



An appeal

- by -

Sean Orr  
("Orr")

- 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:** Robert E. Groves

**FILE No.:** 2013A/33

**DATE OF DECISION:** November 20, 2013

## DECISION

### SUBMISSIONS

|                       |   |
|-----------------------|---|
| Alexander D. Mitchell | counsel for Sean Orr                              |
| Gwendoline Allison    | counsel for Pioneer Distributors Ltd.             |
| Rod Bianchini         | on behalf of the Director of Employment Standards |

### OVERVIEW

1. Sean Orr (“Orr”) commenced these proceedings when he filed a complaint pursuant to section 74 of the *Employment Standards Act* (the “*Act*”) alleging that his former employer, Pioneer Distributors Ltd. (the “Employer”) had failed to pay him overtime wages and accrued vacation pay.
2. Following a hearing of the complaint, a delegate (“Delegate Barker”) of the Director of Employment Standards determined that Orr was entitled to payment of overtime wages, vacation pay, and accrued interest. In addition, Delegate Barker imposed two \$500.00 administrative penalties. The total found to be owed by the Employer was \$17,059.56.
3. Orr appealed the Determination pursuant to section 112 of the *Act*. He challenged Delegate Barker’s conclusion regarding the vacation pay owed to him following the termination of his employment with the Employer on September 10, 2010. Specifically, Orr claimed that the Employer should pay him vacation pay that had been accumulated in its records dating back to 2003, and not merely a sum based on the period from November 1, 2008, to his termination date.
4. On September 19, 2013, the Tribunal issued my decision, BC EST # D095/12, in respect of the appeal (the “Original Decision”). In it, I ordered that the Determination be varied to provide as follows:
  - (a) the Employer pay to Orr the balance of vacation pay accumulated by him and carried forward annually since 2003;
  - (b) the matter of the calculation of the amount owing to Orr for accumulated vacation pay carried forward annually since 2003 be referred back to the Director to be determined in accordance with the reasons in the Original Decision.
5. The Employer applied for a reconsideration of the Original Decision, pursuant to section 116 of the *Act*. In decision, BC EST # RD012/13, dated January 25, 2013, the Tribunal confirmed the Original Decision.
6. A second delegate of the Director (“Delegate Bianchini”) then set about to calculate the amount of vacation pay owed to Orr, in accordance with my reasons in the Original Decision. I now have before me Delegate Bianchini’s report dated May 24, 2013 (the “Report”), and a subsequent submission from him dated July 23, 2013. I also have submissions from counsel for Orr dated June 13, 2013, July 23, 2013, September 16, 2013, and October 3, 2013. Counsel for the Employer has provided submissions dated June 28, 2013 and September 23, 2013.
7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any

combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this aspect of the appeal can be decided on the basis of a review and consideration of the materials now before me.

## FACTS

8. In his Reasons for the Determination Delegate Barker concluded that Orr was entitled to payment of vacation pay for the period from November 1, 2008, which was the anniversary of his date of hire in 1999, until his employment was terminated on September 10, 2010. In doing so, Delegate Barker applied the provisions of subsection 80(1)(a) of the *Act*, which limits the amount of wages, including vacation pay, an employee is entitled to claim in a complaint filed with the Director to the sum that became payable in the period six months prior to termination, plus interest.
9. The sum Delegate Barker found that the Employer owed to Orr by way of vacation pay pursuant to this formula was \$13,875.71, plus interest. That principal sum included a sum of \$88.52 by way of vacation pay on the overtime wages awarded to Orr. The sum found to be owed in the Determination that was referable to vacation pay on Orr's regular wages was, therefore, \$13,787.19.
10. Delegate Barker also found that the Employer's payroll records accurately recorded a sum for accrued vacation pay for Orr dating back to 2003 that the Employer never paid to him. For the reasons noted in the Original Decision, I concluded that Delegate Barker should have determined, as a matter of law, that the conduct of the parties implied a term and condition of Orr's contract of employment that he would be entitled to payment of all of his vacation pay accumulated since 2003 when his employment was terminated.
11. In the Report, Delegate Bianchini noted that the method and calculations used on behalf of the Employer to document and carry over Orr's vacation pay entitlement were not substantially disputed. Indeed, in the Determination, Delegate Barker found that they were accurate. Relying on those records, Delegate Bianchini stated that the total accrued vacation pay owed to Orr as at the date of his termination was \$73,805.56. From that sum, he said, two deductions were to be made:
  - \$4,002.53 in respect of the vacation pay the Employer did pay to Orr upon termination; and
  - the \$13,787.19 Delegate Barker ordered the Employer to pay in the Determination in respect of vacation pay that was not referable to vacation pay on Orr's overtime wages.
12. The balance left over was, therefore, \$56,015.84, plus interest.
13. In submissions following the delivery of the Report, counsel for Orr agreed that the amount of accrued vacation pay owed by the Employer was \$56,015.84. However, he took issue with Delegate Bianchini's calculation of the interest that must be added to this sum. In the Report, Delegate Bianchini stated that the interest payable was \$1,947.51. However, no explanation of the basis for this calculation was provided.
14. In his submission dated June 13, 2013, counsel for Orr asserted that interest should accrue on the outstanding sum for vacation pay commencing on September 10, 2010, the date Orr was terminated, until the date of payment. That submission was grounded in subsection 88(1) of the *Act*, which reads as follows:
  - 88 (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of

- (a) the date the employment terminates, and
  - (b) the date a complaint about the wages or other amount is delivered to the director to the date of payment.
15. Counsel for Orr submitted that the termination date was to be employed as the commencement date for the calculation of interest because Orr filed his complaint sometime later. Employing the formula prescribed in section 25 of the *Employment Standards Regulation*, counsel for Orr calculated the interest owed to May 24, 2013, the date of the Report, at \$4,548.75. He submitted, however, that interest should continue to accrue thereafter, until the date of payment.
16. In a subsequent submission dated July 23, 2013, Delegate Bianchini acknowledged an error in his original calculation of interest. He conceded that interest should commence to accrue on the \$56,015.84 outstanding balance of vacation pay from September 10, 2010, the date Orr was terminated. He stated, however, that the time during which interest would accrue must consist of two distinct periods, namely:
  - the period from September 10, 2010, to March 27, 2012, the date of the Determination; and
  - the period from May 5, 2012, the day after the original appeal period expired, to May 24, 2013, the date of the Report.
17. Delegate Bianchini based the interest-free period from March 28, 2012, to May 4, 2012, on a reading of subsection 88(2) of the *Act*. That subsection says this:

88 (2) No interest accumulates under subsection(1) from the date a determination is made under section 79 or a settlement agreement is made under section 78 requiring payment of the wages or other amount until 38 days after that date.
18. In his July 23, 2013, submission, Delegate Bianchini provided no rationale why interest would cease to accrue as at the date of the Report. In a later submission dated September 16, 2013, counsel for Orr submitted that interest must continue to accrue after the date of the Report until all outstanding amounts are paid by the Employer.
19. Regarding the matter of the interest calculation, counsel for the Employer delivered a submission dated September 23, 2013. In it, she stated that the Employer agreed in principle with the manner in which Delegate Bianchini had calculated interest in his July 23, 2013, submission, but argued that any final sum found to have accrued must take into consideration the amount of wages, particularly vacation pay, and the interest accrued thereon, the Employer did pay to Orr following the issuance of the Determination.
20. In a reply submission dated October 3, 2013, counsel for Orr pointed out that the sum referred to in the September 23, 2013, submission from counsel for the Employer that related to vacation pay had already been accounted for in the Report when Delegate Bianchini had fixed the outstanding balance for vacation pay at \$56,015.84. To subtract it again, counsel argued, would be to deduct it twice.
21. In her submission dated June 28, 2013, counsel for the Employer also mounted three substantive challenges to Delegate Bianchini's conclusion in the Report that the Employer owed a principal sum of \$56,015.84. Those challenges may be summarized as follows:
  - Delegate Bianchini erred in calculating vacation pay on an annual basis, which had the effect of adding 6% to Orr's earnings on a yearly basis, and then a further 6% on the accrued amount of

6% in the year following. Counsel for the Employer argued that such a method of calculation provided Orr with an unintended annual increase in his compensation;

- Delegate Bianchini had no jurisdiction to re-visit the calculation of the vacation pay set out in the Determination for the period November 1, 2008, to September 10, 2010. The Employer paid the amount stated to be owed in the Determination, and neither party appealed that amount; and
- The allocation by way of vacation pay for the periods of vacation that Orr did take while employed should be calculated on the basis of his entire earnings for the applicable years, and not merely his daily base rate.

22. In a reply dated July 23, 2013, incorporating an earlier submission to Delegate Bianchini, counsel for Orr argued:

- Delegate Bianchini's calculation of outstanding vacation pay was based on the Employer's payroll records. Delegate Barker's Reasons for the Determination contained a finding that those payroll records were accurate. The Employer could not now claim that its own payroll records were inaccurate. In any event, as a matter of law, paid vacation pay does become part of the total wages for an employee in a year for the purposes of calculating vacation pay for the subsequent year;
- Orr's appeal, which resulted in the Original Decision, successfully sought a finding that he was entitled to his accumulated vacation pay from 2003 until his termination date, and not merely to October 31, 2008. That being so, Delegate Bianchini acted correctly when he calculated the vacation pay that was owed from 2003 until September 10, 2010, and then deducted the \$13,787.19 figure for vacation pay that Delegate Barker had awarded in the Determination;
- The Employer's submission that Orr's allocation for vacation pay while on vacation should reflect his entire earnings for the applicable years, and not merely a daily base rate, was flawed for three reasons. First, Orr was never paid vacation pay based on his entire earnings. Second, the Employer's calculation contradicted its own payroll records it had relied on in the proceedings that led up to the issuance of the Determination. Third, the Employer's method of calculating vacation pay in this way was expressly rejected by Delegate Barker in his Reasons for the Determination, and the Employer did not appeal Delegate Barker's decision on this point.

## ISSUE

23. Should the Determination, varied by the Original Decision, and supplemented by the Report and Delegate Bianchini's submission of July 23, 2013, be confirmed, further varied, cancelled, or referred back to the Director?

## ANALYSIS

24. I find myself in agreement with the submissions of counsel for Orr on the referral back.

25. I will examine the submissions of counsel for the Employer in order.

***The calculation of vacation pay on an annual basis***

26. Counsel for the Employer takes issue with Delegate Bianchini's calculating vacation pay on an annual basis, with the result that a percentage amount for vacation pay was added to Orr's earnings on a yearly basis, and then a further percentage amount on the accrued amount in the year following. In my opinion, this method of calculation reveals no error of law.
27. Subsection 58(1) of the *Act* sets out how vacation pay is to be calculated. The calculation reflects a percentage – either 4% or 6% depending on the length of service – of the employee's total wages “during the year of employment entitling the employee to the vacation pay”. This means that vacation pay must be calculated annually, as a percentage of the previous year's wages for the employee. It also means that for the purpose of calculating vacation pay for the subsequent year of employment, the employee's wages for the previous year will include the sum determined to be payable in respect of vacation pay for that previous year.
28. The reason for this is that the definition of “wages” in section 1 of the *Act* is broad. It does not exclude vacation pay from its ambit. Instead, the definition is inclusive. It is framed to include “salaries, commissions or money, paid or payable by an employer to an employee for work”. Vacation pay is money that is earned and payable for work. It follows that vacation pay is “wages” for the purposes of the *Act*, and in particular for the purposes of the calculation of vacation pay that is payable pursuant to subsection 58(1). There are many decisions of the Tribunal which support this conclusion (see: *Markin*, BC EST # D228/98; *B. D. Engine Brake Inc.*, BC EST # D326/01; *Unity Wireless Systems Corporation*, BC EST # RD041/05).

***The re-calculation of vacation pay owed for the period from November 1, 2008 until September 10, 2010***

29. Counsel for the Employer argues that Delegate Bianchini erred when he re-calculated the amount of vacation pay owed to Orr for the period November 1, 2008, until September 10, 2010, for the purposes of his Report. She submits that the error is one going to jurisdiction. She bases her argument on two assertions:
- Orr did not appeal Delegate Barker's Determination that the sum of \$13,787.19 for vacation pay was owed to him for the period from November 1, 2008, until September 10, 2010; and
  - The Original Decision ordered a referral back for the purposes of a calculation of the *balance* of the vacation pay owed to Orr. Counsel for the Employer submits that this means the vacation pay owed for the period prior to November 1, 2008, that was not disposed of in the Determination.
30. I decline to accept the Employer's arguments on this point.
31. It is clear from the record in these proceedings that Orr's appeal sought an award of accumulated vacation pay from 2003 until his employment was terminated on September 10, 2010. The period from November 1, 2008, to his termination date was at no time exempted from consideration during the appeal process.
32. In the Original Decision, I expressly decided that the conduct of the parties implied a term and condition of Orr's contract of employment that he would be entitled to payment of all his vacation pay accumulated from 2003 until his employment was terminated. I therefore decided that the Determination must be varied to provide that Orr was entitled to payment of the balance of the vacation pay that was accumulated by him, and carried forward in the Employer's payroll records, beginning in 2003. I ordered the referral back so that the

appropriate calculation of vacation pay that had accumulated over the entire period from 2003 until September 10, 2010, might be made.

33. When I referred in the Original Decision to the *balance* of vacation pay accumulated by Orr, the word was intended to refer to the sum remaining unpaid having regard to my decision that Orr was entitled to *all* the accumulated vacation pay reflected in the Employer's payroll records for the period from 2003 to September 10, 2010, *less* any amount that had been paid by the Employer for vacation pay prior to the date of the Original Decision.
34. Considered in that context, the \$13,787.19 that the Employer had paid after the Determination could not be construed to represent, conclusively, the sum owed to Orr by the Employer for the period from November 1, 2008 to September 10, 2010. Rather, it represented a credit in favour of the Employer that would need to be applied when it came time for the Director to perform the calculation of the accumulated vacation time owed to Orr that I ordered in the referral back.
35. This is precisely the manner in which Delegate Bianchini accounted for the payment of the \$13,787.19 in his Report. I see no error going to jurisdiction in his doing so.

***The amount of accumulated vacation pay should be reduced by the value of vacation days taken by Orr, calculated on the basis of his total income for the years in question***

36. I confess I have significant difficulty with the Employer's argument on this point. If I understand it correctly, counsel for the Employer asserts that the "value" for vacation pay paid to Orr in respect of the vacation days he did take during his tenure should reflect a *per diem* rate for vacation pay that incorporates a consideration of all his earnings, and not just his base salary. Counsel then states that such a revised calculation results in a "value" for vacation pay for the vacation days Orr actually took which significantly reduces the amount of accumulated vacation pay owed to him.
37. I agree with counsel for Orr that the fallacy in this argument is that the Employer never paid Orr any sums representing the augmented value for vacation pay contemplated in the Employer's revised calculations. What appears to have happened is that the Employer attributed, *ex post facto*, a portion of the regular earnings paid to Orr for the period in question to the vacation pay it says would otherwise have been paid to him for his vacation time taken, and so it must now be deducted.
38. The *Act* does not permit vacation pay to be included in the regular income of an employee earned pursuant to the terms of a contract of employment, either by way of salary, or as part of an hourly or unit wage rate. A reason for this is that if vacation pay were to be included in an employee's regular compensation for work performed, it would create a potential for the employee's regular wages to be reduced as vacation entitlement grows, at least in circumstances where the overall amount the employer pays to the employee remains the same (see: *Markin, supra; Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)* (1994) 99 B.C.L.R (2d) 37). Nor can vacation pay be included as part of an amount payable as commission (see: *Atlas Travel Service, supra; Re Ogopogo Boat Sales Inc.*, BC EST # D099/11). Rather, the *Act* is a scheme that requires an employer to pay a sum for vacation pay that is in addition to the ordinary compensation that the employee receives for work performed. The Employer's payroll records do not disclose any additional sums paid to Orr in respect of vacation pay. The only occasions on which vacation pay was paid to Orr was when his base salary was continued during the times that he actually took vacation.

39. I also agree with counsel for Orr that this method of calculating the amount of vacation pay owing to Orr contradicts the Employer's own payroll records. Further, Delegate Barker accepted the Employer's payroll records as being accurate for the purposes of the Determination.
40. It follows from what I have said that I accept Delegate Bianchini's calculations regarding the balance of vacation pay accumulated by Orr and carried forward by the Employer from 2003 until his termination on September 10, 2010. The amount of vacation pay that is payable is, therefore, \$56,015.84, plus interest.
41. I accept the argument of counsel for Orr that interest accrues at the prescribed rate(s) on the \$56,015.84 from September 10, 2010, until the date it is paid, with the exception of the 38 day period from March 28, 2012, to May 4, 2012. Such a conclusion comports with the plain language of subsections 88(1) and (2) of the *Act*. There is no need to deduct the \$13,787.19 again, as suggested by counsel for the Employer, because the \$56,015.84 on which interest will accrue does not include this sum.

### **ORDER**

42. Pursuant to section 115 of the *Act*, I order that the Determination be varied further to provide that the Employer pay to Orr the balance of his accumulated vacation pay in the amount of \$56,015.84, plus interest at the prescribed rate(s) calculated from September 10, 2010, until the balance is paid, with the exception of the 38 day period from March 28, 2012, to May 4, 2012, during which period no interest will accrue.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**