Employment Standards TRIBUNAL

Citation: I.G. Publications (Banff) Ltd. (Re)
2018 BCEST 104

An appeal

- by -

I.G. Publications (Banff) Ltd. carrying on business as Visitor's Choice

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: James F. Maxwell

FILE NO.: 2018A/53

DATE OF DECISION: November 5, 2018

DECISION

SUBMISSIONS

Elaine McPherson	on behalf of I.G. Publications (Banff) Ltd. carrying on business as Visitor's Choice
Andrew Smith	on his own behalf
Linda Tesser	on her own behalf
Dan Armstrong	on behalf of the Director of Employment Standards

OVERVIEW

1. On April 9, 2018, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") pursuant to section 79 of the *Employment Standards Act* (the "*ESA*") in which I.G. Publications (Banff) Ltd, carrying on business as Visitor's Choice (the "Appellant") was ordered to pay Pamela Finch, Andrew Smith, and Linda Tesser (collectively, the "Complainants") the aggregate sum of $39,112.86, representing unpaid annual vacation pay, compensation for length of service, and accrued interest. The Appellant was also ordered to pay $1,000.00 in administrative penalties.

2. On May 30, 2018, the Appellant filed an appeal of the Determination.

3. The deadline for the filing of an appeal of the Determination was May 17, 2018. In light of the fact that the appeal was filed late, the Appellant also seeks an extension of time under section 109(1)(b) of the *ESA*.

4. In its appeal, the Appellant requests that the Tribunal vary the Determination or refer the Determination back to the Director. The grounds upon which the Appellant relies are that the Director erred in law in making the Determination.

5. This decision is based upon my review of the Determination, the Appellant's submissions filed with the appeal, the Director's Record received from the Director's delegate on July 4, 2018, and the submissions of the Director's delegate and the Complainants.

ISSUES

6. The issues that fall to be considered in this Appeal are as follows:

   (a) Is the appellant entitled to an extension to the time for filing an appeal of the Determination?

   (b) If so, did the Director err in law in making the Determination?

FACTS

a. I.G. Publications (Banff) Ltd. carrying on business as Visitor's Choice

7. I.G. Publications (Banff) Ltd. carrying on business as Visitor's Choice is an Alberta company, extra-provincially registered in British Columbia. The Appellant operated a business on Vancouver Island publishing travel guides.

8. The Appellant's business followed a business cycle which saw it commence work to produce a travel guide in approximately September each year. The guide was generally complete by about the end of July in the following year.

9. For a number of years, the Appellant company was operated by its founder, Wayne Kehoe. In 2016, Mr. Kehoe passed away. For a time thereafter, the Appellant was operated by Mr. Kehoe's daughter and, subsequently, by Mr. Kehoe's widow.

10. The Appellant company largely ceased operations in approximately August 2017, and the company was offered for sale.

b. The Complainants

11. Pamela Finch ("Finch") began working for the Appellant company in September 2008. Finch worked as a Production Manager/Graphic Designer. For a time, Finch worked from the offices of the Appellant company, but later worked from her home office using equipment supplied by the Appellant. Finch worked a regularly-scheduled work week, and took instructions from Mr. Kehoe. Finch did not work for any other company. At the end of the Appellant's business cycle in August each year, Finch would take time off, returning to work in about September. When Finch began to work for the Appellant, she understood that she was an independent contractor, and she was instructed to invoice the Appellant for her services, including for G.S.T.

12. Andrew Smith ("Smith") began working for the Appellant company in July 2011. Smith worked as an advertising salesperson. For much of the duration of Smith's engagement, he worked from his home office. Smith was paid on the basis of commissions earned on advertising sales. Smith understood that he was engaged as an independent contractor, and invoiced for draws on the anticipated amounts of his commissions. Smith typically worked a regularly-scheduled work week, and took instructions from Mr. Kehoe. At the end of the Appellant's business cycle in August each year, Smith would continue to provide services until the start of the next business cycle, but did not invoice for these services. Smith did provide some services for other companies during the time that he was working for the Appellant.

13. Linda Tesser ("Tesser") began working for the Appellant some time in the early 2000s. She worked with the Appellant for about 8 years, and then took a period of time away from the company. She resumed working for the Appellant in 2013 or 2014, as a Regional Sales Manager. Like Finch and Smith, Tesser understood that she was an independent contractor. She issued invoices to the Appellant for her services, and charged for G.S.T.

14. Sometime in August 2017, Finch was informed that the Appellant company had ceased operations, and that her services were no longer required. Around that same time, Smith attempted to learn from the Appellant about its future intentions, but his inquiries went unanswered.

15. Approximately August 12, 2017, Tesser received an email from the Appellant company telling her that the Appellant had ceased operations and would no longer honour post-dated cheques that had been issued to Tesser. Tesser was given the opportunity to continue to provide some services to the Appellant, to assist it to find buyer. During September and October 2017, Tesser worked fewer than 100 hours.

16. Between August and November 2017, each of the Complainants filed a complaint with the Employment Standards Branch, within the time period for doing so, alleging that their employment had been terminated, and alleging that they were entitled to receive compensation for length of service and vacation pay.

c. The Determination

17. The Director undertook an investigation into the Complainants' allegations. The Director collected relevant documents from the Complainants and the Appellant, and afforded both the Complainants and the Appellant the opportunity to provide submissions and respond to questions.

18. On April 9, 2018, the Director issued a Determination. The Director found that each of the Complainants was an employee of the Appellant company, and that the Appellant had failed to provide notice of termination of employment, compensation for length of service, or vacation pay to the Complainants. By failing to do so, the Appellant had breached the relevant provisions of the *ESA*. The Director found the Appellant liable to pay the sum of $39,112.86 to the Complainants for compensation for length of service, vacation pay, and accrued interest. The Director also imposed administrative penalties of $1,000.00 under section 29 of the Employment Standards Regulation (the "*Regulation*").

THE APPEAL

19. The Appellant appeals on the ground that the Director allegedly made errors of law in the Determination. The specifics of the Appellant's allegations are numerous, and I list them herein:

(a) The Director erred in concluding that the Complainants were employees and not independent contractors;

(b) In the alternative, the Director made errors in the manner of determining the compensation to which the Complainants are entitled. More specifically:

a. With respect to Finch, the Director used incorrect values for annual salary, upon which was based the entitlements for both compensation for length of service and vacation pay;

b. With respect to Smith, the Director used incorrect values for annual salary, upon which were based the entitlements for both compensation for length of service and vacation pay, and the Director erred in the percentage of wage to be used to calculate the entitlement to compensation for length of service; and

c. With respect to Tesser, the Director used incorrect values for annual salary, upon which was based the entitlement for compensation for length of service, and the Director erred in finding that Tesser was entitled to receive vacation pay. In the alternative, the Director erred with respect to Tesser's employment commencement date, for the purpose of calculating both compensation for length of service and vacation pay.

20. The Appellant also advanced a number of arguments that are clearly outside of the jurisdiction of this Tribunal, and which will not be considered here. These arguments include:

(a) That Finch has wrongfully withheld equipment and information belonging to the Appellant and has published information harmful to the Appellant's business; and

(b) That Smith has wrongfully competed with the Appellant following termination, and has wrongfully published information harmful to the Appellant's business.

ANALYSIS

A. Request for an Extension

Is the appellant entitled to an extension to the time for filing an appeal of the Determination?

21. The Appellant filed the appeal on May 30, 2018, almost 2 weeks after the deadline for doing so. The Appellant requested an extension to the deadline for filing, citing as a reason for the delay in filing that the Appellant's officer's son had been hospitalized for emergency surgery on May 15 and May 22, 2018.

22. In *Re: Niemisto* (BC EST # D099/96), the Tribunal identified a list of criteria that should be considered when an applicant seeks an extension to the deadline for filing an appeal. The criteria identified in *Re: Niemisto* include that:

(a) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

(b) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

(c) the respondent party (*i.e*., the employer or employee), as well the Director, must have been made aware of this intention;

(d) the respondent party will not be unduly prejudiced by the granting of an extension; and

(e) there is a strong *prima facie* case in favour of the appellant.

23. The Tribunal, in *Re: Dustin Harrison, a director or officer of DNT Enterprises Ltd*., BC EST # D094/15, held that the Tribunal can consider other criteria than those listed, and the *Niemisto* criteria need not all be satisfied for an extension to be granted:

> It should be noted that the criteria in *Re: Niemisto* are neither exhaustive nor conjunctive; that is, the Tribunal may consider other unique criteria and it is not necessary that all the criteria favour the applicant before granting an extension of time to appeal (see *Re: Patara Holdings Ltd. c.o.b. Best Western Canadian Lodge*, BC EST # D010/08, reconsideration dismissed, BC EST # RD053/08).

24. The Appellant provided no evidence in support of the allegation that the Appellant's officer's son had been hospitalized. The Appellant gave no explanation as to why the Appellant's officer's son's hospitalization prevented the Appellant from filing the appeal in a timely manner. In the absence of more, I am unable to find that the Appellant's explanation for the delay in filing is reasonable and credible.

25. The Appellant has provided no evidence that there had been any prior intention to appeal the Determination. There is no evidence before me that a prior intention to appeal was brought to the attention of the Director or the Complainants.

26. The Director has expressed no objection to an extension to the deadline for filing the appeal. While two of the Complainants have expressed opposition to an extension, there is no evidence before me that the Complainants will be unduly prejudiced if an extension is granted.

27. I turn then to the question of whether the Appellant has shown a strong *prima facie* case in its favour.

28. The Appellant cites several examples of how the Director allegedly erred in law in making the Determination. These examples include that: the Director erred in concluding that the Complainants were employees, rather than independent contractors; and the Director committed numerous errors in the manner of calculating the Complainants' entitlement to compensation for length of service and vacation pay.

29. This Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

(a) a misinterpretation or misapplication of a section of the applicable legislation;

(b) a misapplication of an applicable principle of general law;

(c) acting without any evidence;

(d) acting on a view of the facts which could not reasonably be entertained; and

(e) adopting a method of assessment which is wrong in principle.

30. In *Re: C.G. Motorsports Inc*., BC EST # RD110/12, at para. 28, the Tribunal accepted that it is necessary to undertake some examination of the merits of an appeal in order to determine whether there is a strong *prima facie* case in favour of the Appellant:

> … to the extent necessary to determine whether there is a "strong *prima facie* case" the Tribunal will examine the merits of the appeal. … An examination of the relative strength of an appeal considered against established principles necessarily requires some conclusions to be made about the merits.

31. The alleged errors in calculation of the Complainant's entitlement to compensation could, if proven, establish error of law in several of the criteria cited in *Gemex*. In order to determine if the Appellant has a strong *prima facie* case that there have been errors of law, it is necessary for me to examine the merits of the Appellant's allegations.

32. With respect to the allegation that the Director erred in concluding that the Complainants were employees, I will return to this issue later in this decision.

33. With respect to the allegation that the Director erred in the manner of calculating the Complainants' entitlement to compensation, upon a preliminary examination of the Appellant's submissions, the Determination, and the Director's Record, I find that the Director may have committed the following errors:

(a) With respect to Smith, the Director calculated an entitlement to vacation pay using 6% of wages for the years July 2015 – July 2016 and July 2016 – July 2017. As Smith had been employed by the Appellant since July 2011, he had not yet completed 5 consecutive years of employment prior to July 2016. Therefore, Smith was only entitled to 4% of wages for year July 2015 – July 2016. If proven, this alleged error would amount to a misinterpretation or misapplication of a section of the *ESA,* and thus an error of law;

(b) Also with respect to Smith, the Director calculated entitlement to compensation for length of service based upon a calculation of Smith's average weekly wage for the prior 12 months. Section 63(4) of the *ESA* provides that compensation for length of service is to be based upon normal wages earned over 8 weeks prior to the termination of employment. Absent a compelling explanation for Director's method of calculation, I accept that this deviation from an express statutory requirement could constitute a misinterpretation or misapplication of a section of the *ESA*, and thus an error of law;

(c) With respect to Tesser, the Director concluded that Tesser most recently began employment with the Appellant in July 2013. The Director then used this start date to determine Tesser's compensation for length of service, and vacation pay. The conclusion that Tesser commenced employment with the Appellant in July 2013 is inconsistent with the documentary Record, which shows that Tesser was not engaged with the Appellant until late 2014. This alleged error, if proven, would amount to acting on a view of the facts which could not reasonably be entertained, and thus an error of law.

34. While the Appellant has failed to satisfy me that it has met many of the *Niemisto* criteria for the granting of an extension to the deadline for filing an appeal, I consider the fact that the Director may have committed error of laws, in the manner of calculating at least some of the Complainants' compensation, to constitute a strong *prima facie* case in favour of the Appellant. For this reason, the Appellant's request for an extension to the deadline for filing the within appeal is granted.

B. Merits of the Appeal

Did the Director err in law in making the Determination?

(a) Relevant Principles

35. Section 112(1) of the *ESA* provides that a person may appeal a Determination on one or more of the following grounds:

(a) the Director erred in law;

(b) the Director failed to observe the principles of natural justice in making the Determination;

(c) evidence has become available that was not available at the time the Determination was being made.

36. In the present appeal, the Appellant alleges that the Director erred in law in making the Determination.

(b) Substance of the Appeal

37. In its Appeal, the Appellant argued that the Director committed the following errors of law:

(a) The Director erred in concluding that the Complainants were employees of the Appellant company. The Appellant argued that the Complainants were independent contractors; and

(b) The Director's calculations of the amounts owing to the Complainants were incorrect.

38. I will examine each of these grounds of appeal in turn.

i) Did the Director err in law in concluding that the Complainants were employees, rather than independent contractors?

39. The Appellant argues that the Director erred in law by concluding that the Complainants were employees, not independent contractors. The Appellant argues that since the Complainants were paid by way of invoices which included GST and which cited the Complainants' business numbers, because the Appellant issued T4As to the Complainants, and because the Complainants were at liberty to engage in work for other companies, it was wrong to conclude that the Complainants were employees of the Appellant company. The Appellant contends that the Director's conclusion was an error of law.

40. The question of whether a person is an employee or an independent contractor is determined, first, by reference to the statutory definitions of "employee", "employer", and "work" set out in the *ESA*. Further guidance can be had by reference to the relevant common law tests for employment. The application of these tests was discussed by this Tribunal in *Re: Kimberley Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST # RD114/05):

> … the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:
>
> > The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her own tasks.

> It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

41. In the Determination, the Director examined the evidence as to the nature of the services performed by the Complainants, and the nature of the relationship between the Complainants and the Appellant company, in the context of the relevant statutory definitions of the *ESA*. The Director examined the facts as to the services performed by the Complainants, in the context of the definitions of "employee", "employer", and "work", as set out in the *ESA*. The Director recognized that the provisions of the *ESA* are paramount in determining the nature of the relationship, but nevertheless went on to consider the common law tests of employment with respect to the facts of this case. The Director examined factors such as chance of profit and risk of loss, degree to which the work is integral to the business, whether the worker has other clients, and whether the work is to be performed during a time-limited period. Based upon all of these considerations, the Director concluded that each of the Complainants performed work for the Appellant company, and that the nature of the relationship was that of employer/employee.

42. I am satisfied that the Director fully examined the evidence and correctly applied the relevant statutory and common law tests to the facts of this case. I am satisfied that the Director did not err in the application of the law, and correctly concluded that the Complainants were employees.

(b) Did the Director err in law in the manner of calculating the amounts owing to the Complainants?

43. The Appellant argues that if the Complainants were employees, then the Director erred in the manner of calculation of both compensation for length of service, and vacation pay.

a) Compensation for Length of Service - General

44. Having found that the Complainants were employees of the Appellant company, the Director concluded that the Complainants were entitled to receive compensation for length of service.

45. The *ESA* provides that employees are entitled, upon termination, to compensation for length of service:

> 63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

46. The *ESA* expressly spells out the manner of calculation of length of service compensation based upon the employee's weekly wages. As described above, the *ESA* provides that an employee's weekly wages

are to be determined based upon the regular wage earned during normal or average hours worked in the last 8 weeks of employment:

> 63 (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
>
> (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
>
> (b) dividing the total by 8, and
>
> (c) multiplying the result by the number of weeks' wages the employer is liable to pay.

1. Compensation for Length of Service - Finch

47. After concluding that Finch was an employee of the Appellant, and therefore entitled, upon termination, to compensation for length of service, the Director calculated the amount of this compensation. For Finch, the Director noted that her monthly wage at the time of her termination was $4,500.00. In keeping with the requirement of section 63(4) to base compensation for length of service on weekly wages, the Director multiplied the monthly wage by 12 months, and divided the sum by 52 weeks, to arrive at an average weekly wage. I am satisfied that the method that the Director used to arrive at average weekly wage at the time of dismissal was reasonable. The Director then, correctly, multiplied this sum by 8 weeks, and added 6% for vacation pay, to arrive at the sum payable to Finch for compensation for length of service.

48. The Appellant's contention that the Director should have calculated compensation for length of service using the amount that Finch earned in the 10 months prior to termination is not consistent with either the provisions of the *ESA*, or the facts. Finch is entitled, pursuant to section 63 of the *ESA*, to compensation for length of service based upon her average weekly earnings in the eight weeks prior to her termination. The fact that Finch normally did not work during the month of August does not affect the calculation of compensation for length of service.

2. Compensation for Length of Service - Smith

49. After concluding that Smith was an employee of the Appellant, and therefore entitled, upon termination, to compensation for length of service, the Director calculated the amount of this compensation. The Director noted that Smith was paid commissions based upon a percentage of sales. The Director noted that Smith's commissions were variable during the course of each year that he worked for the Appellant. For this reason, the Director used the actual amount of Smith's commissions over the prior 11 month period, to arrive at his average weekly earnings during that time. The Director then multiplied this amount by 6 weeks, added 6% for vacation pay, to arrive at the sum payable to Smith for compensation for length of service.

50. I find that the methodology used by the Director to arrive at Smith's entitlement to compensation for length of service was an error. The methodology did not comply with section 63(4) of the *ESA*, insofar as it did not base the compensation on the average of Smith's earnings during the 8 weeks prior to

termination. This error constitutes a misinterpretation or misapplication of a section of the *ESA*, and thus amounts to an error of law.

51. In his submissions to this appeal, the Director explained his rationale for employing a methodology that was inconsistent with the *ESA*. The Director contended that by using Smith's actual earnings for the prior 11 months, he removed the variability in the amount of Smith's commissions. The Director referred to the decision in *Re: Robert Craig*, BC EST # D052/10, in which the Tribunal stated that:

> … when considering the average or normal wages for commissioned employees, the Tribunal has endorsed an approach that seeks to reasonably reflect the employee's typical, regular or usual wages and that approach is not necessarily limited to looking at the wages earned only in the eight weeks preceding the termination.

52. The Director failed to consider that Smith had negotiated an increase in the amount of his commissions for the year 2017. The Record shows that Smith's monthly earnings for each month of 2017 were $5,000.00. By basing compensation for length of service on the past 11 months of earnings, the Director under-valued the amount of Smith's earnings in the 8 weeks prior to his termination.

53. I find that the correct calculation of Smith's entitlement to compensation for length of service is:

$5,000.00 per month x 12 (months) = $60,000.00
$60,000.00 / 52 (weeks) = $1,153.85 (avg. weekly wage)
$1,153.85 x 6 (weeks) = $6,923.10
add 6% (vacation pay) ($415.39) = $7,338.49

3. Compensation for Length of Service - Tesser

54. After concluding that Tesser was an employee of the Appellant, and therefore entitled, upon termination, to compensation for length of service, the Director calculated the amount of this compensation. The Director noted that Tesser's monthly wage at the time of her termination was $7,000.00. In keeping with the requirement of section 63(4) to base compensation for length of service on weekly wages, the Director multiplied the monthly wage by 12 months, and divided the sum by 52 weeks, to arrive at an average weekly wage. I am satisfied that the method that the Director used to arrive at average weekly wage at the time of dismissal was reasonable.

55. The Director then multiplied the average weekly wage by 4 weeks, and added 4% for vacation pay, to arrive at the sum payable to Tesser for compensation for length of service.

56. The Director found that Tesser had commenced work for the Appellant (after a break in service) in July 2013. The Appellant submits that Tesser re-commenced working for the Appellant in the fall of 2014, not July 2013. This argument is supported by the Record, consisting of documents submitted by both Tesser and the Appellant. Tesser was not issued a T4A for 2013. There is nothing in the Record which shows that Tesser worked for the Appellant during 2013. The T4A issued for 2014 shows earnings well below the average annual salary that Tesser earned, which would be consistent with a start date late in the year.

57. Pursuant to section 63(2)(b) of the *ESA*, Tesser was eligible for compensation for length of service of 3 weeks, not the 4 weeks used by the Director. I find that the Director's use of 4 weeks to calculate Tesser's entitlement to compensation for length of service was an error, contrary to the requirements of section 63 of the *ESA*. This error constitutes acting on a view of the facts which could not reasonably be entertained, and thus amounts to an error of law.

58. I find that the correct calculation of Tesser's entitlement to compensation for length of service is:

$7,000.00 per month x 12 (months) = $84,000.00
$84,000.00 / 52 (weeks) = $1,615.38 (avg. weekly wage)
$1,615.38 x 3 (weeks) = $4,846.14
add 4% (vacation pay) ($193.85) = $5,039.99

b) Vacation Pay - General

59. Having found that the Complainants were employees of the Appellant company, the Director also concluded that the Complainants were entitled to receive vacation pay.

60. Vacations and vacation pay under the *ESA* are governed by several provisions. The interplay between these provisions is complex, and this has resulted in a great deal of confusion as to the operation of these provisions.

61. Section 57 of the *ESA* requires an employer to provide employees with annual vacation:

> 57 (1) An employer must give an employee an annual vacation of
>
> (a) at least 2 weeks, after 12 consecutive months of employment, or
>
> (b) at least 3 weeks, after 5 consecutive years of employment.
>
> (2) An employer must ensure an employee takes an annual vacation within 12 months after completing the year of employment entitling the employee to the vacation.

62. Separate and apart from the employer's obligation to provide annual vacation, the *ESA* provides that an employer must pay vacation pay:

> 58 (1) An employer must pay an employee the following amount of vacation pay:
>
> (a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;
>
> (b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.
>
> (2) Vacation pay must be paid to an employee
>
> (a) at least 7 before the beginning of the employee's annual vacation; or
>
> (b) on the employee's scheduled paydays ….

63. From the foregoing, an employer's obligations with respect to vacation and vacation pay can be summarized as follows:

(a) An employer must give an employee a vacation of at least 2 weeks (up to 5 years employment) or 3 weeks (after 5 years employment) after the end of each vacation entitlement year;

(b) Vacation is to be taken no later than 12 months after the end of the vacation entitlement year for which it was earned;

(c) The date that the employee commenced work for the employer is the start date for determining annual vacation and vacation pay;

(d) An employer must pay vacation pay to an employee who is entitled to vacation of at least 4% of wages (up to 5 years employment) or 6% of wages (after 5 years of employment) that the employee has earned during the period for which the vacation is given;

(e) An employer shall pay vacation pay to an employee:

a. in a lump sum at least 7 days before the employee commences his or her vacation, or

b. on the employee's regular paycheque.

64. Though not expressly stated by the ESA, it follows that vacation pay is payable to the employee at any time within the 12 months following the year in which the vacation was earned.

65. The ESA does not expressly contemplate when vacation pay will be paid in the event that the employee does not take the vacation to which the employee is entitled. However, it also follows from the provisions of the ESA that if vacation is not taken within the 12 months following the year in which it was earned, then the vacation pay becomes due and payable no later than the end of that 12 month period.

66. The *ESA* also does not expressly contemplate situations in which employees are not paid their vacation pay annually. Such is the situation in the appeal, where the employees were unaware of their entitlement to vacation pay, and it was not paid to them annually as required.

67. Vacation pay is a form of "wages" as these are defined in the *ESA*. The *ESA* imposes limits on the amount of unpaid wages that may be recovered by employees upon termination of employment. This limit impacts upon amounts of vacation pay that remain unpaid to the employee. Section 80 of the *ESA* provides that:

> 80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that <u>became payable</u> in the period beginning [emphasis added]
>
> (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment … ;

68. The Complainants may recover any unpaid vacation pay that <u>became payable</u> in the 6 months prior to the date of the termination of their employment. Any vacation pay that became payable prior to 6 months before the termination of their employment is not recoverable under the provisions of the *ESA*.

69. In the present case, the Appellant did not expressly terminate the employment of the Complainants. The Director found, in essence, that the actions of the Appellant amounted to constructive dismissal of the Complainants. Because there was no express termination, the Director was somewhat uncertain as to the date the terminations became effective. With respect to Finch and Smith, the Director found that they were terminated "sometime in August, 2017". The Director chose August 1, 2017, as the date that Finch and Smith's employment ended. With respect to Tesser, the Director found that she was terminated on August 12, 2017, upon receipt of an email from the Appellant advising that certain cheques she had received would be cancelled.

1. Vacation Pay - Finch

70. Based upon the termination date identified by the Director, Finch is entitled to recover vacation pay that became payable in the period from February 1, 2017, to August 1, 2017, and not before.

71. Finch's anniversary date, for the purpose of determining vacation entitlement, was deemed by the Director to be September 1. Finch's entitlement to vacation pay for hours worked during the period of September 1, 2016, to the date of her termination, August 1, 2017, became payable on the date of her termination. Vacation pay for hours worked during the period of September 1, 2015, to August 31, 2016 became payable no later than August 31, 2017. As this date falls after February 1, 2017, Finch can recover from the Appellant the unpaid vacation pay for work she performed between September 1, 2015, and August 31, 2016. Vacation pay that Finch earned in the period of September 1, 2014, to August 31, 2015, became payable no later than August 31, 2016. As this date is prior to February 1, 2017, Finch cannot recover, under the *ESA*, the vacation pay for this or earlier periods.

72. The Appellant contends that the Director erred in the calculation of Finch's entitlement to vacation pay. The Appellant alleges that Finch's earnings for each of the periods September 1, 2015, to August 30, 2016, and September 1, 2016, to August 1, 2017, were substantially lower than the amounts used by the Director to calculate vacation pay. The Record contains invoices submitted by Finch for the work that she performed during these periods. Based upon a review of the Record, I am satisfied that the Director used the correct amounts for earnings, and correctly calculated Finch's entitlement to vacation pay.

2. Vacation Pay - Smith

73. Based upon the termination dates identified by the Director, Smith is entitled to recover vacation pay that became payable in the period from February 1, 2017, to August 1, 2017, and not before.

74. Smith's anniversary date, for the purpose of determining vacation entitlement, was found by the Director to be July 15. Smith's entitlement to vacation pay for hours worked during the period of July 15, 2017, to the date of his termination, August 1, 2017, became payable on the date of his termination. Vacation pay for hours worked during the period of July 16, 2016, to July 15, 2017, became payable no later than July 15, 2018. Vacation pay that Finch earned in the period of July 16, 2015, to July 15, 2016, became payable no later than July 15, 2017. As these dates fall after February 1, 2017, Smith can recover from the Appellant the unpaid vacation pay for work he performed between July 16, 2016, and August 1, 2017. Any vacation pay earned prior to July 16, 2016, cannot be recovered under the *ESA*.

75. The Appellant argues that the Director committed 2 errors in calculating Smith's entitlement to vacation pay. The first error, the Appellant alleges, is that Smith was eligible to receive vacation pay calculated at 4% of wages for the year July 15, 2015, to July 14, 2016, not 6% as calculated by the Director. As Smith's starting date was July 1, 2011, he had completed only 4 years of employment at July 1, 2015. Pursuant to section 58(1)(b), Smith was eligible to receive 4% of wages for the year July 15, 2015, to July 14, 2016. This error constitutes a misinterpretation or misapplication of the relevant section of the *ESA*.

76. The Appellant also alleges that the Director used an incorrect sum to calculate entitlement to Smith's vacation pay for the year July 15, 2016, to July 14, 2017. The Appellant contends that Smith's earnings in that period were $41,068.95, and not $52,065.01 as found by the Director. The Record contains invoices of Smith's earnings for this period, and I find that the Director has used the correct amount to calculate Smith's entitlement to vacation pay for the year July 15, 2016, to July 14, 2017.

77. I find that the correct calculation of Smith's entitlement to vacation pay is:

July 15, 2015 – July 14, 2016	$21,458.74 x 4% = $858.35
July 15, 2016 – August 1, 2017	$52,065.01 x 6% = $3,123.90

3. Vacation Pay - Tesser

78. The Appellant argues that Tesser was ineligible to receive vacation pay because she was paid 12 months of each year, even through periods that she was on vacation. The Record contains copies of the invoices submitted by Tesser for work that she performed starting in June 2015. While these invoices do appear to confirm that Tesser worked 12 months of the year, there is no mention of time off for vacation. These invoices were submitted into evidence by both the Appellant and Tesser, and the Appellant did not previously contest the accuracy of the invoices. In light of the absence of any evidence to suggest that Tesser was permitted to take vacation and was paid during these absences, I reject this ground of appeal.

79. Based upon the termination dates identified by the Director, Tesser is entitled to recover vacation pay that became payable in the period from February 12, 2017, to August 12, 2017.

80. Tesser's anniversary date, for the purpose of determining vacation entitlement, was deemed by the Director to be July 1. As discussed above, this date is not correct. Instead, Tesser's anniversary date is sometime in the fall. Given that the Appellant normally resumed its business around September 1, I find that Tesser resumed work for the Appellant in September 2014, and I find that Tesser's anniversary date is September 1. Tesser's entitlement to vacation pay for hours worked during the period of September 1, 2016, to the date of her termination, August 12, 2017, became payable on the date of her termination. Vacation pay for hours worked during the period of September 1, 2015, to August 31, 2016, became payable no later than August 31, 2017. As this date falls after February 1, 2017, Tesser can recover from the Appellant the unpaid vacation pay for work she performed between September 1, 2015, and August 31, 2016. Vacation pay that Tesser earned in the period of September 1, 2014, to August 31, 2015, became payable no later than August 31, 2016. As this date is prior to February 1, 2017, Tesser cannot recover, under the *ESA*, these monies.

81. In light of my finding that Tesser's anniversary date was September 1, and based upon the invoices found in the Record, I find that the correct calculation of Tesser's entitlement to vacation pay is as follows:

September 1, 2015 – August 30, 2016	$60,000.00 x 4% = $2,400.00
September 1, 2016 – August 12, 2017	$78,000.00 x 4% = $3,120.00

ORDER

82. Pursuant to section 115 of the *ESA*, the Determination is varied, as set out herein, to the sum of $37,518.88 (inclusive of administrative penalties), together with whatever further interest that may have accrued under section 88 since the date of issuance.

James F. Maxwell
Member
Employment Standards Tribunal