Employment Standards TRIBUNAL

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.: 2012A/50

DATE OF DECISION: September 19, 2012

DECISION

SUBMISSIONS

Alexander D. Mitchell	counsel for Sean Orr
Gwendoline Allison	counsel for Pioneer Distributors Ltd.
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Sean Orr ("Orr") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Orr challenges a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") issued on March 27, 2012.

2. The Determination followed a hearing of a complaint filed by Orr, alleging that his former employer, Pioneer Distributors Ltd. (the "Employer") had contravened the *Act* when it failed to pay him overtime wages and accrued vacation pay.

3. The Delegate determined that Orr was entitled to payment of $1,475.38 in overtime wages, $13,875.71 for vacation pay, and accrued interest of $708.47. In addition, the Delegate imposed two $500.00 administrative penalties. The total found to be owed by the Employer was, therefore, $17,059.56.

4. Orr appeals the Delegate's conclusion regarding his entitlement to accrued vacation pay, and hence the amount found payable under that heading in the Determination.

5. I have reviewed the Determination and the Delegate's Reasons for it, Orr's Appeal Form, the submissions of his counsel, the record delivered to the Tribunal by the Director pursuant to section 112(5) of the *Act*, a submission of the Director, and the submission of counsel for the Employer.

6. 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 and oral hearings when it decides appeals.

7. Orr did not request an oral hearing. He submits that the appeal can proceed by way of written submissions.

8. The Employer asserts that the principal argument presented on behalf of Orr on this appeal, that the Employer's accountant had actual or ostensible authority to bind the Employer in its dealings with Orr, was not developed by Orr at the hearing before the Delegate. That being so, it submits that if it is to be presented now, there should be an oral hearing to consider the point.

9. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral hearing. The submissions of the parties are extensive, and thorough. There is no sign that the parties will be deprived of the opportunity to state their cases fairly unless there is an oral hearing. The issues to be considered do not, in my view, fall to be decided having regard to disputed matters of fact or concerns relating to the credibility of witnesses.

10. This case turns on the application of legal principles to the facts as found by the Delegate. The Employer has not pointed to any version of those facts that might be elicited that could lead to a different result, once the correct legal principles are applied.

11. In my opinion, an oral hearing would serve no purpose apart from delaying the timely adjudication of the appeal.

FACTS

12. The Employer operates a business which purchases and sells products for cabinet and kitchen manufacturers. It employed Orr from November 1, 1999, until September 10, 2010.

13. Orr was hired as a sales representative, but he performed other duties during his tenure with the Employer, including warehousing tasks, delivery work, collections, and office administration. He also looked after some accounting functions when the Employer's accountant was on vacation, or when there was no accountant on staff. He was, therefore, regularly exposed to the payroll accounting records kept by the Employer.

14. When Orr was hired, neither he nor the Employer discussed his entitlement to accrued vacation pay. At no time does it appear that the parties entered into any written agreements on the subject.

15. At the time of his departure in 2010, Orr claimed payment of vacation pay dating back to 2003, in the amount of $73,805.56. Orr asserted he had an entitlement commencing at that time based on Excel spreadsheets prepared by the Employer's accountant ("Ms. N."), who began to track the vacation pay being accumulated by Orr and other employees when she commenced her duties in 2002. These records showed the amounts of vacation pay credited to Orr on an annual basis, and the unpaid balances that were carried forward to the following year.

16. At the hearing, Ms. N. testified that she did not have the authority to bind the Employer to terms and conditions of employment with the Employer's employees. She also stated, however, that there was no manual tracking of vacation pay when she began work with the Employer in 2002, and so she designed the spreadsheets and commenced to track vacation pay, and carry unpaid portions forward, in accordance with what she understood to be the Employer's statutory obligations.

17. Ms. N. acknowledged that the Employer's sole principal ("Mr. K.") did not instruct her to do this. Indeed, Ms. N. did not seek Mr. K.'s advice, or even inform him, when she commenced to track vacation pay in this way. She said that there was no reason to do so. Mr. K.'s approach to the Employer's payroll accounting was "hands off." At the same time, the spreadsheets were in the Employer's computer system, and could be reviewed by anyone.

18. The practice of accruing vacation pay continued throughout Ms. N.'s tenure, which also ended in 2010. During the times that Ms. N. was absent from work (she took a leave in 2004) her replacements as accountant continued to enter accumulations of vacation pay on the spreadsheets she had created.

19. Mr. K. denied any knowledge of Ms. N.'s recording of accumulated vacation pay for the Employer's employees until another accountant, hired on a temporary basis, informed him about the practice in March 2010. Mr. K. also learned at that time that the spreadsheets indicated Orr had accumulated a balance of $68,246.73 for vacation pay. Despite this notification, the spreadsheets continued to be maintained in the same way, with accumulated vacation pay being recorded, until Orr was terminated in September 2010. At that time, the Employer paid Orr $4,002.55 for vacation pay. The Employer denied, therefore, that Orr was

entitled to payment of the accumulated vacation pay that had been noted on the spreadsheets by Ms. N., her replacements, and her successors.

20. Orr was aware for some time that his accumulated vacation pay was being recorded on the spreadsheets. On various occasions he asked Ms. N. if he could see his accrued vacation pay amount, and Ms. N. would show it to him. He testified that he believed Mr. K. was also aware his vacation pay was accruing because Mr. K. owned the business and he expected Mr. K. to know about it. However, he could not say with certainty whether Mr. K. knew about it or not. Orr did not discuss the matter with Mr. K. until shortly before his employment was terminated. At that time, Mr. K. told Orr that vacation pay should not have been accruing.

21. Orr claimed that a reason he did not raise the issue of accrued vacation pay with Mr. K. was that he believed the money might be used to fund a purchase by him of a share in the Employer's business. He also thought it could continue to accrue, as he was not contemplating quitting, or being asked to depart. Finally, he understood he was entitled to the sums being accrued at least in part because other employees had received the accrued amounts when they had left the Employer's employ.

22. At the hearing, Orr argued that it was an implied term of his employment contract that he would be paid his accumulated vacation pay.

23. The Employer argued that there was no agreement permitting vacation pay to be carried forward from previous years, and that Ms. N. took it upon herself to note accumulations of vacation pay without the knowledge of Mr. K. Accordingly, only the vacation pay entitlement calculated pursuant to the relevant provisions of the *Act* were payable to Orr.

24. In his Reasons, the Delegate, correctly, referred to sections 57 and 58 of the *Act*, dealing, respectively, with entitlement to annual vacation and vacation pay. Those sections read as follows:

> 57 (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.
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> (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.
>
> 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.

25. The Delegate found that Orr regularly took fewer vacation days than his entitlement warranted, and that he was paid vacation pay for those days by means of continued payment of his base salary while absent. However, he did not receive any vacation pay based on his commission income.

26. The Delegate therefore determined that Orr was entitled to be paid more vacation pay than he had actually received when he was terminated. However, the Delegate declined to accede to Orr's argument that he should receive, in addition, payment for the vacation pay that had accumulated since 2003, and which had been carried forward on Ms. N.'s spreadsheets since that date. Rather, the vacation pay owed should only be calculated, pursuant to section 58, from November 1, 2008, the anniversary of Orr's start date, to his termination date in September 2010. In other words, only vacation pay that had accumulated within the window established by section 80(1)(a) of the *Act* was recoverable. Section 80(1)(a) is a provision in the *Act* which limits the amount of wages, including vacation pay, an employee is entitled to claim in a complaint filed with the Director. It reads as follows:

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.

27. Pursuant to section 58, Orr earned vacation pay in each year commencing on the anniversary date of his hire, November 1, 1999. It was payable to him during the following year, either at the time he took vacation, or when his employment ended. When Orr was dismissed on September 10, 2010, he was, therefore, entitled to the payment of unpaid vacation pay under sections 58 and 80(1)(a) for the period from November 1, 2008, to September 10, 2010.

28. The legal rationale the Delegate provided for this conclusion was that Mr. K. never expressly agreed to the accumulation of vacation pay for Orr, Ms. N. was not an agent for the Employer for the purposes of establishing terms and conditions of employment for Orr, and so the Employer should not be bound to pay for any portion of Orr's accumulated vacation pay outside the bounds of what was statutorily required on an application of sections 58 and 80(1)(a).

29. Put simply, the obligation to pay accumulated vacation pay had never become a term of Orr's contract of employment with the Employer. Orr's belief that he was, in fact, entitled to accumulated vacation pay was a mistake, and Mr. K.'s silence on the matter after he discovered what the spreadsheets said was not the same as his acknowledging on behalf of the Employer that an entitlement to accumulated vacation pay existed.

ISSUE

30. Did the Delegate err in law when interpreting Orr's contract of employment with the Employer on the issue of accumulated vacation pay?

THE TRIBUNAL'S STATUTORY JURISDICTION

31. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

32. Section 115(1) of the *Act* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
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> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

THE POSITIONS OF THE PARTIES

33. The positions of the parties are outlined in detail in the lengthy submissions I have received from their counsel. I do not propose to reproduce all the arguments they have made. Rather, I will refer to those parts of their submissions which I believe are directly related to the issue I have decided is fundamental to the outcome of this appeal.

34. Orr submits that the Delegate erred in law when he interpreted his contract of employment in a manner that excluded an obligation on the part of the Employer to pay him vacation pay which had accumulated to his credit, but which was not captured by a strict application of sections 58 and 80(1)(a) of the *Act*.

35. On Orr's view of the law, the fact that Ms. N., and the other accountants retained by the Employer, carried his and other employees' unpaid vacation pay forward annually had the effect of creating a binding implied term of his employment contract with the Employer that entitled him to payment on termination of the whole of the vacation pay that had been accumulated from 2003 until 2010, regardless of the extent of the knowledge of Mr. K. of the practice. This is so, he argues, because employers are bound by the decisions of their employees, made within the scope of their actual and/or ostensible authority. If this were not so, it would lead to the absurd conclusion that employers could avoid all contractual obligations to their employees simply by asserting that they were unaware of what their agents were doing.

36. More specifically, Orr says that the Employer delegated responsibility for the administration of payroll, including vacation pay, to its accountants, including Ms. N., her replacements, and successors. For a period of nearly ten years prior to Orr's dismissal, the Employer's accountants carried forward, and therefore accumulated, the unpaid vacation pay for the Employer's employees, including Orr. Mr. K. relied upon the accuracy of the payroll records kept by the firm's accountants, as he signed cheques to departing employees other than Orr based upon them, including cheques incorporating payments for accumulated vacation pay.

37. In March 2010 Mr. K. became subjectively aware that Orr's vacation pay was being accumulated, and that the accumulated sum amounted to $68,246.73, yet the practice continued for several months thereafter, until Orr

was dismissed. Orr knew that his vacation pay was being accumulated in the payroll records of the Employer. Until he was dismissed, no one informed him that the payroll records were inaccurate, or that no vacation pay beyond the amount due to him on a strict application of sections 58 and 80(1)(a) of the *Act* would be paid to him.

38. In light of the representations of the Employer implicit in this course of conduct, Orr's position is that the Employer's accountants must be seen to have had either the actual or ostensible authority to bind it to pay Orr all his accumulated vacation pay when his employment was terminated.

39. Orr argues further that it is section 58(3) of the *Act* which required that the whole of his accumulated vacation be paid when he was terminated. Since the vacation pay became due and payable at that time, it fell within the time limit for wage recovery provided for in section 80(1)(a) of the *Act*.

40. Orr asserts that he earned the vacation pay that had accumulated, and it was money that the Employer should have paid to him, but did not. A decision which deprives Orr of the vacation pay earned by him throughout his long period of service would have the undesirable effect of condoning the Employer's chronic failure to fulfill its obligations to Orr under the *Act*.

41. In the result, Orr asserts that the Determination should be varied to provide that he is entitled to be paid a further $55,927.32 as wages for unpaid vacation pay, plus interest, over and above the $4,002.53 that the Employer paid him on termination, and the $13,875.71 the Delegate awarded to him in the Determination.

42. The Employer submits, accurately I think, that the principal issue on the appeal is whether the Delegate erred in law in finding that there was no employment agreement between it and Orr which obligated the Employer to carry forward and accumulate unpaid vacation pay for Orr indefinitely.

43. The Employer argues that the Delegate's finding that no such agreement had been made, either through the agency of Mr. K., or the alleged agency of Ms. N., was a finding of fact, and so it is not a proper subject for an appeal to this Tribunal under the *Act*. The Employer says that the Delegate applied the correct legal tests to the facts as found.

44. If the appeal is successful, and the Tribunal determines that Orr is entitled to payment of all or part of the vacation pay that was carried forward from 2003, the Employer asserts that it would undermine a fundamental purpose of the *Act*, which is to promote open communication between employers and employees. Such a result, it says, would give permission to employees to arrange their affairs so as to maximize employment benefits payable without the knowledge of their employers.

45. With respect to this point, the Employer also submits that Orr remained silent about the vacation pay he was accumulating when communicating with Mr. K., yet he was vocal about other compensation issues. The Employer alleges that the reason for Orr's reticence on the vacation pay issue, and his assertiveness on other matters, was that he knew Mr. K. was ignorant of the fact that Ms. N. and the Employer's other accountants were accumulating vacation pay for him and that if Mr. K. became aware of it, he would put a stop to it.

46. In a reply submission, Orr submits that he was not the one who carried forward his vacation pay so as to create the entitlement he seeks in these proceedings. Rather, it was the representatives of the Employer. Moreover, the vacation pay that accumulated was not a windfall. It was earned by him over the years, yet he did not receive it.

47. Orr submits further that the Employer is bound by the actions of its agents in the administration of its payroll functions. The fact that Mr. K. lacked specific knowledge of the accumulation of annual vacation pay on the payroll records of the Employer for the major part of Orr's period of employment is, therefore, of no moment. The reason for this is that Mr. K. was himself an agent of the Employer, and it is the conduct of the Employer, represented in the actions of its agents, that is the telling consideration, not what one of them may have known or thought at any given time.

48. In terms of Mr. K.'s actions in particular, the "ignorance defence" is especially unconvincing, because Mr. K. was the sole principal of the Employer, and had ready access to the payroll records had he decided to review them. Moreover, there can be no merit to an argument that either Orr, or Ms. N., or both, kept the fact that vacation pay was being carried forward from Mr. K. There is nothing in the Delegate's recitation of the evidence to suggest this, and the Delegate's analysis did not rest in whole or in part on any such finding.

49. Orr argues that it was Mr. K.'s duty, as the sole principal of the Employer, to ensure that the Employer was complying with its obligations under the *Act*. It was not for Orr to confirm with Mr. K. that the Employer was doing so. It was the Employer's statutory obligation to ensure that Orr received the vacation pay to which he was entitled. Orr submits that the Employer failed to meet its obligations, and that it is Mr. K., the principal agent for the Employer, who is responsible for that failure, not Orr.

50. Orr argues further that the appeal is not concerned with alleged errors of fact. Rather, Orr alleges that the Delegate applied an incorrect legal analysis to the facts as found. Specifically, Orr argues that the Delegate erred in law in concluding that the carrying forward, and accumulating, of vacation pay for him on the payroll records of the Employer did not bind it because Mr. K. lacked subjective knowledge of the practice.

ANALYSIS

51. Each of the parties has raised preliminary objections in respect of certain aspects of the submissions of the other.

52. Orr asserts that I should decline to consider the submission of the Employer in response to his appeal material as it was delivered to the Tribunal one day late. Rule 15(1) of the Tribunal's *Rules of Practice and Procedure* (dated July 2, 2008) required that a respondent file its response with the Tribunal within the allowed time. Rule 15(2) stated that if in advance of the stipulated time for the filing of a response the respondent provides the Tribunal with a good reason why it will be unable to meet the deadline, the Tribunal may extend the time for the filing of the response.

53. It does not appear that the Employer complied with Rule 15(2).

54. Notwithstanding this, I am not disposed to ignore the submission delivered by the Employer. Rule 1(1) stated that the Tribunal "may" exercise any power under the rules. Conversely, Rule 1(4) provided that the Tribunal "may waive" any rule. The Part I Introduction to the Rules stated as one of their purposes the fair and efficient resolution of appeals filed with the Tribunal.

55. In the circumstances of this case, I cannot accept that my refusing to consider the Employer's submission would contribute either to a fair or to an efficient resolution of this appeal. The Employer's submission is comprehensive, and helpful. Orr has had an opportunity to respond to it in detail, and has done so. There is no suggestion that Orr was prejudiced by a day's delay in the delivery of the Employer's submission.

56. The Employer objects to Orr's tendering a statutory declaration sworn by him delineating some of the evidence tendered at the hearing, to which the Delegate did not specifically refer in his Reasons. I agree with Orr that the evidence tendered at the hearing forms part of the record, and if it is not transcribed or preserved by some other means, it may be proven for the purposes of an appeal by means of an affidavit or statutory declaration (see *C-O-E Posscan Systems Inc.*, BC EST # D155/00 at paragraph 19*)*.

57. The Employer further submits that if the statutory declaration of Orr is admitted, the Employer wishes leave to submit a declaration in reply. However, leave was unnecessary. As noted above, a statutory declaration may be submitted. If the Employer believed that a statutory declaration in reply would be helpful, it ought to have delivered one along with its submission on the appeal. The Employer was required to make its full submission, it did not have any permission from the Tribunal to do otherwise, and it was not entitled to unilaterally decide that the Tribunal would adjudicate its submission in stages. I digress to say that the Employer does not argue that the contents of the statutory declaration supplied by Orr are inaccurate. Nor does it state what other evidence in a statutory declaration of its own it would be appropriate for the Tribunal to consider in order to decide the issues presented in the appeal.

58. The Employer also asserts that Orr's argument on appeal that Ms. N. had actual or ostensible authority to bind the Employer was not presented to the Delegate. If, then, it is to be considered on appeal, the Employer says there should be an oral hearing to canvass it. For the reasons set out earlier in this decision, I disagree that an oral hearing is required in this instance.

59. Furthermore, I agree with Orr that new legal arguments based on the facts found by the Delegate are permissible on an appeal. In his submission in reply, Orr refers to the following comments of the Court of Appeal in *Sulz v. British Columbia (Minister of Public Safety and Solicitor General)* 2006 BCCA 582:

> A legal argument may be raised and considered for the first time on appeal, if no new evidence is necessary to properly consider it; considering it would not result in procedural prejudice to the other party; and not considering it would result in an injustice ...

60. I find I must also decline to accept one of the other submissions made by the Employer, and referred to above. The Employer submits that Orr did not raise the issue of vacation pay being carried forward because he knew that Mr. K. was unaware of it, and that Mr. K. would put a stop to it if he gained knowledge of it. Nowhere in his Reasons does the Delegate make a finding that Orr knew Mr. K. was unaware that vacation pay was being carried forward, at least until a point very shortly before he lost his employment. The evidence referred to by the Delegate was to the effect that Orr believed Mr. K. knew that vacation pay was accruing, but could not say definitively whether Mr. K. did know, or not, presumably because he never discussed the matter with him. The Delegate also stated that Orr operated on the assumption that there was a contractual term entitling him to the vacation pay that had been carried forward, but that he was mistaken. In my view, this evidence, and the Delegate's conclusions, do not lead to an inference that Orr was aware that Mr. K. did not know that vacation pay was being accumulated on the payroll spreadsheets.

61. I turn now to a discussion of the matters I believe are determinative of the outcome in the appeal.

62. The Delegate's legal rationale for the part of his Determination which dealt with the accumulated vacation pay is, I believe, captured in the following excerpts from his Reasons:

> I find Mr. Orr is not entitled to the accrued vacation pay expressed on Pioneer's accounting records as I find there was no agreement between Mr. Orr and Pioneer to indefinitely bank Mr. Orr's unpaid vacation pay. Although Ms. [N.] tracked the amounts owing, this was not done pursuant to an established condition of employment.

> ...
>
> In summation of this portion of my analysis I find the records do not establish that Mr. [K.] was, on a balance of probabilities, of the understanding all employees were entitled to indefinitely carry forward unpaid vacation pay and have it paid out on request or upon termination of employment. Ms. [N.'s] testimony firmly establishes Mr. [K.'s] approach to Pioneer's payroll accounting was "hands off" and I cannot find Mr. [K.] had any knowledge of Pioneer's payroll functions independent of what Ms. [N.] or the other accountants specifically told him.

63. These statements reveal that the Delegate considered that an express agreement between the Employer and Orr was required before the latter would become entitled to payment of his vacation pay accumulated outside of the period contemplated by a strict application of sections 58 and 80(1)(a) of the *Act*. It is also clear that the Delegate believed such an express agreement to accumulate vacation pay indefinitely could only be formed if Mr. K. was subjectively aware that vacation pay was being carried forward during the period the Employer's accountants were recording it in that fashion.

64. In reaching these conclusions the Delegate relied on the decision of the Tribunal in *Patrick O'Reilly*, BC EST # RD165/02. *O'Reilly* was a case where the Tribunal decided that the complainant should be paid accumulated vacation pay that had been carried forward for several years, and which would not have been payable to the complainant upon a strict application of the statutory provisions relating to vacation pay appearing in the *Act*, absent a pertinent term in his employment contract establishing it as a benefit to which the complainant was entitled. The Tribunal found that the parties had expressly agreed that the complainant would be entitled to his "banked" vacation pay. For that reason, the Tribunal decided that the complainant should receive it. It is, therefore, one of several decisions in which the Tribunal has held that the Director may enforce as payment of "wages" the terms of an employment contract even if it provides for benefits that are greater than those contained in the *Act*.

65. In his Reasons, the Delegate seized upon the specific facts of the decision in *O'Reilly* as support for the legal proposition that the employer's knowledge of and consent to the accumulation of vacation pay was necessary before a binding obligation to pay it to an employee could be identified. That, however, is not what *O'Reilly* decided. There is nothing in the decision from which it can be concluded that the Tribunal decided it was *only* an *express* agreement to "bank" and pay accumulated vacation pay that would be binding on an employer. Indeed, the Tribunal in that case stated that its interpretation of the express bargain the parties had made was fortified, in addition, by their conduct.

66. I have no doubt that when parties act on subjective intentions in a way that results in a consensus, they will have laid compelling groundwork for a conclusion that they have created a binding legal contract. However, the converse is not correct. It is not the law that there can be no binding contract absent a finding that the parties have reached a consensus based on the realization of their subjective intentions alone. If that were the case, there would be many valid contracts that would never be enforced.

67. The author of *Canadian Contractual Interpretation Law*, LexisNexis 2007, says this at paragraph 2.4.1:

> It is a fundamental precept of the law of contractual interpretation that the exercise is objective rather than subjective....
>
> The reason for the objective approach to interpretation is grounded in the purpose of the contract law, which is to protect reasonable expectations. Thus the focus must be on what a reasonable person would infer from the words and their context, as opposed to what either of the parties subjectively understood or intended.

68. Moreover, there are special rules that are to be applied to the interpretation of employment contracts. This is so at least in part because employment contracts tend to be for an indefinite term. The relationship between the parties is ongoing. The terms and conditions of the relationship may, and often do, change over time. Frequently, the changes are documented imperfectly, or not at all. It is the parties' conduct, therefore, which will often determine the nature and scope of their contractual obligations.

69. As stated by Anderson J. in *Campbell v. MacMillan Bloedel Industries Ltd.* [1978] 2 WWR 686 at 690-691:

> In my view, it is not correct to compare the fluid relationship that exists between master and servant to other commercial contracts. The relations between master and servant are, at best, uncertain and change from time to time in accordance with circumstances and the conduct of the parties. The court, as a general rule, when called upon to interpret an ordinary commercial contract is bound to concern itself with the terms of the agreement as they are spelled out therein, and cannot go outside the four corners of the agreement. Such is not the case with an agreement made between master and servant. Such an agreement is not reduced to writing and, moreover, the terms of the bargain between the parties are determined by the conduct of the parties during the term of employment, and not by conscious negotiation and agreement between the parties... The terms of the contract may vary from day to day or from year to year... Status and change of status are matters of degree and, again, depend on the facts of each particular case. The terms of the contract are not express (or consciously spelled out by the parties), but are implied by the court, by reference to the complete history of the employer-employee relationship.
>
> In other words, the court does not apply the principles of contract law as though in a vacuum, but reviews the history of the relations between the parties in its entirety so as to arrive at a rational solution in each particular case. The relationship of master and servant in the modern corporate world cannot be determined as though that relationship consisted of a single contract with fixed terms and conditions.

70. The Tribunal has stated that the interpretation of an employment contract is a question of law (see *Grant Howard*, BC EST # D011/07, citing *Director of Employment Standards (Re Kocis)* BC EST # D331/98).

71. When the Delegate based his legal conclusion on Mr. K.'s subjective lack of knowledge that vacation pay was being carried forward, he failed to consider the reasonable expectations of Orr based on the conduct of the Employer as evidenced, specifically, in the manner that the Employer's accountants documented accumulated vacation pay on the firm's payroll records. In so doing, the Delegate misapplied the relevant law, and so he committed an error of law.

72. I do not disagree with the Delegate's finding, based on Ms. N.'s testimony, that she had no authority to bind the Employer to terms and conditions of employment for the firm's employees. What that statement refers to, however, is whether Ms. N.'s contract with the Employer contemplated that she would have actual authority to bind it to Orr, among others. Clearly, she did not have the actual authority to do so.

73. Having made that determination, however, the Delegate went on to say that Ms. N. was not, therefore, an agent of the Employer through whom conditions of employment were created. The difficulty I have with this statement is that it was based on the Delegate's conviction that the agreement with Orr relating to accumulated vacation pay had to be express, and it had to involve a subjective intention on the part of Mr. K. That conviction was in error, because it ignored the effect that the practice of accumulating unpaid vacation pay, carrying it forward, and documenting the practice on the payroll records of the Employer might have on the reasonable expectations of Orr.

74. It is trite to say that corporations can only act through agents. The statutory provision that is applicable appears as section 146(1) of the *Business Corporations Act* SBC 2002 c.57, the relevant portions of which read as follows:

> 146 (1) Subject to subsection (2), a company ... may not assert against a person dealing with the company, ...that
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> ...
>
> (c) a person held out by the company as a director, officer or agent
>
> (i). is not, in fact, a director, officer or agent of the company, as the case may be, or
>
> (ii). has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent,
>
> (d) a record issued by any director, officer or agent of the company with the actual or usual authority to issue the record is not valid or genuine...
>
> (2) Subsection (1) of this section does not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the company, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection.

75. In *Canadian Laboratory Supplies Ltd. v. Engelhard Industries of Canada Ltd.* (1980) 97 DLR (3d) 1, at 24, Estey J., speaking for the majority of the Supreme Court of Canada, made the following comments regarding the delegation of authority by corporations to agents:

> Neither law nor commerce has apparently found a practical alternative to the delegation of the corporate authority to agents, its employees. In undertakings of all but the smallest proportions, division of authority according to function is as necessary as it is commonplace. The day of the proprietor and the one-man operation has, for better or for worse, long departed from the main stage of business, and the corporate vehicle with attendant business structures has taken over much of the commerce of the country. The law has altered old rules and developed new ones to facilitate the conduct of trade on this larger scale. Obviously some employee must be placed in charge of buying, another of selling, another of financing, and another in charge of accounting, and so on, and each must have the authority necessary to deal responsibly with his counterpart in other trading and governmental organizations.

76. While Ms. N. and the Employer's other accountants may not have been hired with the actual authority to determine the terms and conditions of the employment of the employees of the Employer, there is no dispute that they were authorized to administer the payroll accounting functions of the firm. This is made abundantly clear in the excerpt from the Delegate's Reasons reproduced above, where the Delegate states that Mr. K.'s approach to the Employer's payroll accounting was "hands off." The only plausible inference to be drawn from this finding is that Mr. K. relied on Ms. N. and her counterparts to accurately represent the interests of the Employer within the limits of their function.

77. One of the principal duties within the Employer's payroll accounting function was to ensure that the payroll records of the Employer were accurate. Indeed, the obligation to keep accurate records is specifically mandated in section 28 of the *Act*, including, in section 28(1)(i), "the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing."

78. It is important to remember that the statutory obligation to keep accurate payroll records is an obligation of the employer, and not the employee. It was, therefore, an obligation of the Employer to ensure that its records were accurate. It was not Orr's obligation. Therefore, if there was a mistake in the Employer's payroll records, it was not Orr's mistake, but the Employer's at least, as here, where there is no evidence that Orr knew the records were inaccurate, or misleading.

79. As regards the Employer's description in its payroll records relating to the vacation pay it was documenting it owed to Orr, the Employer failed to keep accurate records. In so doing, it misrepresented to Orr what the Employer's position was regarding Orr's vacation pay entitlement. This is so because there could be no rational explanation for the Employer's continuing to record vacation pay carried forward annually in an accumulated amount that far exceeded the amount recoverable by Orr on a strict application of sections 58 and 80(1)(a) of the *Act* unless the Employer was representing in its records that vacation pay accumulated in this fashion was a benefit to which Orr was entitled pursuant to the terms of his employment contract.

80. For the reasons I have explained, I do not believe it was unreasonable for Orr to expect that the Employer's payroll records, and in particular the records relating to accumulated vacation pay, would accurately reflect the position of the Employer. Nor do I believe there should have been anything suspicious about the notation of accumulated vacation pay on Orr's payroll records kept by Ms. N. and the other accountants employed by the firm. Orr was entitled to vacation pay, and he had not been paid what his entitlement provided, as he should have been. The reason was that he had not taken enough vacation. But again, section 57(2) of the *Act* makes it clear that it was the Employer's obligation to ensure that Orr took proper vacations, and was paid his vacation pay accordingly.

81. Given the history of the employment relationship, the Employer's statutory obligations to ensure that employees took vacations, and the information that was appearing on his payroll records, it was, I believe, reasonable for Orr to infer that his unpaid vacation pay was being accumulated, and would be paid to him at some point in the future. The fact that Mr. K. was unaware that the representations contained in the Employer's payroll records were not in accordance with the true intentions of the Employer, and that Ms. N. and the firm's other accountants were communicating information that amounted to a misrepresentation of the Employer's intentions, is beside the point. In my view, the Employer must be taken to have held them out as persons on whom Orr could rely for information representing the Employer's position regarding the terms and conditions of his contract of employment. That being so, the representations by their conduct they made to him regarding his vacation pay entitlement are binding on the Employer.

82. In Fridman's *Canadian Agency Law*, second edition, LexisNexis 2012, the following appears:

> Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that there is reliance upon such belief, cannot afterwards be heard to say that the true state of affairs was far different, if to do so would involve the other person suffering some kind of detriment. Applied to agency this means that a person who by words or conduct has allowed another to appear to the outside world to be his or her agent, with the result that third parties deal with that other as the first person's agent, cannot afterwards repudiate this apparent agency, if to do so would cause injury or loss to such third parties ...
>
> Everything depends upon (a) the way the one considered the principal makes the situation appear to the outside world, in the light of what is usual and reasonable to infer, and (b) the reliance put by third parties upon the appearance of authority of the person with whom they deal.

83. Through a combination of the actions of Mr. K., Ms. N., and each of the Employer's other accountants while employed by it to act as an agent of the Employer within the scope of his or her usual and customary authority, Orr was led to believe that he would enjoy as an employment benefit the accumulation of unpaid vacation pay carried forward on an annual basis. That belief was incorrect. However, contrary to what the Delegate concluded, the consequences of the mistake should, I believe, be borne by the Employer, not Orr.

84. Orr relied on the Employer's representations regarding vacation pay contained in the payroll records, to his detriment, in at least two ways. First, he appears to have refrained from taking vacation days that he might otherwise have enjoyed if he had been made aware that he would have to use his vacation days in order to

receive vacation pay, and if he did not, he would lose any accumulated vacation pay benefits that were not captured by the application of sections 58 and 80(1)(a) of the *Act*. Second, he appears to have continued to work for the Employer under the misapprehension that his vacation pay was being carried forward, at least in part because he viewed it as an asset, generally, but also one that might be employed to assist him in purchasing an ownership interest in the Employer.

85. It follows from this discussion that I believe the Delegate should have decided, as a matter of law, that the conduct of the parties implied a term and condition of Orr's contract of employment with the Employer that he would be entitled to payment of all his vacation pay accumulated since 2003 when his employment was terminated.

86. In the result, I have decided that the Determination must be varied to provide that Orr is entitled to payment of the balance of the vacation pay that was accumulated by him, and carried forward, beginning in 2003.

87. Orr has submitted that he is owed the sum of $55,927.32 representing the balance of his unpaid vacation pay. Orr argues that this amount may be calculated having regard to the payroll spreadsheets for the Employer which appear in the record delivered to the Tribunal by the Director. I have reviewed the spreadsheets, and I must say that it is not obvious to me precisely how the $55,927.32 number was calculated. As it is the primary function of the Director to find the facts in respect of complaints, I believe that it is necessary to refer the matter of the calculation of the amount of the balance of vacation pay owed to Orr back to the Director.

ORDER

88. Pursuant to section 115 of the *Act* I order 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 this decision.

Robert E. Groves
Member
Employment Standards Tribunal