Employment Standards TRIBUNAL

An appeal

- by -

Derek Blyth
(the "Appellant")

- 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: Wayne R. Carkner

FILE No.: 2002/374

DATE OF HEARING: August 12, 2002

DATE OF DECISION: August 20, 2002

DECISION

APPEARANCES:

for the Appellant	Derek Blyth E. Blyth
for the Respondent	Anita Hawes
for the Director	No Appearance

OVERVIEW

This is an appeal by Derek Blyth (the "Appellant") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued by the Director of Employment Standards (the "Director") on October 1, 2001. The Determination concluded that there was insufficient evidence that Woodpro Engineering Ltd. had contravened the vacation pay sections of the *Act* and ceased the investigation of the Appellant's complaint. The Appellant alleged that he was not paid vacation pay for his last year of employment. At the commencement of the hearing both the Appellant and the Respondent confirmed that this was the only issue under appeal.

An oral hearing was originally scheduled on February 8, 2002. The Tribunal canceled this date. The Tribunal set a subsequent date for March 22, 2002. The Appellant was scheduled to attend the hearing via telephone however he applied for an adjournment through the Tribunal's offices. The Tribunal denied this application for adjournment. The hearing commenced and the Appellant failed to phone into the hearing as had been arranged. After waiting forty-five minutes I adjourned the hearing and wrote a decision (BC EST # D102/02) concluding that the Appellant had abandoned the appeal. The Appellant applied for reconsideration of that decision and, in the reconsideration decision BC EST # RD239/02 the Chair of the Tribunal ordered that the original decision be referred back to me to rehear this application for appeal. The Chair of the Tribunal concluded that as the Tribunal bore the responsibility of canceling the original hearing date and due to confusion over the convenience to the parties of the scheduled date, it was appropriate in these circumstances to rehear the issue to ensure a full and fair hearing of the appeal.

ISSUE

Did the Director err in concluding that there was insufficient evidence to support a claim by the Appellant for entitlement of a vacation payout for the employment period from February 1, 2000 until January 31, 2001?

FACTS

Woodpro Engineering Ltd ("Woodpro"). is in the business of consulting engineering for the forest industry. The Appellant was employed by Woodpro from February 1, 1985 until February 28, 2001 as a Branch Manager. The Appellant provided 30 days notice of resignation on February 28, 2001 and Woodpro opted to pay a months notice and release the Appellant from service. At the conclusion of the

Appellant's employment the appellant was paid out 3.34 days of vacation earned from February 1, 2001 until March 31, 2001.

When the Appellant commenced service with Woodpro he worked out of the basement of the owner (John Rasmussan) with one other employee, Denis Therrien. The company was subsequently sold and Mr. Rasmussan continued on as an employee of Woodpro.

Woodpro did not have employee records dating back to 1985, only back to 1989.

EVIDENCE

The Appellant both testified, and by written submission, stated that since he commenced working for Woodpro he received vacation based on entitlement earned in the previous year. His submissions, both to this panel and the Director asserted that he had neither taken vacation during his first year of employment nor had he received a payout for vacation owed for his first year of employment. He testified that, as outlined in the *Act,* he earned his vacation in one year and took his vacation in the next subsequent year. He averred that this occurred for the duration of his employment. His submissions also alluded to inaccuracies in the Determination regarding a conversation between the Delegate of the Director and former employee Denis Therrien. He submitted a copy of an Email dated June 12, 2002, which stated in part:

> "Further to my last letter indicating that I had not taken holidays in the first year of my employment with Woodpro engineering. I wish to advise that at no time during the second or subsequent years was I ever paid out two weeks pay for not having time off during the first year."

The Appellant asserted that this contradicted the Determination wherein the Delegate wrote at Page 6:

> "During a telephone conversation with the delegate, Mr. Therrien repeated what is noted above. However, he [Mr. Therrien] was unsure if he or the complainant were paid out for that year."

He testified that this supported his position in the complaint. It should be noted that the Appellant did not call Mr. Therrien as a witness and that the Email was dated after the date of the original hearing.

When cross-examined the Appellant acceded that the spreadsheet outlining his vacation over the years and showing when his vacation was taken, was not accurate. He testified that the spreadsheet was only a "guideline" drawn up to assist him to explain his position to the Delegate.

Anita Hawes ("Hawes") had been the bookkeeper for Woodpro for 10 years at the time the complaint was filed by the Appellant. Hawes testified, and by written submission, that Woodpro's policy on vacations is as follows:

> "1. An employee is entitled to vacation time as it is accrued throughout each year.
> - Employees are generally given 10 vacation days for the first year of employment. (Some employees have started with 15 vacation days). They do not have to wait until their first year of employment is complete to take those days.
>
> 2. An extra day is given each year to a maximum of 20 days per year.
> - On an employee's first anniversary, they are given an extra vacation day, for a total of 11 days in the second year. On their second anniversary, they are given another extra

> vacation day, for a total of 12 days in the third year. This continues until the employee reaches the maximum of 20 days per year."

Hawes testified that this was the policy when Woodpro first employed her and that this policy has carried on since that time. She stated that Woodpro only had employee records dating back to 1989 as they had no room to maintain additional records and that her employer had previously maintained a minimum of seven years of records to meet Revenue Canada requirements.

Hawes provided the spreadsheet records of employees, including the Appellant's, showing the employee's vacation history, both accrued and when vacation days were taken. Hawes also provided letters, which were referred to in the Determination, from 2 employees outlining that the employees took their vacation in the year their entitlement was accrued, including an employee who has been employed by Woodpro since 1987. Hawes also produced a letter from a previous employee who worked approximately 5 years in the late 1980's. All these letters stated that these employees of Woodpro received vacation days in the year they were accrued.

ARGUMENT

The Appellant submits that in accordance with Section 57 (1) (a) and (b) of the *Act,* there is no entitlement to vacation in the first year of employment and that he neither received any vacation days in that year nor was he paid out his vacation for the first year. He submits as neither party has records dealing with the time period in question that the provisions of the *Act* should apply and that he is entitled to an additional payout of 20 days vacation. The appellant submits that the Email from Therrien supports his contention of non-payment of vacation in the first year of employment and this document should be accepted as evidence to support this proposition. He further submits that the Director erred in law concluding that there was insufficient evidence to prove a contravention of the *Act* had occurred. The Appellant submits that due to an absence of credible records from either party the provisions of the *Act* should prevail and the Determination should be varied to show an entitlement to the Appellant of a vacation payout equivalent to 20 vacation days.

Hawes submits that the evidence shows that Woodpro has consistently applied the vacation policy outlined in her evidence and that the letters from the employees supported this position. Hawes supported the conclusions reached by the Director and submits that this appeal should be denied.

The Director submits that all the issues outlined in the appeal were dealt with in the body of the Determination. The Director stated, in a written submission, that the Appellant provided no evidence supporting the claim that he had neither taken vacation in his first year of employment nor received a vacation payout for the first year of employment. The Director submits that Woodpro has shown a consistent practice of applying the vacation policy as far back as the employment records are maintained (1989). The Director submits that the appeal is without merit and should be dismissed.

ANALYSIS

The burden of proof falls to the Appellant to show that the Director erred in fact and/or law to a degree that would deem the conclusions reached by the Director not valid. The Appellant has not met this onus.

Section 57 (1) and (2) of the *Act* reads in part:

> "57 (1) An employer must give an employee an annual vacation of
>
> (a) at least 2 weeks, after 12 consecutive months of employment, or
>
> (b) at least 3 weeks, after 5 consecutive years of employment.
>
> (2) An employer must ensure an employee takes an annual vacation within 12 months after completing the year of employment entitling the employee to the vacation."

As noted by the Director in the Determination, this language establishes the minimum standards that an employer must meet under the *Act.* It is clear in the evidence that Woodpro's vacation policy exceeded this standard

The evidence and argument provided in this appeal is identical to that outlined in the Determination with one exception, that being the Email from Therrien.

The evidence provided in Woodpro's records from 1989 showed that the vacation policy was consistent in that employees took their vacation in the year that the entitlement for that vacation was earned. The letter from the employee (Steve Ollech, attached to the Determination) who was employed from 1987 stated that he received 2 weeks vacation in his first year of employment as outlined in Woodpro's vacation policy. The letter from the employee (Ron Penluk, attached to the Determination) who worked 5 years in the latter part of the 1980s stated that he received 2 weeks vacation during his first year of employment and three weeks in every subsequent year of his employment. This too is consistent with Woodpro's vacation policy during the first year of employment.

The Determination noted that John Rasmussen, the owner of the Company in 1985, stated that from the outset, employees either took their paid vacation time within the same year it was earned or had their vacation paid out within the same or following year.

Turning to the Email from Therrien, the Email stated that he had not received a pay out for his first year of vacation entitlement, however, the Determination, at page 6, outlined a telephone conversation between the Delegate and Mr. Therrien where the Delegate was informed by Mr. Therrien that he was unsure whether or not he or the Appellant were paid out for that first year of vacation entitlement. This is a direct contradiction in Therrien's evidence. Mr. Therrien was not called as a witness to test the credibility of his evidence. As a result I find that Mr. Therrien's evidence is of no assistance.

The Appellant failed to produce any documentation (pay stubs, bank statements, etc) to support his claim. The Respondent had no records covering the time frame in dispute but showed a practice from 1989 supporting their position and from 1987 through employee evidence.

The Delegate stated at page 8 of the Determination:

> "Given the length of the years that have elapsed since 1985, and given the lack of documented evidence, the only other way to determine this issue would be to examine the information gathered from the parties involved and their witnesses. It is difficult to deduce from the information gathered from the Complainant and the Employer and arrive at a conclusion that the Employer did or did not contravene Section 57 of the Act [sic]. The information, anecdotal as it is, can only lead to speculation upon which a decision cannot be based."

Based on the lack of evidence for the timeframe covering the first year of employment, both through documentation and witnesses, the Delegate of the Director exercised his discretion, pursuant to Section 76 (2) (d), and ceased the investigation of the complaint. After reviewing the evidence and submissions I must concur with this decision as the Appellant has not shown that any errs of fact or errors of law have occurred.

CONCLUSION

I conclude that the Appellant has failed to meet the burden of proof to shows errors in the Determination. Accordingly, the appeal of the Determination dated October 1, 2001 is denied.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination dated October 1, 2001 be confirmed.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal