

An appeal

- by -

Peter Z. Colak

- 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:** Carol L. Roberts

**FILE No.:** 2002/422

**DATE OF HEARING:** December 5, 2002

**DATE OF DECISION:** December 17, 2002

## DECISION

### APPEARANCES:

Peter Z. Colak: Appearing on his own behalf

John Gaetz: Appearing on behalf of UV Systems Technology Inc.

### OVERVIEW

This is an appeal by Peter Z. Colak, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 11, 2002.

Mr. Colak alleged that UV Systems Technology Inc. ("UVST") owed him wages and expenses. The Director's delegate concluded that Mr. Colak failed to provide her with information supporting his claim, determined that he was not owed any wages, and closed the file.

### ISSUE TO BE DECIDED

Whether the Director's delegate erred in determining that Mr. Colak was not entitled to wages.

### FACTS

Mr. Colak was hired as the Vice-President of sales and marketing for UVST, a water and wastewater disinfection technology company on October 1, 1997. He was provided with an office, a desk, secretarial support, a computer and phone. The Directors of UVST are John Gaetz and Ken Fielding.

On February 28, 2000, the parties entered into a written employment agreement, which formalized the working relationship. The document was jointly drafted.

Pursuant to this agreement, Mr. Colak was to "perform such duties and assume such responsibilities as assigned and approved by [UVST] from time to time which are customarily associated with a position of Vice President – Sales and Marketing". Those duties were attached as an appendix to the agreement.

Mr. Colak was to be paid an annual salary of \$90,000 payable biweekly, a commission of 0.5% of all UVS worldwide sales, and an incentive plan. That incentive plan included shares in UVST's parent company, Service Systems International Ltd. ("SSI") and commissions. Both Mr. Fielding and Mr. Gaetz are also the directors of SSI. At the hearing, Mr. Colak provided the Tribunal with documentation that indicates that, on November 15, 2002, SSI changed its name from SSI to UltraGuard Water Systems Corp. ("UltraGuard")

Mr. Colak was also entitled to 4 weeks paid vacation each year.

Although Mr. Colak was responsible for sales and marketing UVST's products, it evolved into one where he also developed product proposals.

Mr. Colak worked mainly from his home in the latter stages of his employment, essentially to prepare proposals and to market the product, because UVST's computers lacked the necessary software and high speed internet access.

UVST began experiencing cash flow problems in late 2001. On October 9, UVST acknowledged a debt of back wages and expenses in the amount of \$29,000, and indicated that it expected the funds to become available shortly.

UVST moved out of its rented space on January 25, 2002 because of financial difficulties, and did not relocate. I note that UVST's faxed response to the appeal was on both UltraGuard and UVST letterhead bearing a Langley address, and signed by Mr. Fielding.

On February 20, 2002, Mr. Colak emailed UVST, indicating that he was owed salary of \$6,923.08 and commission wages of \$10,000 for 2001, as well as company expenses.

Mr. Colak received his last paycheque on February 22, 2002. At the end of February, Mr. Colak contacted UVS regarding his unpaid wages. Mr. Colak stated that he was advised that a deal with a prospective investor was imminent. He was later instructed to continue to find potential investors for the company, which he did.

On February 25, 2002, Mr. Colak filed his complaint with the Employment Standards Branch, contending that he had been "constructively dismissed".

The delegate contacted Mr. Colak on June 13. Mr. Colak says he was out of Canada seeking work when he was contacted, and advised the delegate that he would gather information necessary to support his claim upon his return home.

The delegate issued the Determination on July 11. Mr. Colak says that he was in the process of compiling the information when he received the Determination.

The Determination notes that Mr. Colak failed to provide the delegate with any information regarding hours he claimed to have worked after January 25, despite numerous requests from the delegate that he do so. She was not satisfied Mr. Colak was entitled to wages after January 25. She further concluded that, since expenses did not fall within the definition of "wages", she was unable to order UVST to reimburse him for any funds expended.

The delegate further found no evidence that Mr. Colak's employment was terminated, and she closed the file.

After the Determination was received, Mr. Colak's counsel provided the delegate with a copy of a Record of Employment ("ROE") sent to Mr. Colak in June. That ROE sets out a termination date of April 5, 2002. The ROE indicates that Mr. Colak was owed wages for three pay periods, that he was owed \$3,271.43 in commissions, and that a further \$7,283.06 in commission sales "may" become payable.

The delegate refused to reconsider her decision. She says that when she received Mr. Colak's initial complaint in February, he indicated he was constructively dismissed. She says she took that to mean that he was "no longer performing work for [UVST]." The delegate states "The fact that the employer and

Colak agree that wages are owing for a period after January 25, 2002 does not satisfy me that wages are owing pursuant to the Employment Standards Act”.

## ARGUMENT

Mr. Colak does not dispute the delegate’s determination that expenses are not recoverable under the Act.

Mr. Colak argues that he was not given sufficient time to prepare his records, and was never advised by the delegate that he had a deadline for the submission of such information. Mr. Colak argues that the delegate did not conduct a proper investigation, and did not allow him the opportunity to provide the relevant facts. Further, Mr. Colak says that most of the information provided on appeal was not available when he filed his complaint, and that it was not before the delegate at the time she made her Determination. That material includes the emails noted above, as well as the following documents:

- A fax from UVST to Mr. Colak dated March 1, 2002, indicating that he was entitled to the sum of \$10,554.49 in commissions for 2001. Mr. Colak has not received this money.
- On or about April 10, Mr. Colak called the principals of UVST, and discussed ending his association with them. He sent UVST a letter seeking their agreement to mutually end his employment. The only response he received was an email dated April 25, indicating that a salary cheque in the amount of \$2,257.18 had been made out and would be sent to him by courier. That cheque was never received.

Mr. Colak says he was never given notice that he was laid off from his employment until he received his ROE. He argues that he is entitled to compensation for length of service.

Mr. Colak also argues that he is entitled to wages in the amount of \$10,384, as acknowledged by UVST.

The delegate submits that, although UVST and Mr. Colak agree that wages are owed for work performed after January 25, 2002, because Mr. Colak was not able to tell her what work he performed for UVST after January 25, she was not satisfied “that wages are owing pursuant to” the Act. She also submits that, while Mr. Colak may be owed annual vacation pay, Mr. Colak did not raise this issue in his complaint, and that she had no indication of the amount owed.

The delegate also stated that Mr. Colak did not clarify whether he was intending to pursue a civil action for wrongful or constructive dismissal or to seek a remedy under the Act. The delegate argues that, in light of the lack of information, and Mr. Colak’s failure to clarify his choice of forum, the determination should be upheld.

UVST contends that the delegate erred in failing to determine whether Mr. Colak was an employee or employed in an executive capacity. I find this argument irrelevant for the purposes of this decision. All managers are employees. However, it is only necessary to determine whether an employee is a manager for the purpose of determining whether overtime wages are owed. That is not at issue here, as Mr. Colak is not seeking overtime wages.

UVST acknowledges that April 5 is “the official date of notification of termination to Mr. Colak”. Although UVST did not dispute that Mr. Colak was owed funds, it did not agree on the amounts claimed. It agreed that Mr. Colak was owed wages, commissions, compensation for length of service, and vacation

pay. It contended however, that commissions were only payable to Mr. Colak on contracts that had been paid for, not merely entered into. Mr. Gaetz agreed that Mr. Colak was entitled to commission wages in the amount of \$3080, wages in the amount of \$10,384.62, plus three weeks vacation pay and compensation for length of service.

Notwithstanding the Tribunal's lack of jurisdiction on this issue, Mr. Gaetz also agreed that Mr. Colak was owed expenses as claimed.

## **ANALYSIS**

The burden of establishing that the Determination is incorrect rests with an Appellant. I find Mr. Colak has met that burden.

I am satisfied that the delegate misled Mr. Colak with respect to her investigative process.

In her June 13 letter to Mr. Colak, the delegate outlined the claim, and the issues arising out of it. She indicated that she required further information from Mr. Colak to proceed. In her final paragraph, the delegate said "I will not be taking any further action regarding your complaint until I hear from you". The Determination, which was issued July 11, said, in part, "Despite verbal and written requests, Peter Colak has failed to provide me with any information regarding hours he claims to have worked after January 25, 2002."

Mr. Colak says he relied on the delegate's letter of June 13, and was compiling information for her when the Determination arrived. The delegate has not explained why she proceeded to issue the Determination without hearing from Mr. Colak, as she expressly stated she would do, nor did she explain why the Determination suggests that she made several verbal and written requests of Mr. Colak to provide information, when the evidence is that one telephone call was made, followed by one letter. Further, the Determination suggests that Mr. Colak neglected or refused to provide information sought by the delegate, when the evidence is that Mr. Colak was in the process of complying with her request when the Determination was issued. It is clear that Mr. Colak did not have the emails, the ROE, or other supporting documentation when he filed his claim in February, and was in the United States when contacted by the delegate and did not have the information available at that time.

I find that the delegate denied Mr. Colak the opportunity to present his case, and failed to consider relevant and material evidence.

The delegate says she relied upon Mr. Colak's complaint form, which indicated that he had been constructively dismissed, and assumed that he was no longer working for UVST as of February 25.

In fact, Mr. Colak stated as follows: "The employer has not terminated me officially. However, given that they have not given me the resources to fulfil my responsibilities and stopped paying my salary, expenses and commission such that I can not operate nor pay for my living expenses, I am the victim of constructive dismissal. "

Mr. Colak is not a lawyer, nor is he necessarily familiar with employment law. An employee can be of the view that they are constructively dismissed and continue to work for an employer. Mr Colak was of the view that he had been constructively dismissed given that he had not been paid. It was up to the delegate

to make a determination as to whether he was dismissed, after an examination of the facts. The delegate did not have all the facts. Consequently, she could not have investigated them.

The delegate cites Mr. Colak's vagueness in responding to her questions about what work he performed after January 25 as one of the reasons for concluding that he had no evidence to support his wage claim for work performed after that date. I find that the delegate erred in placing on Mr. Colak the burden of substantiating his hours of work, not UVST. Mr. Colak's employment contract, and his job duties, were included with his material. I accept that Mr. Colak continued to do what work he could for UVST, including the pursuit of contracts. I also find the delegate erred in concluding that Mr. Colak ceased working for UVS on February 25, in light both of Mr. Colak's statement that he had not been officially terminated, as well as the ROE which indicates that his last day of employment was April 5. UVST agrees that Mr. Colak was terminated on that date.

Furthermore, on April 25, the delegate obtained a document from UVST indicating that it owed Mr. Colak commissions of \$3080, expenses of \$7838, and wages to April 5 in the amount of \$11,282.70. (my emphasis) The wage amount represents "5 pays owing to April 5". It also says "due later (not paid) \$7,919.57."

I find this to be sufficient documentation for the delegate to conclude that Mr. Colak had not been paid for work performed after mid February and before April 5.

Other documentation provided to the delegate by UVST acknowledges commissions owing to Mr. Colak of \$10,554.49. This amount corresponds to the total commission wages owed and owing as set out on the ROE, and the March 1, 2002 fax to Mr. Colak. At the hearing, the parties disputed whether commissions were owed upon a contract being entered into or upon an invoice being paid. UVST takes the position that Mr. Colak is entitled to commission wages in the minimum amount of \$3080, and a further \$7919 upon the future payment of invoices.

The delegate also states that, although Mr. Colak alleges vacation pay may be owed, because this was not an issue raised by him, she had no indication of what amount that might be. It is the delegate's duty to apply the Act, which includes a determination of what amount may be owed for vacation pay and compensation for length of service.

Although an employee has no duty to raise these issues simply because they may be unfamiliar with the Act, the delegate refused to address this matter even after Mr. Colak did so. UVST does not dispute that vacation pay is due to Mr. Colak.

I conclude that the delegate erred in dismissing Mr. Colak's complaint, and I refer the matter back for investigation. In doing so however, I make the following findings of fact to assist the delegate in her investigation:

1. Mr. Colak's employment was terminated on April 5, 2002. He is entitled to compensation for length of service.
2. Mr. Colak is entitled to unpaid salary of at least \$10,384.61, and unpaid commissions in the amount of at least \$3080. The delegate is to investigate whether additional amounts are owed, and if so, in what amount. In particular, the delegate is to determine whether commissions are owed based on sales contracts being entered into, or invoices paid.

3. Mr. Colak is entitled to a minimum of three weeks vacation pay. The delegate is to determine whether he is owed additional weeks.

## **ORDER**

I Order, pursuant to Section 115 of the Act, that the matter be referred back to the delegate for investigation, on an expedited basis.

The delegate is to address the issues noted above, and any incidental issues arising from them. In addition, the delegate is directed to investigate and make a determination as to whether UVST and SSI (now UltraGuard) are associated companies pursuant to s. 95, given that Mr. Colak's remuneration package included shares in SSI, UVST's parent company, and the shared directorships of both companies.

The delegate is also to investigate whether the directors of UVST are jointly and severally liable for the recovery of wages owed to Mr. Colak. In addition, the delegate is to turn her mind to whether the directors of UVST are personally liable for any unpaid wages owed to Mr. Colak pursuant to s. 96.

---

**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**