



An appeal

- by -

Advantage Plumbing and Drainage Inc.
(“Advantage”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2006A/27

DATE OF DECISION: March 23, 2006

DECISION

SUBMISSIONS

Ted Mitchell	on behalf of Director of Employment Standards
David Abrams	on his own behalf
Fred van Hunenstijn	on his own behalf

OVERVIEW

1. This is an appeal of a decision of the delegate following a referral back by Tribunal Member Lawson (BC EST #D070/05). The original appeal was by Advantage Plumbing and Drainage Inc. (“Advantage”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued January 17, 2005.
2. The Determination required Advantage to pay David Abrams wages, vacation pay, statutory holiday pay, compensation for length of service and interest.
3. Advantage appealed that Determination, arguing that the delegate had erred in law and failed to observe the principles of natural justice in making the Determination. Advantage also argued that evidence had become available that was not available at the time the Determination was being made.
4. On appeal, Member Lawson dismissed Advantage’s appeal on the issues of compensation for length of service and regular wages, concluding that Advantage had not provided any compelling evidence demonstrating that the delegate had erred. However, Member Lawson did refer the issues of vacation pay and statutory holiday pay back to the delegate for further investigation, finding that he had not correctly calculated the amounts Advantage had already paid to Mr. Abrams.
5. Advantage then filed a request for reconsideration of Member Lawson’s decision. By way of a letter dated June 15, 2005, the Tribunal advised Advantage that the request would be considered only after the referral back issues had been decided.
6. In the referral back, the delegate recalculated vacation pay and statutory holiday pay based on the relevant clauses of the Employment Contract. He determined that statutory holiday pay paid to Mr. Abrams under the contract satisfied the minimum holiday pay requirements set out in the *Act*. Consequently, he determined that no statutory holiday pay was owed.
7. The delegate further determined that the vacation pay paid to Mr. Abrams was also less than the amount calculated owing under the contract, and that no further vacation pay was owed.
8. The delegate provided the parties with his calculations. Advantage advised the delegate in writing that it agreed with those calculations. Mr. Abrams disagreed, stating that the contract used by the delegate to calculate his entitlement had been signed under duress. He also contended that none of his pay stubs reflected his statutory holiday pay or annual vacation pay contrary to the *Act*.

9. Neither Mr. Abrams nor Advantage has filed a reply to the delegate's referral back report.
10. The sole issue before me is whether the delegate has correctly calculated the statutory holiday pay and vacation pay amounts

DECISION

11. The delegate had regard to the contract between the parties in determining whether Advantage paid Mr. Abrams his statutory entitlements. Although Mr. Abrams contends he signed this contract under duress, and this appears to have been accepted by the delegate at first instance, it nevertheless appears to be relied upon by both the delegate and the member. Mr. Abrams did not seek a reconsideration of the original decision, and that is not an issue before me.
12. The delegate determined that the commission structure, according to the contract, included vacation pay and statutory holiday pay. He also determined that the total wages paid to Mr. Abrams in 2001 and 2002 included vacation and statutory holiday pay in amounts in excess of what he was statutorily entitled, and what was originally ordered in the Determination. Therefore, he concluded that no further amounts were owed.
13. Advantage did not dispute the delegate's conclusions on this issue. Mr. Abrams again contended that the contract of employment, which set out his commission structure and his vacation pay and statutory holiday pay, was signed under duress. That issue is not before me, as I noted above.
14. Although Mr. Abrams also continued to argue that the inclusion of annual vacation pay and /or statutory holiday pay in a commission wage structure did not comply with the requirements of the *Act*, the delegate found the employer to have contravened the *Act* in this respect, and nothing further turns on this.
15. I find no basis to interfere with the delegate's calculations.

ORDER

16. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated January 17, 2005, be varied to show that no vacation pay and statutory holiday pay is owed to Mr. Abrams. In all other respects the Determination is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal