Employment Standards TRIBUNAL

An appeal

- by -

Digital Accelerator Corporation
("DAC")

- 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: Mark Thompson

FILE No.: 2002/249

DATE OF DECISION: September 9, 2002

DECISION

OVERVIEW

This is an appeal by Digital Accelerator Corporation ("DAC") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 19, 2002. The Determination found that DAC had failed to pay two former employees, Marcus Garbsch ("Garbsch") and Jian Qing (Tony) Tang ("Tang") regular wages, vacation pay, and compensation for length of service. DAC owed Garbsch $7, 135.42, and Tang, $13,222.24, including interest.

DAC filed an appeal on May 7, 2002. The appeal covered the Determination under review in this Decision and two other determinations involving other persons who had been employees of DAC. The appeal implicitly acknowledged that it owed wages to former employees, but alleged errors of fact and law in the Determination that affected the amount owed. In particular, it argued that a number of employees had received payments against wages owed, that certain employees were "over subscribed" for their vacation pay, and any monies due to them should be reduced by the amount of the over subscription. DAC also argued that the use of a 4 per cent formula to calculate vacation pay was incorrect in some cases.

DAC also filed a document on July 5 containing information containing employment records of Garbsch and Tang. The Director's delegate pointed out that this document was filed after the deadline for appeals.

This Decision was based on written submissions.

ISSUES TO BE DECIDED

The issues to be decided in this case were: what were the appropriate amounts of wages vacation pay and compensation for length of service owed to Garbsch and Tang, and what weight should be given to the July 5, 2002 submission from DAC.

FACTS

Garbsch worked for DAC from August 25, 1999 until October 5, 2001. Tang was employed from November 15, 2000 until March 3, 2002. Garbsch filed a complaint alleging that he was not paid from September 1, 2001 until October 5, 2001. Tang complained that he was not paid from January 16, 2002 until March 31, 2002. Garbsch and Tang filed their complaints on March 20, 2002 and March 19, 2002 respectively.

DAC encountered financial difficulties in 2001, and did not deny to the delegate that employees had not been paid. The delegate notified Nick Ringma ("Ringma"), an officer of DAC, on April 15, 2002 that a number of employees had filed complaints alleging that they had not received regular wages, compensation for length of service and vacation pay. The letter set out the amounts owed to Garbsch and Tang. The delegate warned DAC that she would issue a determination with respect to these individuals unless she received information "such as signed cancelled cheques and payroll information" to show that the wages in question have been paid no later than April 18, 2002. The letter also concerned the complaint of another individual, Ze-Nian Li.

Ringma replied on April 18, 2002. He stated that Li was a contractor and provided a copy of his contract. DAC did not deny that wages had been paid, but stated that Garbsch and Tang "had left to work elsewhere after we failed to make their salary payments."

According to the delegate DAC also informed her at some point that it was expecting to obtain funds that would enable it to pay wages to its former employees between March 20 and 30, 2002. However, it failed to make these payments. DAC did not provide the delegate with any information concerning the pay status of Garbsch and Tang, apart from admitting that they had not been paid for the periods in question. In particular, DAC did not provide the delegate with payroll documents to support any argument that it had paid its employees.

The delegate then relied on information from Garbsch and Tang to calculate the amounts owing for regular wages and vacation pay, pursuant to Sections 18, 58 and 63. The Determination did not mention Ze-Nian Li. The delegate further found that DAC had violated Section 17 of the Act when it failed to pay Garbsch and Tang in a timely fashion. By Ringma's own statement, the two complainants had ceased to work for DAC when they were not paid.

The Determination stated that the deadline to file an appeal was May 13, 2002. DAC filed its appeal on May 7, 2002. It alleged in general terms that the Determination contained errors of fact and law and that the delegate possessed the relevant information to correct those errors, in particular that a letter dated February 20, 2002 set out DAC's position regarding outstanding claims against it. It disputed that all employees, presumably including Garbsch and Tang, who had filed complaints were entitled to compensation for length of service and stated that it had paid all employees $500.00 on October 5, 2001, a fact the Determination did not include in its calculations. It further asserted that some employees had "over subscribed" in their "vacation accounts." DAC requested that any monies owed to former employees be reduced by the amounts of the vacation over payment.

The Director's delegate replied on May 21, 2002, pointing out that she had provided DAC with a calculation of the wages owed to Garbsch and Tang on April 15, 2002, and DAC had not provided any information to support any other calculation of the wages owed. Similarly, DAC did not produce any information on the amount of vacation pay earned, taken or paid. The delegate thus had issued the Determination on April 19 based on the information available.

DAC submitted an extensive document in support of its appeal of another determination issued with respect to a number of employees, including Garbsch and Tang on July 5, 2002. The status of DAC's July 5, 2002 statement is subject to analysis below. DAC stated in the document that the information regarding vacation pay and wages owing to Tang and Garbsch was provided to the delegate as soon as possible after they filed their complaints. The record contained no documentary evidence to support this statement.

In brief, the document stated that Tang had taken more vacation than he had accrued with a value of $1,500, so that amount should be deducted from any monies paid to him. Garbsch entitled to additional vacation pay, but had received $500 on October 5, 2001. That amount should have been deducted from any amount paid to him. According to DAC, Garbsch had "voluntarily left his position," so he should not receive compensation for length of service.

The submission contained a copy of a cancelled cheque made out to Garbsch on October 5, 2002 for $500. It also showed Tang as receiving pay cheques in January and February 2002. Payroll records for a number of employees were provided, but none contained information on Garbsch or Tang. A petition

dated September 12, 2001 tendering the resignation of a group of employees, including Tang, was an exhibit. DAC argued that Tang had thus resigned and was not entitled to compensation for length of service. A handwritten statement calculating Tang's vacation time was submitted. The statement declared that Tang had taken 7.5 days more vacation than his entitlement. DAC's position was that the value of the 7.5 days was $1500, and this amount should be deducted from any monies owed to Tang. DAC acknowledged that its February 20, 2002 letter to which it had referred in its May 7, 2002 appeal contained no information on Garbsch and Tang.

The delegate's brief statement of July 23, 2002 asserted that the information in the July 25, 2002 submission was not available during her investigation, also stating that the deadline for an appeal of the Determination was May 13, 2002.

ANALYSIS

In its July 5, 2002 submission DAC basically argued that Tang was not entitled to vacation pay because he had already taken more vacation than he had accrued, that he had resigned in September 2002 and thus should not receive compensation for length of service. By its calculation, DAC owed Tang $3,208.94. Garbsch was entitled to more vacation pay than the delegate had calculated, but not compensation for length of service because he had voluntarily "left his position." DAC stated that it owed $4,469.81.

The first issue to be addressed in this decision is the status of DAC's July 5, 2002 submission to the Tribunal. The fact pattern of this case falls under the precedent of *Re Tri-West Tractor Ltd*. BC EST # D268/96. (See also *Re Kaiser Stables Ltd.* BC EST # D058/97). In *Tri-West Tractor*, the delegate requested information from the employer to support its allegations against a former employer to justify her termination. The adjudicator found that the employer had produced no documented evidence to support its claim. The employer ignored verbal and written requests for information, and there was no evidence to validate its claim of cause for termination. In its appeal, the employer provided new information to support its termination. The adjudicator stated:

> The Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under section 112 of the Act is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

In this case, the Director's delegate wrote to Ringma, an officer of DAC on April 15, 2002 to provide her calculation of the amounts owed to Garbsch and Tang. She asked Ringma to provide information concerning the status of the complainants. She even stated the types of information that would be necessary. In its April 18 reply, DAC stated that it did not have the money to pay the wages, but provided no information to show that any of the amounts in question had been paid.

The delegate then issued her Determination on April 19, 2002 with a deadline for appeals of May 13, 2002. DAC's appeal of May 7 contained only unsupported allegations of errors of law and fact in the Determination. Without any explanation, DAC then presented its July 5, 2002 document, which contained more detailed information concerning Garbsch and Tang.

This is a clear case of an employer "lying in the weeds," in the words of the adjudicator in Tri-West Tractor. DAC knew the claim being made against it. It was invited to reply with documentation to support any contrary conclusion. When it did provide information regarding a complainant, Ze-Nian Li, the delegate responded when she issued the Determination. DAC then filed an appeal within the time limit that did not contain any information to contradict the Determination. Only 7 weeks after the deadline for appeals, did it produce any records to shed light on its position. These records could and should have been made available to the delegate in her investigation. The Tribunal has consistently refused to accept submissions of this type, and DAC cannot rely on the data in the July 5, 2002 document to overturn the Determination. Even if the submissions of July 5 were admitted, they still did not contain all of the information the delegate had requested in April.

DAC argued in its reply to the delegate's April 15 communication that Garbsch and Tang had resigned because they stopped working when they were not paid. The most fundamental obligation of an employer is to pay employees for their services. Section 17 of the Act sets out that obligation in terms of prompt payment. There was no dispute in this case that DAC failed to meet the requirements of Section 17. The right of an employee to resign is personal and must be supported by clear and unequivocal facts in order for the Tribunal to relieve an employer of its obligations to pay compensation for length of service (see *RTO (Rentown) Inc.* BC EST # D409/97). It would be a gross violation of the purposes of the Act in Section 2, "to promote the fair treatment of employees and employers," to permit an employer to stop paying an employee his or her wages and then seek to escape paying compensation for length of service because the employee stopped working. There was no evidence that either Garbsch or Tang intended to resign. Even if I accepted the evidence of the September 12, 2001 petition, which was contained in the July 5 submission, DAC's own evidence shows that Tang was still working early in 2002.

DAC also raised the issue of proper calculation of vacation pay for Garbsch and Tang. Based on the evidence of their employment history in the Determination, the delegate's calculation was correct. The Tribunal has no authority to assist employers in recovering overpayment of vacation or other forms of compensation. DAC can use other avenues to pursue its claim.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination is confirmed. DAC owes Garbsch $7,135.42, plus interest accrued since May 13, 2002, under Section 88 of the *Act*. DAC owes Tang $13,222.24, also plus interest under Section 88.

Mark Thompson
Adjudicator
Employment Standards Tribunal