

An appeal

- by -

Geoff Fern and Patricia Fern operating as Ferndale Ranch

- 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

TRIBUNAL MEMBER: John Savage

FILE No.: 2005A/7

DATE OF DECISION: April 6, 2005

DECISION

SUBMISSIONS

Geoff Fern for Geoff Fern and Patricia Fern doing business as Ferndale Ranch

Robbie Gabrysh and Cathy Gabrysh for Robbie Gabrysh

Erwin Schultz for the Director of Employment Standards

OVERVIEW

Robbie Gabrysh made a complaint to the Director of Employment Standards with respect to unpaid vacation pay. The facts are not in dispute.

Robbie Gabrysh and Cathy Gabrysh (“the employees”) entered into a contract of employment with Geoff Fern and Patricia Fern to provide Farm Management Services, Animal Husbandry and Farm Labour services at the Ferndale Ranch in Westridge B.C.

The terms of the contract were set out in writing and provided to the employees before the employment commenced although the contract was not signed. It provided for employment for two years commencing July 1, 1997 and after two years there could be annual renewals by mutual consent. The employment relationship continued for nearly 7 years uneventfully until 2004 when the contract terminated upon notice.

The contract of employment provided that the employees were to receive \$30,000 per year plus housing and utilities. All of the wages were paid to Robbie Gabrysh although time at work was shared equally. During the course of the employment, commencing in 1998, the employees received other benefits including the personal use of a ranch diesel 1 ton truck, they were allowed to and did start their own herd of cattle on the ranch, cattle were assigned to their children to be raised for 4-H purposes, and subsequently sold, etc. The employer calculated the employee’s total annual remuneration at \$61,100 per annum with these benefits, so the value of the benefits exceeded the money paid as wages. The employees acknowledged receiving most of these benefits.

The employment commenced July 1, 1997 and continued until May 15, 2004. In September 2003 the employees were advised that the Ferndale Ranch was to be sold. The employees were given 9 months notice with limited offers of continued use of housing and some part time employment after May, 2004.

The parties agree that some 17 days vacation were taken in December 2002, July 2003 and November 2003. The days in dispute concern days taken for employment at the Pope & Talbot sawmill and days taken for a family funeral.

In March, 2004, while still receiving wages from Ferndale Ranch, Robbie Gabrysh commenced employment with the Pope and Talbot sawmill in Midway, B.C. He worked there for 22 days prior to the cessation of his employment with Ferndale. It is not alleged that he continued to work at the Ferndale Ranch during this period.

In August 2003 Robbie Gabrysh took 10 days off to attend a family funeral. He was paid for that time. There was no provision in the contract of employment for bereavement leave.

When his employment ended with Ferndale Ranch he was overpaid regular wages as noted by the Delegate and agreed to by all parties.

Under the contract of employment the employees were entitled to a “reasonable amount of paid vacation time” and were themselves to “schedule such vacation time in a manner consistent with their responsibilities”. Neither the employer nor the employees were aware of the vacation pay requirements of the *Employment Standards Act* and it appears that the employer took a completely hands-off approach.

In July 2004 Robbie Gabrysh filed a complaint with the Director of Employment Standards claiming unpaid vacation pay. The Director found that there was unused vacation entitlement, and thus unpaid vacation pay, and did not include in the paid vacation time either the employee’s 22 day absence while working at the Pope & Talbot mill, or 10 days paid time taken off to attend a funeral in Saskatoon.

The Ferndale Ranch appeals this determination, claiming that the Director should have credited the employer with paid time off taken when working for the new employer and paid time off taken to attend a funeral as vacation.

The Employment Standards Tribunal determined that the appeal was to be determined by written submissions. No objection is made to that method of appeal. The Tribunal has received reasoned and thoughtful submissions from all of the parties.

ISSUES

Did the Director err in law in finding those days taken off work to attend other employment or personal matters while being paid were not vacation days?

Was the employee in the circumstances entitled to vacation pay?

LEGISLATION

An employee is entitled to an annual paid vacation. The provisions of the *Employment Standards Act* as they related to vacation are as follows:

Entitlement to annual vacation -- s. 57

- 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.*
- (3) *An employer must allow an employee who is entitled to an annual vacation to take it in periods of one or more weeks.*
- (4) *An annual vacation is exclusive of statutory holidays that an employee is entitled to.*
- 1995, c. 38, s. 57.

Vacation pay -- s. 58

- 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 days before the beginning of the employee's annual vacation, or*
 - (b) *on the employee's scheduled paydays, if*
 - (i) *agreed in writing by the employer and the employee, or*
 - (ii) *provided by the collective agreement.*
- (3) *Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.*

1995, c. 38, s. 58; 2002, c. 42, s. 28.

Other payments or benefits do not affect vacation rights -- s. 59

- 59 (1) *An employer must not reduce an employee's annual vacation or vacation pay because the employee*
- (a) *was paid a bonus or sick pay, or*
 - (b) *was previously given a longer annual vacation than the minimum required under section 57.*
- (2) *Despite subsection (1)(b), an employer may reduce an employee's annual vacation or vacation pay because at the written request of the employee the employer allowed the employee to take an annual vacation in advance.*

1995, c. 38, s. 59.

ANALYSIS

The *Employment Standards Act* does not define the term “vacation”. The Act, however, makes it clear that it is a right earned by a specific employee through the effluxion of time during employment with a particular employer. It is the statutory responsibility of the employer to ensure that vacation is taken by that specific employee.

That these rights accrue to specific employees is supported by the language of these provisions. Subsection 57(2) refers to the entitlement of “the employee to the vacation”, Section 58 makes six references to “the employee”, and Section 59 has three further references using this expression. In my opinion these provisions, like other provisions in the Act, make it clear that the rights that accrue are personal to the employees that perform the work or services.

In this case the Delegate of the Director found that Robbie Gabrysh worked a seven day work week¹ in return for wages of \$30,000 per year plus benefits. The undisputed evidence before the Delegate,

¹ At Page 5, Reasons for Determination, ER#126-737, “Given his seven-day workweek, Mr. Gabrysh (sic) earned \$82.19 for each day worked”.

however, was that both Robbie Gabrysh and Cathy Gabrysh worked equal hours² for this sum plus the substantial benefits enumerated above.

The Delegate also found that Robbie Gabrysh worked at the Pope and Talbot Mill for 22 days during a period of time when employed by Ferndale Ranch³. It was also undisputed that the Robbie Gabrysh took 10 days off while being paid to attend a funeral in Saskatchewan.

The 22 days taken off to attend other work was found not to qualify as vacation for two reasons. The first reason was no other employee was hired to perform the work. The second reason given was that the absence was not recorded as vacation on employer records.

As I have noted, vacation is a right earned by a specific employee through employment. Whether a period of absence is a vacation cannot depend on whether another person works during that period of absence. If an employer requires that work be done, then in such cases work will be done by a different employee. If the work can be deferred it may not be done. The fact work was done by another employee or other employees cannot be a fact that defines whether the complaining employee's absence was vacation.

In this case it is clear that both Robbie Gabrysh and Cathy Gabrysh were employees of Ferndale Ranch. The unsigned contract of employment specifically provides that both are employees. As the Delegate noted, letters of reference referring to the employment of both were provided by Ferndale at their request. The submission of Robbie Gabrysh references the work done by both.

If Cathy Gabrysh worked, that does not entail that Robbie Gabrysh did not take vacation. Likewise, work by Cathy Gabrysh could not accrue vacation entitlement for Robbie Gabrysh or any employee other than Cathy Gabrysh. In my opinion the Delegate conflated the question of whether work was done by another employee with the question of whether the employee's absence with pay constitutes vacation, and so erred in law. These are separate questions.

In his submission to the Tribunal the Delegate stated that "As noted in the determination, the employer was aware that Mrs. Gabrysh often performed work on the farm, for which Mr. Gabrysh was paid...I concluded that...Mr. Gabrysh's wages flowed through him and were paid to Mrs. Gabrysh for the work she performed". This is consistent with the submission of Robbie Gabrysh. Mr. Gabrysh said "Robbie Gabrysh was hired to manage Ferndale Ranch. His wife, Cathy Gabrysh was also given many duties on the ranch. Their four children also worked on the ranch. The ranch was operated by the whole family. Each member had chores that they performed. Monthly wages were paid only to Robbie, even though the entire family worked".

The second reason for the Delegate's determination was that there are no records indicating that the time taken off work at Ferndale Ranch by Robbie Gabrysh was vacation. Clearly the requirement to keep employee records falls on the employer, Ferndale Ranch. The issue here is not, however, whether the records were kept or whether they could be produced on demand. The question is whether certain time taken off work, while being paid, qualifies as vacation under the Act.

² In the record before the Delegate, "Hours Gabrysh family put on Ferndale Ranch", 4 pages, signed by Robbie Gabrysh.

³ At Page 5, Reasons for Determination, ER#126-737, "With regard to the period of May 19 to May 15, 2004 the complainant was working for another employer at the time that he was employed by Ferndale".

The term “vacation” is not defined in the Act, and there are no provisions that entail that only time taken off work *that is recorded as vacation qualifies as vacation*.

To require that time taken off work, to be vacation, must be *recorded* as vacation would require that substance follow form. In the absence of a contrary statutory requirement, the law looks to the substance of a transaction, not merely to its form, to determine legal effect: *Creswell v. Raven Bay Holdings* (1984), 53 BCLR 183. Such a position is consistent with the requirement when analyzing employment relations to look beyond the language to ascertain the true nature of the relation: *Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341⁴.

This tribunal has consistently asserted, for example, that the determination of whether there is an employment relation or an independent contractor relation is not dependant on the language employed by the contract, or what the contract is called: *Bay Technology Corporation* BC EST#143/01.

Moreover, this interpretation when applied to other concepts utilized in the *Employment Standards Act*, would make rights dependent on employer records. In my opinion the issue cannot on turn on whether employer records specify an absence as vacation.

A consideration of other cases confirms that this Tribunal has not considered employer records to be determinative of these issues: see, for example, *Re Chin* BC ESD #D347/98, where records were considered but not considered determinative, *Re The T Eaton Company*, BC ESD #D593/97 where a “PTO” (paid time off) program was construed as equivalent to vacation entitlement, *Re Alkon Trading Ltd.* BC EST D# 106/02, where an employer’s failure to document the payment of vacation pay was considered a separate issue from whether vacation pay was paid, and the Tribunal determined that the absence of documentation did not warrant a finding that vacation pay was not paid.

The term “vacation” is an ordinary English word and undefined in the Act. The *Shorter Oxford English Dictionary* defines the noun “vacation”, in part, as follows:

1. a. Freedom or rest from or *from* an occupation, work, etc. LME.
 - † b. Leisure for, or devoted to, some special purpose. LME-M17.
 - † c. Absence from duty or one's usual post. LME-L16.
 2. A fixed period of formal suspension of work or other activity; *esp.* a period of the year when lawcourts, universities, or schools are closed. LME.
- long vacation*: see LONG *adjective*¹.

....

In general, the first definition occurring in a dictionary is the common or usual meaning of a term: *Pfizer Co. Ltd. v. Deputy MNR for Customs & Excise*, [1977] 1 S.C.R. 456 at 459, *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 830.

The *Shorter Oxford English Dictionary* defines the term “vacation” as “freedom or rest from *an* occupation or work” (my emphasis). This appears to reflect the common sense notion that “vacation” does not necessarily connote the absence of work, but just the absence of occupation or work of a particular kind, namely, that of the employer.

⁴ "The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship".

This definition of “vacation” does not completely inform the meaning of “vacation” as it occurs in the *Employment Standards Act*. As provided for in the Act, vacation includes the notion of an obligation on the employer, to ensure that vacation is taken.

Here the employees were managing and working at Ferndale Ranch according to the terms of the employment contract. Vacation scheduling, but not entitlement, or ensuring that vacation was taken, involved contractual responsibility of the employees. The Delegate in his decision quotes from the contract of employment as follows:

“The Managers shall be entitled to a reasonable amount of paid vacation time and, to the fullest extent possible, shall schedule such vacation time in a manner consistent with their responsibilities for the efficient and smooth operation of the Ranch, after consultation with the Owners”.

This provision is not inconsistent with the employer’s obligations under subsection 57(2) of the *Employment Standards Act*. In the circumstances of this contractual provision, in my opinion the voluntary intentional absence of the employee from work at Ferndale Ranch while being paid to work there but actually working at other employment falls within the ordinary meaning of the term “vacation”. While not recorded as vacation it qualifies as vacation within the ordinary meaning of that term.

In coming to this conclusion I have considered earlier decisions of this tribunal that have come to different conclusions albeit in differing circumstances. In *Re Keep On Trucking* BC EST D# 087/99 the Tribunal concluded that on appeal one could not argue that days taken off work for undisclosed reasons long after the fact could retroactively be construed as vacation days. There was, however, in that case no responsibility for scheduling vacation in the employee.

Where there is an employer practice of paying sick leave, and sick leave is taken, one cannot argue that sick leave is in fact vacation, nor can days where employment is frustrated by unexpected inclement weather, be converted, without notice, to vacation days: *Re Marathon Systems Solutions Inc.*, BC EST #D539/97.

The situation here is distinguishable from that in these earlier decisions. Here the employee who was responsible for scheduling vacation intentionally and voluntarily took days off work to work in other employment shortly before the employment relationship ended. In my opinion that falls within the ordinary meaning of “vacation”. It follows that the Delegate erred in law in finding that the absence of Robbie Gabrysh, albeit to work for another employer, was not vacation from his employment from Ferndale Ranch.

With respect to the time taken off work for bereavement, the contract of employment does not provide for bereavement leave. There is no evidence of a practice of allowing bereavement leave. As there is no contract or practice allowing for bereavement leave, and the employee was paid during this period, this time take off work would also qualify as vacation within the ordinary meaning of the term.

In the circumstances when the periods of paid absence are appropriately considered as vacation and the overpayment of \$979.08 is accounted for, there is no amount due to Robbie Gabrysh on termination.

It follows that no amount is owed the employee by Ferndale Ranch. The administrative penalty cannot stand.

ORDER

The appeal is allowed. The order of the Director is set aside.

There is no amount owed Robbie Gabrysh for vacation pay.

The administrative penalty is cancelled.

John Savage
Member
Employment Standards Tribunal