

An appeal

- by -

Victoria Ford Alliance Ltd. carrying on business as Suburban Motors
("Suburban Motors")

– 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)

and

An application for suspension

- by -

Victoria Ford Alliance Ltd. carrying on business as Suburban Motors
("Suburban Motors")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2010A/19 & 2010A/20

DATE OF DECISION: May 19, 2010

DECISION

SUBMISSIONS

Rajiv K. Gandhi	Counsel for Victoria Ford Alliance Ltd. (carrying on business as Suburban Motors)
Robert Craig	on his own behalf
Ian MacNeill	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Victoria Ford Alliance Ltd. carrying on business as Suburban Motors (“Suburban Motors”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 29, 2010.
2. The Determination was made in respect of a complaint filed by Robert Craig (“Craig”), who alleged Suburban Motors had contravened the *Act* by failing to pay annual and statutory holiday pay and had terminated his employment by substantially altering conditions of his employment.
3. The Determination found that Suburban Motors had contravened Part 7, section 58 of the *Act* and ordered Suburban Motors to pay Craig an amount of \$26,291.90, an amount which included wages and interest.
4. The Director also imposed administrative penalties on Suburban Motors under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
5. The total amount of the Determination is \$26,791.90.
6. In this appeal, Suburban Motors says the Director erred in law and failed to observe principles of natural justice in making the Determination and seeks to have the Determination varied to a lesser amount payable. Suburban Motors submits the error in the Determination arose in the calculation by the Director of the period for which the vacation pay owed to Craig was found payable under the *Act*.
7. Suburban Motors also seeks a suspension of the Determination and in support of that request has deposited the amount of the Determination which the Director has agreed to hold pending the outcome of this appeal.
8. The Tribunal has a discretion whether to hold an oral hearing on an appeal: see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. None of the parties seeks an oral hearing on this appeal. In this case, the Tribunal has decided an oral hearing is not necessary and this appeal can be decided on the submissions and the material submitted by all of the parties, including the section 112 (5) Record filed by the Director.

ISSUE

9. The issue in this case is whether the Director erred in calculating the vacation pay liability of Suburban Motors under the *Act*.

THE FACTS

10. Suburban Motors operates three automobile dealerships in Victoria, BC. Craig was employed at one of the dealerships as a Financial Services Representative from January 28, 2006, until June 3, 2009. In respect of the issue raised in this appeal, the relevant findings of facts are as follows:
1. The employment agreement between Suburban Motors and Craig entitled Craig to 4 weeks vacation;
 2. Craig's vacation pay entitlement was 8%;
 3. Suburban Motors provided Craig with annual vacation time off during his employment and continued to pay him a share of commissions earned by the business office staff while he was off;
 4. During Craig's period of employment, Suburban Motors did not pay Craig a percentage of his "total wages during the year" as annual vacation pay, as required by section 58 of the *Act*;
 5. Craig's employment was terminated on June 3, 2009;
 6. The wage recovery period was December 3, 2008 to June 3, 2009;
 7. Craig's vacation pay entitlement for the first year of his employment, January 2006 to January 2007, did not fall within the wage recovery period of the complaint;
 8. Craig's vacation pay entitlement for the balance of his employment did fall within the wage recovery period for the complaint;
 9. Craig was entitled to \$9,833.90 in annual vacation pay in his second year of employment, \$12,024.55 for his third year of employment and \$4,776.19 for his fourth year of employment;
 10. Craig received \$725.00 annual vacation pay on termination;
 11. The total amount of annual vacation pay owed to Craig was found to be \$25,909.64; and
 12. Interest under section 88 of the *Act* was calculated to be \$382.26.

ARGUMENT

11. Suburban Motors says the Director erred in finding the annual vacation pay to which Craig was entitled for his second and third years of employment fell within the wage recovery period set out in paragraph 80(1) (a) of the *Act*. Suburban Motors submits all but \$4,370.66 of the annual vacation pay owed to Craig was payable outside of the six month entitlement period set out in that paragraph, which reads:

80 (1) 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, 6 months before the earlier of the date of the complaint or the termination of employment, . . .

plus interest on those wages.

12. Suburban Motors argues this conclusion flows from an application of subsection 58(2) to the facts. Subsection 58(2) says

58 (2) Vacation pay must be paid to an employee

- (a) at least 7 days before the beginning of an employee's scheduled 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.

13. Suburban Motors says evidence tendered and accepted at the complaint hearing showed Craig took all of the annual vacation time off to which he was entitled in each of the years 2007, 2008 and 2009 and, based on the statutory requirement in paragraph 58(2) (a), accepts that they were required to pay Craig his annual vacation pay entitlement seven days before each period of annual vacation time off. Suburban Motors does not dispute the finding that they failed to meet this requirement, but argues the contravention of the *Act* occurred at the time the statutory requirement to pay arose which, for Craig's vacation pay entitlement for the years 2007 and 2008, was before December 3, 2008 and outside the wage recovery period.
14. Suburban Motors also argues the Director erred in calculating Craig's annual vacation pay entitlement for 2009.
15. The Director and Craig have each filed a response on the appeal.
16. The response filed by Craig has not addressed the issue raised in this appeal and, for that reason, I do not need to comment further on it.
17. The response submitted by the Director accepts the argument relating to the wage recovery period has some merit. The Director says the argument on the wage recovery period raised in this appeal was not argued during the complaint process, but accepts it accords with the provisions of the *Act*. The Director disagrees, however, with the amount of wages that Suburban Motors' says is affected by the argument. The Director says the annual vacation pay entitlement affected by the argument would be that resulting from Craig's earnings in the period January 2007 to January 2008. Craig's vacation pay entitlement from January 2008 until his termination would fall within the wage recovery period.
18. The Director has recalculated the wages that are owed in the amount of \$15,951.09 and interest in the amount \$238.94.
19. In their final reply, Suburban Motors, with one exception, accepts the recalculation by the Director. Suburban Motors says, however, the recalculation does not take into account the amount of \$725.88 paid to Craig on his termination and which was credited in the Determination.

ANALYSIS

20. I have reviewed the arguments and the provisions of the *Act* that have been raised in this appeal. I accept the position of both Suburban Motors and the Director on the interpretation and interplay of sections 58 and 80 on the facts of this case. The view of those parties is logically consistent with the language of those provisions.

21. I agree with the Director that the amount of vacation pay entitlement affected by this reading of the *Act* are those resulting from Craig's earnings in the period January 2007 to December 2007 and that Craig's vacation pay entitlement from January 2008 until the termination of his employment would fall within the wage recovery period.
22. As a result, the appeal is allowed in part.
23. However, I am unable to accept the Director's recalculation of the wage amount owing to Craig as a result of this appeal.
24. There are some inconsistencies between the wage recalculation done by the Director in the Determination and that done in the Director's response to the appeal. In the Determination, the Director finds that Craig's "total wages" for the year January 2008 to December 2008 was \$150,306.96, an amount comprised of his earnings during that year, \$140,473.06, and the amount of annual vacation pay he should have been paid for that year based on his earnings. In the recalculation, the annual vacation pay amount is ignored. The Director finds Craig's earnings for that period to be \$140,473.06 and uses only that amount in determining Craig's annual vacation entitlement for that year. The effect of that calculation is to reduce the amount which is added to his earnings in 2009 and used to calculate annual vacation pay entitlement for that year.
25. The decision of the Director to ignore the annual vacation pay amount in the recalculation is not explained. It is possible that since the Director accepted this period fell outside of the wage recovery period, it could not be used for any purpose, including calculating Craig's vacation pay entitlement for the claims which fell inside the wage recovery period. In my view, this approach would be wrong.
26. The effect of section 80 is only to limit the amount of wages that may be included in a Determination. Section 80 does not absolve an employer from effect of the statutory obligations found in the *Act*, and most particularly does not foreclose the Director from finding a contravention of the *Act* outside of the wage recovery period or from requiring a person who has been found to have contravened the *Act* from compliance, penalty or the other non-wage aspects of the Director's authority under section 79 and the Director's obligation under section 98. Nor does section 80 alter the formula for calculating annual vacation pay in section 58(1) of the *Act*. Annual vacation pay will always be calculated on an employer's total wage obligation under the *Act*, whether or not that obligation can be included in a Determination as wages owed.
27. In light of the above comments, it is appropriate that I refer the matter of the recalculation back to the Director. Once the amount owed to Craig has been recalculated, the varied Determination will be returned to the Tribunal for a final decision under section 115 of the *Act*.
28. Suburban Motors has requested a suspension of the effect of the appeal under section 113 of the *Act*. That request satisfies the requirements of the provision and is granted. The amount deposited with the Director should continue to be held until the amount owed to Craig is confirmed in a decision of the Tribunal.

ORDER

29. Pursuant to section 115 of the *Act*, I order the Determination dated January 29, 2010, be varied in accordance with this decision and the matter be referred back to the Director to calculate the wage amount owed to Craig. The request under section 113 of the *Act* for a suspension of the Determination is granted pending a final decision on this appeal.

David B. Stevenson
Member
Employment Standards Tribunal