes that Russell had been paid for some of the jobs while others were not payable due to the fact that they were not complete. What that list shows, however, is that Russell has not been paid, not because the sale was not made, but because the installation was not complete (see the employer’s list of jobs, page two of the letter dated December 11, 1998, the Marsh project). He has not been paid for his work.

It was not a commission on sales that Russell was paid but a portion of his employer’s actual profit. As such, pay is not according to sales made, in other words, work performed, but a portion of what is left after the employer’s business costs are factored in.

Russell was paid little or nothing if the customer did not pay (same list of projects, the Xycron and Blue Ocean jobs) and if a job lost money (the Boda, Gunn, and Leung jobs). Clearly, a job may lose money for reason of shoddy work, a lack of production, and unforeseen circumstances, indeed, for all sorts of reasons that beyond the control of the employee. I have considerable difficulty in accepting that Russell is to be paid nothing for reason of something like a bad debt. I would like this explained.

Employer and employee agree that Russell was issued pay cheques as is listed in the table, Sheet2 IAN'S WAGES. According to that record, Russell received cheques totalling \$22,821.51 in 1997 and another \$18,655.36 in 1998.

Russell is said to have stolen a further \$7,501.50 from BC Furnace. I find that he was not charged with a criminal offence. He is without explanation found guilty of theft by the delegate.

I am shown that a Mr. Sidhu chose to pay his BC Furnace bill entirely in cash. There were three payments in all, one for \$1,704.30, another for \$1,704.30 and a final payment of \$5,797.20. The money was paid to Russell. Russell turned over the first payment to Lucy Shih, its bookkeeper. Vardy claims that Russell kept the rest of the money. What Russell claims is that he handed the second and the third payments over to Vardy, that Vardy kept the second payment, and that Vardy handed back the \$5,797.20 and told Russell that it was his to keep as wages.

It may be that Russell is improperly in possession of the employer's funds but that is not something which I need decide. The complaint has not been dismissed for the reason that it is not in good faith but for the reason that Russell was overpaid, and for reason of the judgements against him. And on that it is important to consider that Russell has the \$5,797.20.

There are two judgements against Russell. One is for \$7,697.50, the amount that the employer claims that Russell stole from it plus expenses and interest. The other is for \$10,925.89, the maximum that BC Furnace could claim in Small Claims Court in regard to what is said to be the \$15,443.12 overpayment in commissions, plus expenses and interest. Russell did not appear in either of those cases. Russell sought legal counsel but found that he could not afford legal representation. And he tells me that he thought that everything would be cleared up through the investigation of the Employment Standards Branch. It is not explained why he did not seek legal aid.

The delegate has found that an amount of vacation pay is outstanding. He does not say what Russell is owed in terms of vacation pay. What the delegate finds is,

“... I also believe that the employer has a legitimate interest in seeking to recover the overpayment and the stolen funds and that the court actions were not an attempt to frustrate the complainant's claims with the branch. The complainant, by not defending these actions or counter-claiming against the employer, has allowed judgement to be entered against him. I

am bound by the validity of the judgements and, therefore, find that whatever vacation pay that is owing to the complainant has been extinguished by the judgements. There is no further wages owing to the complainant.”

### DECISION ON THE APPEAL

Sections 17 (1) and 18 (2) of the *Act* require that employers pay wages as they are earned and that, should an employee quit, as is the case here, that the employer pay what remains to be paid within 6 days of the date of termination.

*17 (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.*

*18 (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.*

*(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.*

An employer may not withhold wages or require payment of an employee’s wages for any purpose, except as permitted by legislation. Moreover, an employer may not require an employee to pay any of its business costs.

*21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee’s wages for any purpose.*

*(2) An employer must not require an employee to pay any of the employer’s business costs except as permitted by the regulations.*

I cannot tell from this particular Determination whether the employer has in fact paid Russell his wages. In part that is because the Determination fails to reach or, at least, state conclusions in regard to important matters such as the rate of pay, the amount of Russell’s guarantee and, if there was a draw, whether the agreement on pay does or does not provide that the shortfall in commissions in one month may be carried forward and applied against Russell’s subsequent earnings. I find also that the delegate fails to address evidence that the employer’s pay scheme is such that Russell ended up paying business costs.

Section 81 (1) of the *Act* requires that delegates provide reasons for their Determinations.

81 (l) *On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*

- (a) *the reasons for the determination;*
- (b) *if an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or another amount, the amount to be paid and how it was calculated; ... .*

I find that this particular Determination does not meet the requirements of section 81 (a) and 81 (b). The latter because the Determination, in effect, orders that what Russell is owed in the way of vacation pay be applied against the judgements which are against him and there are no calculations. I also find that the Determination flies in the face of the facts as they have been presented to me.

It is not enough to say merely that records were studied and no amount is owed. That is to sidestep all of the major issues which are raised by the complaint. Delegates need not address each and every issue which is raised, no matter how minor or inconsequential, nor is there any requirement for long drawn out explanations, but all of the substantive issues must somehow be addressed in each and every determination.

The delegate finds that vacation pay is owed but does not state what amount of vacation pay is owed. That is of no assistance to the employee or the employer. And, the delegate goes on to express that the claim for vacation pay is extinguished by the judgements without ever explaining this new concept of extinguishment. It moreover strikes me that the delegate has, in this case, put the cart before the horse in that it seems to be that the judgements are something that the Director would only want to consider at the enforcement stage.

I have decided to refer the entire matter of the complaint back to the Director for further investigation and a Determination that deals with the important, underlying issues of the complaint and which shows Russell what he is entitled to under the *Act*. Should it suit the parties and the Director, however, I realize that the best course may be to attempt to settle the matter of what, if anything, is owed.

**ORDER**

I order, pursuant to section 115 of the *Act*, that this entire matter be referred back to the Director.

**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**