

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 -

Creative Screen Arts Ltd.
("Creative")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/738

DATE OF HEARING: December 17, 1997

DATE OF DECISION: January 22, 1998

DECISION

OVERVIEW

The appeal is by Creative Screen Arts Ltd. (“Creative”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Appealed is a Determination by a delegate of the Director of Employment Standards (the “Director”) dated September 22, 1997. The Determination is an award of wages and vacation pay. Only that part of the Determination dealing with vacation pay has been appealed.

APPEARANCES

Sherry A. MacLennan	Counsel for Creative
Marg K. E. Wagner	On her own behalf
Rick Wagner	In support of Marg Wagner
Michael Fu	Delegate of the Director

ISSUES TO BE DECIDED

There are three issues. At issue is the amount of vacation pay due as a result of commissions earned. Creative, relying on *Kenpo Green Houses Ltd. v. British Columbia (Director of Employment Standards)*, February 7, 1997, B.C.S.C., unreported, argues that it is 4 percent of commissions, not 8 percent as has been found by the delegate of the Director. Marg Wagner (“Wagner”) responds by saying that she never waived her right to receive vacation pay on commissions and that commissions are not the same as the bonuses paid by Kenpo Greenhouses as they are a basic part of pay.

At issue is the Director’s ability to collect unpaid vacation pay. Creative argues that the Determination is in error in that section 80 of the *Act* limits recovery to unpaid vacation pay for the last 24 months of employment. It disagrees with what it describes as the delegate’s extension of the time frame to incorporate moneys outstanding from 1993 on the basis that they were “payable”.

At issue is the delegate’s conclusion that Creative contravened section 16 of the *Act*. Creative argues that there are no facts, law or issues in this case which support that conclusion.

FACTS

Marg Wagner was employed by Creative Screen Arts as its Sales Manager. She began work for the company on March 9, 1992. Her last day of work was January 24, 1997.

The parties presented the Tribunal with an agreed statement of facts. On the matter of the employment contract they agree that:

4. At the time Ms. Wagner's employment contract was entered into, payment or receipt of a percentage of commission for vacation was not stipulated or discussed. Ms. Wagner was not aware that she was entitled to vacation pay based upon a percentage of commissions (pursuant to the *Employment Standards Act*) at the time her contract was negotiated or entered into.
5. At the time the employment contract was entered into, Ms. Wagner understood the employment contract to mean she would receive four weeks' vacation each year. CSA (Creative) understood that it would pay Ms. Wagner for four weeks' vacation based on four weeks of her base salary of \$39,000.00.
6. In October, 1993, a new sales representative joined CSA. Ms. Wagner learned from her that her former employer paid her vacation pay on commissions. Ms. Wagner subsequently October, 1993 raised this with James Clark, President of CSA. He advised that most employers do not pay vacation pay on commissions.

The delegate found that Wagner was owed commissions as a result of certain work and deductions which he found contrary to section 21 of the *Act*. He also found that she was owed moneys for piece work which she performed. He did not award minimum wages. The delegate concluded, however, "Based on my investigation, I find that Creative Screen Arts Ltd. has contravened Sections 16 and 21 of the *Employment Standards Act*."

ANALYSIS

Section 16 of the *Act* is as follows:

16 An employer must pay an employee at least the minimum wage as prescribed in the regulations.

The employee earned a salary of \$39,000 a year and roughly the same amount in commissions beyond that. That is well in excess of the minimum wage. In finding that Creative did not pay wages, the delegate would have been correct in stating that Creative contravened either section 17 or 18 of the *Act* but Creative did not violate section 16 of the *Act*. The delegate erred in saying that it did.

The Director may enforce vacation pay terms of the employment contract even where it provides for a vacation which is greater than the minimum vacation standards of sections 57 and 58 of the *Act*. She may do so by virtue of section 58 (3) of the *Act* and because vacation pay is “wages” as the term is defined in section 1 of the *Act*. And where the bargain between employer and employee is merely that a certain number of weeks’ vacation be paid each year, it seems to me that it is entirely reasonable to conclude that such an agreement by implication provides that pay is to continue for the duration of the vacation period, basically, if not always exactly, as it is when the employee is not on vacation, commissions or no commissions. That is not the case here, however. As matters are presented to me, I am led to the conclusion that Wagner understood, on agreeing to the terms of her employment, that vacation pay was not going to be paid on commissions. Wagner was not even aware of her entitlement to vacation pay based on commissions. It was not until later, on arrival of a new employee in October of 1993, that she became aware that employers do pay a percentage of commissions as vacation pay.

The particular contract of employment between Wagner and Creative does not call for the payment of vacation pay on commissions at a rate of 8 percent. As it does not, the Director may only enforce only the minimum standard of the *Act*. In that regard, this case is similar to *Kenpo*. Wagner is owed, as Creative now accepts, vacation pay which is 4 percent of commissions.

The final issue which I must decide is whether the Director may collect vacation pay for work prior to January 25, 1995. The relevant section of the *Act* is s. 80 (a). It is as follows:

80 *The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that **became payable** in the period beginning*

(a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment,

(b) . . .

plus interest on those wages.

(my emphasis)

Section 80 does not limit the Director to the collection of vacation pay earned in the last 24 months of employment but contemplates the collection of all vacation pay which is payable in that period. Vacation pay earned by Wagner for work in her first year of employment, March 9, 1992 to March 8, 1993, was due and therefore payable at any time in her second year, and so on. The fact that section 58 (2) of the *Act* states that vacation pay must be paid 7 days before an employee’s annual vacation or on the employee’s scheduled pay days, hardly prevents the Director from collecting vacation pay which is not paid as that section requires. Vacation pay earned for work in her second year was due in the period March 9, 1994 to March 8, 1995. As it was never paid, it is vacation pay due and payable after January 25, 1995 and the Director is entitled to collect those moneys.

As the delegate presents matters to me, the Determination is entirely consistent with the above. Hearing nothing to the contrary, I find that vacation pay of \$6,533.83 is owed

Wagner. That reflects the decision that Wagner is, under the *Act*, entitled to only 4 percent of commissions, not 8 percent.

In summary, I have found that Creative paid Wagner well above the minimum wage and that as such it did not contravene section 16 of the *Act*. I find that Wagner is owed 4 percent of commissions, not 8 percent as set out in the Determination. The contract of employment did not provide for the latter. As such, it is the minimum standard of the *Act* that applies. Finally, I find that Creative owes vacation pay on commissions earned in 1993 as section 80 does not limit the Director to the collection of vacation pay earned in the last 24 months of employment but to vacation pay which is due and payable in the period.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated September 22, 1997 be varied. Creative Screen Arts Limited owes Marg Warner wages and vacation pay totalling \$9,040.17 together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc