

An appeal

- by -

Lu Verticchio
("Lu Verticchio")

- 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

ADJUDICATOR: W. Grant Sheard

FILE No.: 2000/730

DATE OF DECISION: February 27, 2001

DECISION

APPEARANCES:

Lu Verticchio, the Employee	on his own behalf
Linda M. Howey	on behalf of the Employer, Shell Oil
Linda Naso	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by the Employee, Lu Verticchio, pursuant to Section 112 of the Employment Standards Act (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on September 28, 2000. In this appeal the employee claims that “Results Pay” of \$5,473.00 under the employer’s “Baseplus Pay System” is due to him as wages earned and accrued prior to his resignation from the Employer company, Shell Oil (“the Employer”). The Employer says that the money claimed by the Employee is not “wages” as defined by the Act and is not due to him as he had resigned by the time these funds were paid to other employees, thus failing to satisfy a condition of eligibility that he be employed at the time the funds are paid. The Director’s Delegate ruled in her determination that the Employee did not meet the requirement, which had been clearly communicated to him prior to his resignation, that he must remain employed by the Employer at the time the Results Pay bonus was paid out and, therefore, he was not eligible for it.

ISSUE

Was the “Results Pay” earned and payable such that it became wages as defined by the Act?

ARGUMENT

The Appellant Employee’s Position

In written submissions filed with the appeal form on October 20, 2000 and a letter dated December 12, 2000 (responding to the Delegate’s and Employer’s submissions), the Employee’s position is that the Results Pay is an incentive related to the performance of the employee and/or the Employer and, as such, is “wages”. Further, he submits that the Employer’s requirement that, to be eligible to receive this bonus, (that an employee must be employed at the time the Results Pay is paid) is a waiver of the provisions of the Act and, pursuant to section 4 of the Act, is of no effect.

The Employer's Position

In a letter dated November 20, 2000, Ms. Howey submits that:

1. The amount claimed never became payable by the Employer (because he was no longer employed as required by the Employer) so could not be classified as “wages” or subject to a waiver.
2. The amount claimed was not wages because it was not for work done or an incentive related to hours of work, production, or efficiency.
3. The condition of eligibility to receive the payment (that the person continue in the employment at the time of the payout) was not met and so nothing is due.

The Director's Position

The Director's delegate stated in the Determination that the Employee did not meet the requirement that he remain in the Employer's employment at the time the Results Pay was paid out and so he was not eligible to receive it. In written submissions on the appeal dated October 31, 2000 the Director's delegate responded to one of the Employee's submissions saying it was unnecessary to determine if the “Results Pay” was wages or not because the employee had failed to meet the criteria to be eligible for the “bonus”. The Delegate further stated that the employer has the right to stipulate the conditions that must be met to be eligible for a bonus, providing the conditions fall within the requirements of the Act.

THE FACTS

The facts were not contentious in this dispute. The Employer operates fuel service stations within British Columbia. The Employee was employed with the Employer company as its Northern British Columbia Territory Manager for approximately 3 years. In written submissions to the Delegate at the time of the investigation, the Employee notes that “when I resigned from Shell to assume a new position with the Prince George Citizen, I was informed that I would not be entitled to any compensation (results pay) should Shell achieve financial targets...despite the fact that I was employed throughout the entire period the results pay is based on - January 1, 1999 to December 31, 1999.” The Employee states in the “Complaint and Information Form” filed that his last day of work was December 31, 1999. There was no evidence led that I am aware of as to what the “Results Pay” would have been for this Employee had he remained employed at the time it was paid.

The Employee acknowledged that he had received a copy of “employee binder” provided by the Employer which delineates the Employer's pay and bonus system and that he was aware of the Employer's electronic Human Resources Library which contained the same relevant information. The Employee did not deny knowledge of the requirement that he be employed at the time “Results Pay” was paid to be eligible for it. It is not clear whether this pay and bonus system

was freely negotiated between the parties before employment commenced or simply unilaterally offered to existing employees purely as an incentive. However, for reasons which will become apparent further on, I do not find it necessary to require more information on this point.

The Employer's literature says:

THE BASEPLUS PAY SYSTEM

As its name suggests, there are two parts to the BasePlus System: your Base Pay and some additional pay called Results Pay. Base Pay is the regular earnings for salaried employees. Base Pay is determined by the marketplace and individual competence in a job. Results Pay is awarded over and above Base Pay. It is an annual, one-time payment that does not increase your Base Pay. Results Pay is not included in the calculation of pension and other benefits. Results Pay depends on the financial performance of the Company and your business unit. The Company has established a five-year business plan to achieve a specific financial result - a 12% return on net investment (RONI) by 1999. Results Pay is funded from a pool of money created when the Company achieves at least 75% of its target RONI. The pool is expressed as a percentage of total Base Pay. Your business unit's Results Pay pool for a given year depends on how well both your business unit and the Company as a whole did in comparison to their business plans. There is also a part of the pool set aside for special awards to individuals who demonstrate outstanding performance during the year.

BASEPLUS	=	BASE PAY	+	RESULTS PAY
		Linked to the		Linked to Financial
		Competitive Market		Performance and
				Personal Performance

The Employer's literature clearly indicates that, in the event of a voluntary resignation, Results Pay is "excluded" and on "Voluntary Resignations/Retirements... Employees must be actively at work when Results Pay is paid to be eligible."

ANALYSIS

With respect, I do not agree with the Delegate's submission that is unnecessary to determine if the bonus system was wages because the Employee failed to meet the criteria that he be employed at the time the award is paid. Similarly, I disagree with the Employer's submission that the amount never became payable and so could never be characterized as wages. I agree with the Employee's submission that, if the bonus is "wages" within the definition of the Act, section 4 precludes a waiver of the requirements of the Act.

I note that the onus is on the employee to show that bonuses paid in the past constituted “wages” (see *Re Bell* BC EST #D408/98 (Thornicroft, Adj.) (“*Bell*”) and *Re Julson* BC EST #D106/97 (Thompson, Adj.)).

Section 1 of the Act defines wages as follows:

- (a) *salaries, commissions or money, paid or payable by an employer to an employee for work,*
 - (b) *money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,....*
- but does not include:*
- (g) *money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*

Section 18(2) of the Act provides as follows:

An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

As I read section 1 (b), to be wages, the requirement is that first, money be paid as an incentive and second, that it relates to hours of work, production **or** efficiency (emphasis added). In other words, the second component is met if any of those criteria (hours of work, production or efficiency) are present. The money does not have to be paid with a specific connection to hours of work or hours of work, production *and* efficiency.

In *Bell*, supra, the Adjudicator concurred with the Delegate’s ruling that Christmas bonus payments were “wages” as defined in section 1 of the Act and quoted the Delegate’s Determination where the following was said:

“The bonus monies paid to Bell and other employees were not discretionary payments as there is a company policy that all employees receive a bonus. The bonus is an incentive related to hours of work, production and efficiency because employees are aware of its existence and know throughout the year that working long hours and making extra effort to contribute to the company’s productivity and efficiency will result in the payment of a bonus. These bonus payments constitute part of the wages paid to Bell during the period in question.”

In the appeal of *Bell*, supra, the Adjudicator said the following:

I am satisfied that the delegate did not err when she treated the bonus payments as “wages” paid by Trico. The evidence before me shows that while the payment of a Christmas bonus was a discretionary matter on the part of Trico, once the decision was made to pay a bonus, the bonus amount was predicated on the individual employee’s total hours worked, their work performance and the

company's relative financial success during the year - the Christmas bonuses were not simply "gifts" from the employer to the employee.

In the present case the Employer's literature refers to the "BasePlus Pay System" as "your Base Pay *and* some additional *pay* called Results Pay" (emphasis added). Further, "Your business unit's Results Pay pool for a given year depends on how well both your business unit and the Company as a whole did...There is also a part of the pool set aside for special awards to individuals who demonstrate outstanding performance during the year."

I note the Employer refers to the Results Pay as "pay" as opposed to a bonus. Also, the entitlement is based on individual, unit (department) and overall company performance. In my opinion, this is an "incentive" related to either "production or efficiency" as referred to in section 1 (b) of the Act and, notwithstanding that it is not specifically related to hours of work, it is money that are "wages" as defined by the Act.

As in *Bell*, employees are aware of this "Rate Plus" bonus throughout the year and that contributing to the company's productivity and efficiency (achieving "RONI") will result in payment of a bonus. Once the performance criteria were achieved (notwithstanding the condition of continuing employment at a later date) the bonus became "wages" and payment of them cannot be avoided by a "contracting out" due to section 4 of the Act.

I find that the Employee clearly earned this bonus in that he worked for the entire period for which the bonus was calculated and, presumably, contributed to the Employer realizing its performance criteria by achieving at least 75% of its target return on net investment ("RONI"). I also find that, when the Employee terminated his employment, section 18(2) of the Act accelerated his entitlement to receive that bonus.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated September 28, 2000 and filed under number 2000/730, be varied in accordance with the directions contained herein. This matter is referred back to the Director so that the amount of the "Results Pay" to be paid can be calculated and an amended determination issued.

W. GRANT SHEARD

**W. Grant Sheard
Adjudicator
Employment Standards Tribunal**