

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Marathon Systems Solutions Inc.
("Marathon")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/497

DATE OF HEARING: November 17, 1997

DATE OF DECISION: November 20, 1997

DECISION

APPEARANCES

W. Neil Anderson	on behalf of Marathon Systems Solutions Inc.
Robert A. Cheek	on his own behalf

OVERVIEW

This is an appeal by Marathon Systems Solutions Inc. (“Marathon”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 11, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Marathon alleges that the delegate of the Director erred in the Determination by concluding that Robert A. Cheek (“Cheek”) was owed wages in the amount of \$2,070.60 plus interest for a total of \$2,096.74.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Is Cheek entitled to an additional \$928.60 for vacation pay ?
2. Did Marathon illegally deduct sick days and non work days from Cheek’s final pay ?

FACTS

The following facts are not in dispute:

- Cheek was employed as a programmer/analyst by Marathon from March 11, 1996 to February 28, 1997;
- Cheek was away from work for 4 days in October/November 1996 due to a back problem;
- Marathon paid Cheek for those days at that time;
- Cheek was away from work for 4 days in December 1996 due to inclement weather conditions which prevented him from attending work;
- Marathon paid Cheek for those days at that time;
- Cheek submitted notice of resignation to be effective February 28, 1997;
- Marathon prepared Cheek’s final pay and at that time deducted wages for the 4 sick days and the 4 days missed due to inclement weather conditions;
- Marathon concedes that the amount of \$928.60 is owed to Cheek for vacation pay;

- prior to the appeal hearing, settlement discussions were held however, the settlement was not finalized.

W. Neil Anderson testified and stated that:

- he is the president of Marathon;
- he has no dispute with regard to the additional vacation pay of \$928.60;
- the settlement was not finalized due to no fault of his;
- Marathon has a policy of not paying for sick days of its employees;
- the payment of sick days for another employee Ray Carroll (“Carroll”) was different as Carroll worked a lot of overtime on a project and the payment was in consideration of that extra effort;
- at the time of the inclement weather conditions in December 1996, Cheek agreed that those days would be considered as vacation days;
- Marathon’s payroll records did not keep track of vacation days taken;
- he does not recall any letters being received from the Employment Standards Branch in this matter.

Robert A. Cheek testified and stated that:

- he was treated differently with respect to the sick days and the days lost due to inclement weather as was Carroll;
- an example of the payroll records for July 1996 when Cheek took vacation clearly indicates that Marathon made the appropriate adjustments to his salary to reflect vacation days taken;
- Marathon did not make any adjustments with regard to the sick days or days lost due to inclement weather until his final pay.

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with Marathon.

Marathon provided no evidence that they had a clear policy with regard to not paying for sick days, rather, their practice indicates the opposite as both Cheek and Carroll were paid for sick days.

I am satisfied that Marathon intended to pay and in fact paid both Cheek and Carroll for their sick days and, absent Cheek’s resignation, no attempt to ‘recover’ those payments would have been made.

The right of Marathon to make deductions from Cheek’s wages are set forth in Section 21 of the *Act*, which states:

Section 21, Deductions

21.(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Marathon did not provide any evidence that the days lost due to the inclement weather were to be considered as vacation days. Marathon's payroll records did not separate time taken for vacations as required by Section 28 of the Act.

Furthermore, Section 59 of the Act prohibits an employer from reducing an employee's annual vacation because of other payments. Section 59 states:

Section 59, Other payments or benefits do not affect vacation rights

59.(1) An employer must not reduce an employee's annual vacation or vacation pay because the employee

(a) was paid a bonus or sick pay, or

(b) was previously given a longer annual vacation than the minimum required under section 57.

(2) Despite subsection (1) (b), an employer may reduce an employee's annual vacation or vacation pay because at the written request of the employee the employer allowed the employee to take an annual vacation in advance.

With respect to Marathon's submission in regard to the settlement discussions, those discussions are held on a "without prejudice" basis and aside from the fact that there was no settlement concluded, are not relevant to this appeal hearing.

Marathon has not established that the delegate of the Director erred in the Determination.

I conclude that Cheek is owed for the additional vacation pay and I further conclude that the wages deducted by Marathon are contrary to the *Act*.

The appeal by Marathon is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 11, 1997 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal