Employment Standards TRIBUNAL

An appeal

- by -

Eye2Buy Technology Canada Ltd.
(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: Mark Thompson

FILE No.: 2002/206

DATE OF DECISION: September 16, 2002

DECISION

OVERVIEW

This is an appeal by Eye2Buy Technology Canada Ltd. (the "Employer") 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 March 26, 2002. The Determination found that the Employer had failed to pay a former employee, Daryl H. Hepting ("Hepting") regular wages and vacation pay in the amount of $4,264.00.24, plus interest, for a total of $4,532.89.

Hepting worked for the Employer from August 1, 2000 until April 19, 2001. Both the Employer and Hepting agreed that he was laid off in 2001, although the date is in dispute. Hepting filed a complaint seeking to recover wages and vacation pay for time worked in April 2001. The Employer did not respond to numerous requests from the Director's delegate for Hepting's employment records. The delegate then issued a Determination based on Hepting's submissions on March 26, 2002. John A. Vasilakos ("Vasilakos") filed an appeal on April 17, 2002. He submitted a more detailed statement on May 28, 2002. The May 28 statement argued that Hepting had worked as a volunteer for the Employer in April 2002 and was not entitled to any compensation for his services. Furthermore, he had previously received a salary in excess of the amount agreed between himself and the Employer.

Hepting stated that he did not ever understand that his work from April 1-19, 2001 was on a volunteer basis.

This Decision was based on written submissions.

ISSUES TO BE DECIDED

The issue to be decided in this case was whether Hepting was entitled to be paid for the period April 1-19, 2001.

FACTS

Hepting was first employed by the Employer on August 1, 2000. Hepting stated that he ceased to be an employee on April 19, 2001 when he filed his complaint. According to the Employer, Hepting was laid off on March 31, 2001 and continued to work as a volunteer until April 19, 2001.

The delegate contacted the Employer by letter on September 7, 2001, setting out the Hepting's allegation and requesting employment records. The Employer did not reply, and the delegate sent a second letter on October 4, 2001, requesting a reply to the first letter. The Employer left a voice mail message with the delegate on October 19, 2001 to ask that he be contacted by telephone. The delegate returned to his office in November 2001 and left a voice mail message with the Employer. The delegate and the Employer did not establish telephone contact, so the delegate wrote the Employer on November 27, 2001, to repeat his request for the records necessary to verify Hepting's complaint. The Employer sent the delegate a copy of Hepting's Record of Employment (ROE) and a copy of a letter it had sent to Human Resources Development Canada requesting changes to the data in the ROE.

On January 8, 2002, the delegate issued a Demand for Employer Records with a deadline of January 22, 2002. Canada Post returned the Demand as "unclaimed." The delegate sent another letter to the Employer on January 29, 2002, repeating the requests for records and pointing out the penalty provided under the *Act* for failure to produce records. The Employer did not respond. The delegate issued a Penalty Determination on March 7, 2002. He then issued the Determination under appeal in this proceeding, relying on Hepting's records.

In support of its appeal, the Employer did not provide any payroll records. Vasilakos asserted that the Employer had paid Hepting more than the amounts called for in his contract. He further argued that employees in the information technology knew when they began work that the industry was volatile, and an element of risk of not being paid existed. He asserted that the delegate was not available by telephone and was unsympathetic to the difficulties the company was facing.

In his reply to the appeal, Hepting stated that no one ever told him that the work he performed for the Employer in April 2001 was on a volunteer basis. He further stated that he was the principal contact between the Employer and the payroll service the Employer began using in January 2001. Vasilakos instructed him to stop the payroll before the April 15 payroll date, and the payroll service told him that payment could be delayed without affecting the employees adversely. When he left a voice mail message to that effect for Vasilakos, Vasilakos called him back, demanding that the payroll be stopped until further notice. Hepting complied with the instructions. According to Hepting, he continued to work and even signed cheques in favour of the U. S. executives of the company shortly before his last day at the office. He asserted that his last day of work was April 19, 2001, and disputed the Employer's statements to Human Resources Development Canada to the contrary. Hepting told the delegate that he learned on April 19, 2001 that no funds were available to meet the payroll, so he ceased work.

ANALYSIS

At no point in these proceedings, did the Employer produce records to support its position that Hepting was not entitled to the amounts contained in the Determination, despite numerous written and oral requests from the delegate.

Section 28 of the *Act* requires all employers to maintain a specified set of payroll records. Section 85(1)(f) gives the Director or her delegate the power to order a person to produce records necessary for the investigation of a complaint. The delegate informed the Employer of these provisions, to no avail. The delegate also issued a Penalty Determination as a result of the Employer's failure to produce payroll records. The Employer did not appeal that determination.

Furthermore, Section 18(2) of the *Act* requires an employer to pay all wages owing to an employee within 6 days if the employee terminates his or her employment. This provision was reproduced in the Determination.

The Employer's initial appeal contained no information to permit the Tribunal to vary or cancel the Determination. Arguably, the May 9, 2002 statement from Vasilakos was out of time under the time limits in Section 112(1) of the *Act*. But even if the Tribunal accepted it as an addendum to the original appeal, it provided no basis for challenging the Determination. Vasilakos asserted that the Employer was entitled to violate the *Act* because of the volatile nature of the industry and its previously generous treatment of Hepting.

Section 1 of the *Act* defines work as:

> The labour or services an employee performs for an employer whether in the employee's residence or not.

Based on the evidence before the Tribunal, Hepting was carrying out work for the Employer from April 1-19, 2001. Section 4 of the *Act* provides that minimum requirements cannot be waived by agreement between an employer and an employee.

The Tribunal will vary or cancel a Determination if the appellant provides evidence or argument to demonstrate that the Determination contained errors of fact or law. The appellant bears the onus of persuading the Tribunal that a determination should be varied or cancelled. The Employer in this case has made no such showing.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination of March 22, 2002 is confirmed. The Employer owes Hepting $4,532.89, plus additional interest accrued since the date of the Determination, under Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal