

Citation: Director of Employment Standards (Re)
2019 BCEST 10

An Application for Reconsideration

- by -

The Director of Employment Standards
("the Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts (Panel Chair)
Kenneth Wm. Thornicroft
David B. Stevenson

FILE No.: 2018A/123

DATE OF DECISION: January 23, 2019

DECISION

SUBMISSIONS

Dan Armstrong

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by the Director of Employment Standards (the "Director") for a reconsideration of Decision 2018 BCEST 104 (the "Original Decision"), issued by the Tribunal on November 5, 2018.
2. I.G. Publications (Banff) Ltd. carrying on business as Visitor's Choice (the "Employer") operated a business on Vancouver Island publishing travel guides. It largely ceased operations in approximately August 2017, and the company was offered for sale.
3. Between August and November 2017, three individuals filed complaints with the Director alleging that the Employer had failed to pay compensation for length of service. On April 9, 2018, the Director issued a decision determining that all the complainants were employees, and that the Employer had contravened the *Employment Standards Act* ("ESA") in failing to pay compensation for length of service and vacation pay to each of the complainants.
4. The Employer appealed the Determination to the Tribunal on the grounds that the Director erred in law in concluding that the complainants were employees rather than independent contractors. The Employer argued, in the alternative, that the Director erred in law in determining the compensation to which the complainants were entitled.
5. The appeal was filed beyond the statutory deadline and the Employer sought an extension of time in which to file the appeal. The Member granted the extension and no issue is taken with the Member's decision in this respect.
6. After a preliminary review of the Employer's submissions, the Member was of the view that the Director may have erred in calculating one of the Employee's entitlement to vacation pay and compensation for length of service. The Member was also of the view that the Director may have erred in determining the length of employment of another of the Employees, which would have affected his entitlement for compensation for length of service and vacation pay. The Member sought submissions from the Director on four questions, two of which are the subject of this reconsideration application. Those two questions included "the date and manner of termination of employment" of one of the complainants, and "whether vacation pay unpaid more than 12 months after the date it becomes payable continues to be a debt owed by the employer."
7. The Member allowed the appeal in part. While finding that the Director had not erred in concluding that the complainants were Employees, the Member determined that the Director had erred in calculating the Employees' entitlement to vacation pay and varied the amounts determined owing.

8. After reviewing section 57 and 58 of the *ESA*, the Member summarized an employer's obligations 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;

...

9. The Member then varied the amount of vacation pay determined by the Director for one of the Employees.
10. The Director seeks reconsideration of the Original Decision, arguing that the Member erred in departing from Tribunal decisions interpreting the vacation pay provisions set out in the *ESA*. The Director also submits that the Member erred in failing to request an explanation for the Director's calculation of vacation pay at six percent, leading to a flawed analysis of one of the Employees' vacation entitlement.
11. In adjudicating this application, we have reviewed the subsection 112(5) record that was before the Tribunal in the appeal, as well as the written submissions filed by the Director's delegate. Although invited to do so, neither the Employer nor the affected Employee filed a submission in this application.

ISSUE

12. There are two issues on reconsideration:
1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the Member?

ARGUMENT

13. The Director argues that the Member erred in concluding that the delegate's calculation of vacation pay at six percent of the employee's total wages for the fifth year of employment is contrary to the Tribunal's decisions regarding the interpretation of section 58 of the *ESA*. The Director further argues that the Member's conclusion is also contrary to the clear wording of section 58(1)(b), which establishes that an employee is entitled to 6% vacation pay in the fifth year of their employment.
14. The Director submits that section 58 requires employers to pay vacation pay at least seven days before the beginning of the employee's annual vacation leave, and therefore, vacation pay earned in one year

must be paid at least seven days before the employee takes annual vacation leave in the following year. He says that employees who pass their fifth anniversary become entitled to three weeks' vacation and that section 58(b) provides that employees who pass their fifth anniversary are also entitled to 6% vacation pay on wages earned during the previous year.

15. The Director argues that if the Tribunal were to depart from this interpretation of section 58, employees would be entitled to an increase in vacation leave after their fifth anniversary of employment, but not a corresponding increase in vacation pay. During the first year an employee became entitled to take three weeks' vacation (or 6% of the year) they would only receive 4% vacation pay, a result, the Director contends, would be arbitrary and not in accord with the purposes of the *ESA*.

ANALYSIS

16. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 of the *ESA* provides

- (1) On application under subsection (2) or on its own motion, the tribunal may
 - (a) reconsider any order or decision of the tribunal, and
 - (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

1. The Threshold Test

17. The Tribunal reconsiders a decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA* detailed in section 2(d) "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."
18. In *Milan Holdings*, BC EST # D313/98, the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle, or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
19. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration panel will in general be with the correctness of the decision being reconsidered.
20. In our view, this application passes the first stage of the *Milan Holdings* test. The Original Decision departed from long-standing Tribunal jurisprudence on the manner in which vacation pay is calculated, an interpretation which has significant consequences for all employees in the province. It is important

that both employers and employees have certainty about their rights and obligations under the *ESA* and that vacation pay is calculated consistently.

21. Section 57 of the *ESA* sets out employees' entitlement to 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

...

22. Section 58 of the *ESA* provides:

- 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.

23. Section 58(2) requires vacation pay to be paid to an employee at least 7 days before the beginning of the employee's annual vacation.

24. We are of the view that while the *ESA* could be worded more clearly to avoid the difficulties presented by these sections, the Tribunal's longstanding interpretation of the provisions must be both reiterated and upheld in order to provide for legal certainty. (see, for example, *Markin*, BC EST # D228/98)

25. In *Intercity Appraisals Ltd.*, BC EST # D151/97, a reconsideration decision of BC EST # D245/96, the Tribunal said as follows:

While there [are] elements of ambiguity in the law, the most logical interpretation of Sections 57 and 58 of the *Act* leads to a conclusion that vacation pay is based on the previous year's earnings. The law entitles an employee to three weeks of vacation after the completion of the fifth year of employment, i.e. after the employee's fifth anniversary of employment. Section 58(1)(b) states that the six per cent payment is based on the employee's wages "during the year of employment entitling the employee to the vacation pay." In other words, the basis for calculating entitlement to vacation pay is the previous year of employment. Sections 57 and 58 establish reliance on the previous year's wages to calculate vacation pay consistently. An employee who completes one year of employment is entitled to four per cent vacation pay based on earnings during the first year of employment, for instance. In subsequent years, the four per cent is based on earning the year before. At the fifth anniversary, the entitlement becomes six per cent of the earnings the previous, i.e., the fifth year. . . .

26. Additionally, in *Metropolitan Fine Printers Inc.*, BC EST # RD022/13, a reconsideration decision confirming BC EST # D113/12, the Tribunal noted that the combined effect of sections 57 and 58 is that
- ... a newly hired employee is entitled to *at least* two weeks' unpaid leave, to be taken in their second year of employment. In addition, at the start of the vacation leave, *at least* 4% of their *prior year's earnings* must be paid to the employee as vacation pay. These entitlements increase to 3 weeks' leave and 6% vacation pay after 5 consecutive years of employment.
27. The Panel finds that this interpretation, which the Tribunal has endorsed on many occasions, must be reaffirmed, and that the Original Decision must be varied.

ORDER

28. The Panel orders that the Decision be varied. The Panel confirms the Director's determination that Andrew Smith be entitled to 6% vacation pay on wages earned during his fifth year of employment.

Carol L. Roberts
Member and Panel Chair
Employment Standards Tribunal

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal

David B. Stevenson
Member
Employment Standards Tribunal