

**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 -

Norpac Lawn & Leisure  
("Norpac")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 96/585

**DATE OF HEARING:** February 7, 1997

**DATE OF DECISION:** February 11, 1997

## DECISION

### APPEARANCES

Linda MacKinnon	on behalf of Norpac Lawn & Leisure Ltd.
Hugh Paterson	on his own behalf
Jim Walton	on behalf of Director of Employment Standards

### OVERVIEW

This is an appeal by Norpac Lawn & Leisure Ltd. ("Norpac"), under Section 112 of the *Employment Standards Act*, (the "Act") against Determination No. CDET 004024 which was issued by a delegate of the Director of Employment Standards on September 17, 1996. The Determination found that Norpac was required to pay vacation pay in the amount of \$866.48 (plus interest) to Hugh Paterson ("Paterson"), a former employee of Norpac. On October 28, 1996 the Director's delegate wrote to the Tribunal asking it to revise the Determination to show vacation paying owing in the amount of \$311.52 (plus interest).

A hearing was held in Langley on February 7, 1997 at which time all witnesses gave evidence under oath.

I have decided that the Determination, issued on September 17, 1996, should be confirmed.

### ISSUE TO BE DECIDED

The issue to be decided is: what amount is owed by Norpac to Paterson for vacation pay?

### FACTS

Norpac employed Paterson as its Parts Manager from April 11, 1995 to May 14, 1996. Paterson's salary was \$30,000 per year when he was first employed and was increased to \$32,400 per year effective August 1, 1995.

Paul Weme, President of Norpac, made a written offer of employment to Paterson on April 11, 1995.

The relevant paragraph in the offer of employment states:

Dear Hugh:

We are pleased to offer you the position of Parts Manager. Your salary will be \$30,000 a year with two weeks holidays. We acknowledge at this time that you have requested June 1, 1995, July 13-15, 1995 and September 20-23, 1995 as days off.

Paterson accepted this offer and began working on April 11, 1995. His employment was terminated, without notice, on May 14, 1996.

The reason given by Norpac for its appeal is that the contract of employment was misinterpreted.

The calculation schedule attached to the Determination shows Paterson's income for 1995 as \$21,662.00. As a result, it shows vacation pay owed to Paterson in the amount of \$866.48 (4% of \$21,662.00) plus interest.

In a letter dated October 28, 1996 the Director's delegate informed the Tribunal that the Determination had been "revised" to show \$311.52 plus interest as the amount owed to Paterson, for the following reasons:

- based on 1995 earnings of \$21,662.00 the complainant was entitled to 7.5 days vacation;
- all 1996 vacation was paid out upon termination.
- the complainant took the following paid time off in 1995:
  - June 1
  - July 13-15
  - September 20-23

for a total of 8 days. The employer records shows this time as being paid days off with no reference to days being vacation days or normal paid days. The complainant's position is that he used his regular paid day off for June 1, July 13 and September 20 in conjunction with the other previously requested time off. The employer's position is that all eight days were considered to be vacation.

- the complainant also received Christmas Day as a paid statutory holiday in 1995. The employer records shows that other days taken off when the business was closed between Christmas and New Years were unpaid;

- the officer accounts for the paid days taken off by the complainant during 1995 as follows:
  - June 1 (regular paid day off)
  - July 13 (regular paid day off)
  - July 14 and 15 (vacation days)
  - September 20 (regular paid day off)
  - September 21,22 and 23 (vacation days)
- the above analysis results in 5 vacation days being accounted for with an additional 2.5 days being unaccounted for.

The evidence given at the hearing by Linda MacKinnon("MacKinnon"), Norpac's bookkeeper, confirmed that Paterson was not paid for December 26, 27, 28, 29, 1995 because the business was closed between Christmas and New Year. MacKinnon also testified that when she prepared the payroll cheques for the pay period ending December 31, 1995 any salaried employees whose vacation entitlement exceeded 4 days were paid full salary for the period of December 26-29 inclusive.

Paterson testified at the hearing that Paul Weme("Weme") had telephoned him at home to offer him the position as Parts Manager. Following a meeting in Weme's office, Paterson testified, he accepted the position at an annual salary of \$30,000.00 However, Paterson was emphatic in giving his evidence that he told Weme that he "...needed 8 days absent" and that "...Weme did not say that he intended to remove those days from my vacation entitlement." Paterson also testified that his salary at Norpac was less than the salary he was earning at the time and, in his mind, the 8 additional days to which Weme agreed had persuaded him to accept Norpac's offer of employment.

Paterson's salary was increased to \$32,400 per annum effective August 1, 1995.

Paterson introduced into evidence copies of several of his earnings statements. In summary, these earning statements show that Paterson's salary was neither reduced nor amended for the following pay periods:

- June 15-30, 1995
- July 1-15, 1995
- July 15-31, 1995
- September 1-15, 1995
- September 16-30, 1995.

Paterson testified that the only days on which he was absent for any purpose during 1995 were July 14, 15 and September 21,22,23. He also testified that he when requested (in April, 1996) two weeks' vacation (to be taken in July, 1996) Weme approved his request and did not make any comment which would suggest he was entitled to less than two weeks' vacation.

## **ANALYSIS**

Section 57(1) of the *Act* sets out an employee's entitlement to annual vacation in the following terms:

### ***Section 57, Entitlement to annual vacation***

*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.*

Section 58 of the *Act* sets out the minimum amount of vacation pay to which an employee is entitled.

Section 59 sets out the following restrictions on the payment of vacation pay:

### ***Section 59, Other payments or benefits do not affect vacation rights***

*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.*

Thus, the central issue to be decided in this appeal is the meaning of the following statement in Weme's letter of April 11, 1995:

*"We acknowledge at this time that you have requested June 1, 1995, July 13-15, 1995, and September 20-23, 1995 as days off."*

Paterson's evidence on this point was clear. He believed that Weme had agreed to pay him \$30,000 per annum with two week's vacation plus 8 additional days off.

Weme did not appear nor did he give evidence at the hearing despite his knowledge of the hearing.

It is important to note that this appeal was made by Weme on behalf of Norpac. Thus, the burden of proof rests with Norpac.

When I consider:

a) the oral evidence, given by Paterson concerning the offer of employment in Weme's letter of April 11, 1995 and;

b) the fact that Norpac did not reduce Paterson's salary when he was absent on July 14,15, 1995 and September 21,22,23, 1995

I am driven to the conclusion that Weme agreed that Paterson's absence on the specified dates would not reduce his annual vacation entitlement.

Section 59(1)(b) of the *Act* prevents Norpac from reducing Paterson's annual vacation entitlement below the level agreed to on April 11, 1995.

For all the reasons set out above, I find that Paterson is owed vacation pay calculated on 4% of his total wages for 1995 (i.e. 4% of \$21,662.00). I also find that the Director's delegate erred when he determined that July 14,15, 1995 and September 21,22,23, 1995 were to be included in Paterson's entitlement to two weeks vacation.

#### **ORDER**

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 004024 dated September 17, 1996 be confirmed and that the revisions or amendments dated October 28, 1996 be cancelled.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**