BC EST #D057/98

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 -

Allstar Dental Laboratories Ltd
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 97/743

DATE OF HEARING: January 23, 1998

DATE OF DECISION: February 19, 1998

BC EST #D057/98

DECISION

APPEARANCES:

Emiko Ando, for the Employer

Heidi Hughes, for the Director of Employment Standards
John J. Hartmann, for the Director of Employment Standards

Maria Sepe, for herself

OVERVIEW

This is an appeal brought by Allstar Dental Laboratories (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a Delegate of the Director of Employment Standards (the "Director") on October 3, 1997. The Determination found that the Employer owed a former employee, Ms. Maria Sepe ("Sepe"), vacation pay. The Employer agreed with the Director on the amount of vacation pay payable to Sepe during the 24 month period prior to her termination, $7,159.30. The issue raised by the appeal was the status of the amount of vacation pay Sepe had received prior to her termination. The Employer argued that it had overpaid Sepe for her vacation during that period, thereby reducing the amount of vacation pay due to Sepe when she was terminated. The Director held that prior over payments (i.e. payments for time previously accrued) to Sepe could not reduce her entitlements in the final 24 months of her employment.

An earlier Determination, issued by the Director on November 28, 1996 and varied on January 16, 1997, found that the Employer owed vacation pay to Sepe. That determination was the subject of another appeal to the Tribunal. In BC EST #D148/97, the Adjudicator cancelled the previous determination and remitted the case back to the Director for further investigation and the issuance of a new determination consistent with the Decision. The Director's Delegate did issue a second Determination, which is the subject of the Employer's appeal in this case.

ISSUE TO BE DECIDED

The issue to be decided in this case is the method of calculating Sepe's vacation pay entitlement in the last 24 months of her employment with the Employer.

FACTS

Most of the facts of the case were not in dispute. The relevant period of Sepe's employment commenced August 1, 1992. Counsel for the parties agreed that Sepe was entitled to $7,159.30 in vacation pay from the beginning of the period in question until the date of her termination, January 24, 1996, including her severance pay. The Employer pointed out that Sepe had received vacation pay of $6,840.03 during that period, including $$318.84 paid pursuant to the earlier proceeding before the Tribunal. The difference between the parties in this proceeding concerned vacation pay Sepe received before January 25, 1994. Between August 1992 and August 1993, Sepe accrued $2,003.43 in vacation pay and received $4,006.19 in vacation pay. From August 1993 to August 1994, she accrued $1,892.11 and did not receive any vacation pay. During the following 12 months, August 1994 to August 1995, she accrued $2,014.09 and received $3,221.88. Counsel for the Director argued that only $2,014.09, i.e., the amount accrued, should be credited to the amount the Employer owed. Between August 1995 and January 1996, she received $646.16 and accrued $939.51. By the Delegate's calculations, Sepe was entitled to approximately $4,188.89 in vacation pay, plus interest. Counsel for the Employer argued that the previous payment of $318.84 fulfilled all of its obligations to Sepe.

ANALYSIS

The *Act* sets out an employee's entitlement to annual vacation in Section 57 as follows:

> (1) An employer must give an employee an annual vacation of
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> (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.

Section 59 of the *Act* affects an employee's entitlement to vacation pay:

> (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.

Section 80 of the *Act* limits the amount of wages an employer may be required to pay.

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 date of the complaint or the termination of the employment, and

(b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination,

plus any interest on those wages.

Counsel for the Director also relied on Section 128(3) of the *Act*, which covers the transition from the old statute to the current *Act*:

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

Counsel for the Employer argued that Section 80 limits an employer's liability to the amount that became period payable in the previous 24 months, but does not specify the period in which an employer can claim an offset against vacation pay is owed. Counsel also referred to Section 38 of the previous *Employment Standards Act*, which was in effect during the period of Sepe's employment until November 1, 1995. She pointed out that Section 38 did not prohibit a reduction in vacation pay as a result of a previous overpayment of vacation pay or vacation pay paid in advance.

The crux of the disagreement between these parties is Section 80 of the *Act.* The intent of Section 80 is to limit the amount of wages an employer may be required to pay to 24 months prior to an employee's termination. Section 80 does not address the method of calculating wages that may be payable. When dealing with annual vacations, the law requires that employees are entitled to vacation based on their length of service. Section 80 must be interpreted in light of the requirements of Section 57. Clearly, the amount of vacation pay to which employees are entitled reflect their length of service, and the Director's delegate is required to examine employees' records prior to the 24 month period to verify their eligibility for vacation pay. When payment is made pursuant to

Section 57, it should be calculated based on the previous year's earnings. See *LaPorte and Niemi*, BC EST #141/97.

Section 57(2) is especially important in this regard. It requires an employer to ensure that vacation is taken accrued within the 12 months after the completion of the year in which the entitlement was established. In most cases, this requirement benefits employers, as employees who have not taken their vacation within the prescribed period are not entitled to recover compensation for time previously accrued. In other words, had the situation been reversed, i.e., Sepe had accrued vacation in January 1994 beyond her entitlement from the previous 12 months, she would not have been able to recover this part of her wages. In addition, Section 59(2) prohibits an employer from deducting an employee's vacation pay because of previous overpayment without a written authorization from the employee. Counsel for the Employer did not allege that Sepe had given such authorization.

While Counsel for the Employer raised the requirements of earlier legislation, the wording of Section 128(3) did not assist her case. Section 128(3) is especially broad, stating that a complaint "is to be treated for all purposes, including Section 80 of this Act, as a complaint made under this Act." While there may be some clash in the provisions of the two statutes, Section 128(3) was intended to bring cases such as this one under the current *Act.* While the previous statute did not prohibit a reduction in vacation pay as a result of overpayment, Section 128(3) is a bar to the application of the earlier legislation. One advantage of Section 128(3) is that it ensures that the Tribunal (or the Employment Standards Branch) will not become embroiled in interpreting a statute that has been repealed. The Employer also relied on the Branch's Interpretation Guidelines Manual in support of its case. Clearly, the Manual is not binding on this Tribunal, and the interpretation of the *Act* advanced by Counsel for the Director would logically supersede the Manual in any case.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination of October 3, 1997 is confirmed.

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Mark Thompson
Adjudicator
Employment Standards Tribunal