

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

William A.S. Rowe
("Rowe")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 95/018

DATE OF DECISION: March 19, 1996

DECISION

APPEARANCES

William Rowe ("Rowe"),	the Appellant
Ron Carriere ("Carriere")	Delegate of the Director of Employment Standards, (the "Delegate")
Danette Kynoch ("Kynoch")	Vice-President, Lougheed Ventures Ltd.
Theresa Lee ("Lee")	General Manager, Biltmore Hotel

OVERVIEW

This is an appeal by Rowe pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination Number CDET No. 000169 issued by the Delegate on November 22, 1995. In this appeal, Rowe claims he is owed wages by Lougheed Ventures Ltd. ("Lougheed").

This appeal was conducted by way of a hearing which was held at the Tribunal's offices on February 27, 1996.

FACTS

Rowe commenced employment with Lougheed as an Executive Assistant on September 9, 1991.

On December 9, 1991 Rowe signed an employment contract which said that his remuneration included his salary, and any bonuses and benefits. The contract is silent on the specific amount of his salary, benefits and vacation entitlement. Regarding termination of employment, the contract states Rowe is entitled to 3 months notice if employed for three to six years. There is no mention of pay in lieu of notice.

Rowe's starting salary was \$24,000.00 per year. In April 1993 his salary increased to \$30,000.00 per year or \$2,500.00 per month. He was paid on a semi-monthly basis.

Rowe reported to Lee who, in turn, reported to Thomas Tidball ("Tidball"), President of Lougheed.

Lougheed provided medical and insurance benefits to Rowe. The premiums, which were paid to ARM Management, amounted to \$776.70 per year.

Rowe's employment was terminated on June 19, 1995. That day Rowe signed a release discharging Lougheed from all claims arising out of his contract of employment in exchange for the sum of \$10,188.52 (gross). This sum represents wages for the period June 1-June 19

(\$1,479.89); vacation pay (\$1,208.63); and severance pay (3 months @ \$2,500.00 per month = \$7,500.00).

Rowe claims that Loughheed still owes him some wages. This is denied by Loughheed. The Delegate supports the position of Loughheed.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is what wages, if any, are owed by Loughheed to Rowe.

ARGUMENTS

Rowe claims that the sum of \$10,188.52 does not represent all the wages that are owed to him by Loughheed. He said he signed the release under duress and did not have a chance to check the figures.

Rowe states that he is still owed some vacation and severance pay, as well as 2 days pay for doing inventory on January 1, 1995 and April 1, 1995.

Rowe contends that when he was hired, Tidball promised him 3 weeks of paid vacation after 3 years of employment. To support this claim, Rowe states that 3 weeks vacation after 3 years of work is only reasonable in view of the level of his position and the standards in the industry. Furthermore, Amin Abdullah ("Abdullah") told him that he was getting in excess of 3 weeks vacation. Abdullah is currently employed by Loughheed as a Front Office Manager, which is a position lower than an Executive Assistant.

Rowe states that he earned 2 weeks of vacation for 1992 and 1993, and 3 weeks of vacation for 1994 and 1995. As well, since his start date, he earned 12 days of pay for doing inventory on his regular days off. Rowe states he took 2 weeks of vacation in 1992, 1993 and 1994 and he took 10 of the 12 inventory days off with pay, for a total of 40 days. Therefore, he is owed 1 weeks vacation for 1994, 3 weeks vacation for 1995 and 2 days of pay for January 1, 1995 and April 1, 1995. According to his calculations, the 2 days of work amounts to \$250.00 and the vacation pay amounts to \$1,191.37 (approximately 10 days), which is the difference between the amount of \$1,208.63, which is the 10-11 days he was paid upon termination, and \$2,400.00, which is what he calculates as 4 weeks of vacation pay.

Kynoch states that Rowe was never promised 3 weeks of paid vacation. She said that Tidball told her he never made such a promise to Rowe. Kynoch states that Rowe was entitled to 2 weeks of paid vacation (4% of annual earnings) each year. She said that Abdullah receives 2 weeks of paid vacation, and he also receives another 2 weeks or 4% of earnings because he has to work statutory holidays, whereas Rowe did not have to work statutory holidays. Rowe agrees he did not have to work all the statutory holidays. He does not know if Abdullah had to work these days. Kynoch also states that the only employees who get 3 weeks of paid vacation or 6 % vacation pay after 3 years are their unionized hourly paid employees.

Lee states that Tidball did not promise Rowe 3 weeks of paid vacation. She said she was at the meeting when Tidball and Rowe discussed Rowe's duties and salary and Tidball told Rowe he would get 2 weeks of paid vacation with statutory holidays off. There was no discussion about 3 weeks of vacation. In response, Rowe states that Lee was not at this meeting for the whole time.

According to Kynoch, Rowe earned 38 days of vacation while he was employed by Lougheed. Based on his anniversary date, this represents 2 weeks or 10 days for each of the three years he completed and 8 days for the last year. The last year, which is September 9, 1994 to June 19, 1995 has to be pro-rated as he never completed a full year of work. She accepts he also earned 12 days for doing inventory. The total days earned are 50. She contends that Rowe took 41 days off with pay while employed, which consists of 31 vacation days and 10 inventory days, and he received 11 days (\$1,208.63) at his termination for a total of 52 days. Accordingly, he was overpaid.

Rowe also claims that he is owed some severance pay as the monthly salary used to calculate his severance pay is incorrect. He claims that the medical premiums should be included in the monthly salary and therefore he should have been paid an additional amount of \$64.73 per month x 3 months = \$194.18. Kynoch and the Delegate argue that these premiums are not wages and therefore should not be included in the calculation.

When Rowe first filed his appeal he also claimed he was owed some wages for the period June 1, 1995 to June 19, 1995. At the hearing he stated he did not want to pursue this part of his claim.

ANALYSIS

The onus in this appeal rests with the appellant, Rowe. I am not satisfied that Rowe has established he is owed wages by Lougheed.

Regarding the vacation pay issue, there is no written documentation to support Rowe's claim he was promised 3 weeks paid vacation after 3 years of employment. The fact that Abdullah may have received in excess of 3 weeks paid vacation does not convince me that Rowe was promised 3 weeks vacation. Furthermore, whatever the industry standards may be, there is no evidence that a specific agreement was made between Lougheed and Rowe regarding vacation pay in excess of the statutory minimum.

The parties agree that Rowe received at least 50 days of paid vacation and time off for doing inventory. I accept that Rowe earned 38 days of vacation (10 days each for the first 3 years, and 8 days for the last year as he did not complete a full anniversary year) and 12 days for doing inventory for a total of 50 days. Therefore, there is no outstanding wages owed to Rowe in this area.

Regarding the severance pay issue, or, as it is called under the new Act, compensation for length of service, I find Rowe is not owed any further wages by Lougheed. Under Section 63 of the Act, an employee is entitled to 3 weeks' wages as compensation after working 3 years for an

employer. If Rowe had an employment contract which provided for a greater benefit, then that contract would prevail over the *Act*. Rowe's contract, however, only makes reference to notice and not to compensation pay. No evidence was provided to indicate that any other agreement existed between the parties respecting compensation in excess of the statutory minimum. Accordingly, the *Act* applies and Rowe clearly has been paid in excess of the minimum standard and is not owed any further compensation pay by Lougheed.

Alternatively, had I accepted that an agreement existed wherein Lougheed owed Rowe 3 months compensation, then in the absence of language in the agreement to the contrary, I would find that medical premiums are not included in the calculation of compensation. The issue is not whether the premiums are wages, but whether they are part of a regular wage which is the basis on which compensation is calculated under the *Act*.

Section 63 (4) of the *Act* states that compensation is calculated by totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks of employment, dividing by 8, and multiplying the result by the number of weeks' wages the employer is liable to pay. The basis of the calculation for compensation is the concept of a regular wage. Under the *Act*, the regular wage is bereft of overtime or premium rates of pay. The *Act* does not state that the calculation for compensation includes all wages paid to, or on behalf of an employee in the last 8 weeks of employment. Given the foregoing, I conclude, for the purposes of calculating compensation, the regular wage is also bereft of any benefits, such as medical premiums, which an employer pays on behalf of an employee.

For the above reasons, I find that Rowe is not owed any wages by Lougheed.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 000169 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

March 19, 1996

Date

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