

An appeal

- by -

Phiroze Irani aka Phil Irani operating as Amy's Loonie Toonie Town
(the "Employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/424

DATE OF DECISION: July 30, 2001

DECISION

OVERVIEW

This is an appeal filed by Phiroze Irani operating as “Amy’s Loonie Toonie Town” (the “Employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 10th, 2001 (the “Determination”) pursuant to which the Employer was ordered to pay \$1,578.65 to his former employee, Ly Heng (“Heng”), on account of unpaid vacation pay (section 58) and interest (section 88).

By way of a letter dated July 23rd, 2001 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on the parties’ written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

FACTS

The Employer operates a retail store in Vancouver, B.C.; Ms. Heng was employed by the Employer from December 1998 to June 14th, 2000 as a clerk and was paid \$2,000 per month.

Ms. Heng filed a complaint alleging, *inter alia*, that she did not receive vacation pay as required by section 58 of the *Act*. The Employer, who purchased the business in December 1998, maintained that vacation pay was included in Ms. Heng’s \$2,000 monthly salary. The delegate, after reviewing the Employer’s payroll records and other documents, concluded that there was insufficient evidence to show that Ms. Heng’s monthly salary included vacation pay.

ISSUES ON APPEAL

In his appeal documents the Employer alleges that the delegate was biased and the Employer also reiterates his position before the delegate that Ms. Heng’s monthly salary included 4% vacation pay.

I should add that the Employer’s appeal documents also include a number of other irrelevant (*e.g.*, Ms. Heng was not entitled to *statutory holiday pay*--note the Determination only addresses *vacation pay*--because she was a “manager” and “non-union”) and inflammatory comments that I do not intend to address.

ANALYSIS

There is no evidence before me upon which I could conclude that the delegate was biased. The delegate, as is obvious from the material before me, gave the Employer a full and fair opportunity to present his case and the Employer seemingly availed himself of that opportunity.

The Employer did not raise any concern about possible bias until after the Determination was issued. Bias cannot be shown from the mere fact of an adverse decision.

Regarding the matter of bias, there is no evidence that, for example, the delegate was financially interested in the outcome of the dispute, or was personally related to, or had some other relationship with, the complainant, or was in some way in a conflict of interest. In my view, the bias allegation is vexatious and entirely without merit.

The former owner of the store provided a letter to the delegate in which she indicated that the sale of the business closed on December 2nd, 1998. It would appear that the Employer purchased the assets of the business from the former owner. The employment of Ms. Heng (and her concomitant right to vacation pay) continued uninterrupted and unaffected by the sale (see section 97 of the *Act*). The fact that Ms. Heng's employment continued uninterrupted by the sale was acknowledged by the Employer in his July 18th, 2001 submission to the Tribunal and in a letter dated January 17th, 2001 to the delegate where the Employer stated: "we inherited [Ms. Heng] rather than to [*sic*; go?] through a selection process...".

It is clear that prior to the sale, Ms. Heng was paid a \$2,000 monthly salary plus 4% vacation pay which latter sum was paid out to her in a lump sum prior to the completion of the sale. If, following the sale, Ms. Heng's salary included 4% vacation pay, the Employer had, in effect, unilaterally reduced her compensation. While parties are free to mutually agree to change the existing terms and conditions of employment, the wage reduction contemplated by the Employer in this case appears to have been undertaken without Ms. Heng's consent or even knowledge.

Certainly, if the Employer and Ms. Heng agreed to a reduction in her wages, I would have expected some clear and unequivocal evidence on that point. There is none. Vacation pay is a statutory entitlement and although vacation pay can be lawfully paid out by way of installments on each of the employee's scheduled pay days (rather than by way of a lump sum), that form of payment requires the mutual agreement of the employer and employee [section 58(2)(b)]. There is no evidence of such agreement in this case. Even if there *was* such an agreement, it would seemingly be a void agreement inasmuch as it would not appear to have been supported by any lawful consideration [see *Watson v. Moore Corporation Ltd.* (1996), 134 D.L.R. (4th) 252 (B.C.C.A.)]. Finally, any agreement to, in effect, forgo what had been, prior to the sale, Ms. Heng's lawful entitlement to vacation pay is, in my view, proscribed by section 4 of the *Act*.

Further, (and equally importantly), quite apart from any alleged agreement with respect to the inclusion of vacation pay in her monthly salary, there is no documentary evidence that Ms. Heng was, in fact, ever actually paid her vacation pay on each of her scheduled paydays. Section 27 of the *Act* states that if an employee's pay for the current pay period includes, for example, vacation pay, that item should be separately identified and accounted for on the employee's wage statement for that pay period. Ms. Heng's wage statements, *prepared by the Employer*, do *not* indicate that *any* vacation pay was ever paid. Ms. Heng, for her part, denies having ever entered into an agreement with the Employer following the sale of the business whereby her monthly salary would henceforth include vacation pay (*i.e.*, she denies having agreed to a reduction in her pay following the sale of the business).

The Employer's appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$1,578.65** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal