Employment Standards TRIBUNAL

An appeal

- by -

Independent Electric and Controls Ltd.
("IEC")

- 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: David B. Stevenson

FILE No.: 2010A/93

DATE OF DECISION: September 28, 2010

DECISION

SUBMISSIONS

Robert A. Sider	Counsel for Independent Electric and Controls Ltd.
Hans Suhr	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Independent Electric and Controls Ltd. ("IEC") of a Determination that was issued on May 28, 2010, by a delegate of the Director of Employment Standards (the "Director"). The Determination found IEC had contravened Part 3, section 17 and Part 7, section 58 of the *Act* in respect of the employment of Allen M. Gault ("Gault") and ordered IEC to pay Gault an amount of $2,204.94, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on IEC under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $1,000.00.

3. The total amount of the Determination is $3,204.94.

4. In this appeal, legal counsel for IEC says the Director erred in law in making the Determination.

5. IEC has requested a suspension of the Determination under section 113 of the *Act*. This request has already been addressed by the Tribunal but will be revisited once this appeal has been decided.

6. None of the parties to this appeal has requested an oral hearing before the Tribunal and while we have a discretion whether to hold an oral hearing on an appeal – see section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575 – I have reviewed the appeal, the submissions and the relevant material submitted by all of the parties, including the section 112 (5) record filed by the Director, and have decided the appeal can be decided on that material and that an oral hearing is not necessary.

ISSUE

7. The issue in this appeal is whether the Director has erred in law in the interpretation of section 58 of the *Act* or in interpreting the terms and conditions of Gault's employment to include an agreement by IEC pay 6% vacation pay on total wages.

THE FACTS

8. IEC operates an electrics and instrumentation services business in the province. Gault has been employed by IEC as an electrician since May 12, 2008. He filed a complaint with the Director in March 2010 alleging IEC had failed to pay vacation pay on overtime wages from the start of his employment until February 2010 and had made adjustments to his vacation pay entitlement over that period without his consent.

9. The Determination sets out the following agreed facts:

- The Employer was calculating vacation pay based on 6% of regular hours only, excluding any other hours (overtime, double time, travel) from the calculation;
- The Employer was calculating statutory holiday pay at the rate of 3.6% of regular hours;
- The Employer retroactively recalculated annual vacation pay which had been paid to the Complainant for the period May 13, 2008, to December 31, 2009, at the rate of 4% of total wages. The Employer determined that the Complainant was owed an additional amount which was paid to the Complainant.

10. In paying vacation pay on regular hours, IEC, an Alberta based company, was mistakenly applying Alberta Labour Standards to its BC employees. When the mistake was brought to their attention in February 2010, IEC notified its BC employees that it was adjusting vacation pay for those employees to comply with the *Act*. That adjustment included changing the vacation pay rate from 6% on regular wages to 4% on "regular, overtime, double time and travel time hours" effective January 1, 2010, and going back 36 months to recalculate vacation pay entitlement on 4% of "regular, overtime, double time and travel time" hours. The recalculated amount was compared to what the employee had actually received and if the former amount was greater than the latter, the employee was paid the difference. Where the latter amount was greater than the former, no recovery was made.

11. The Director found IEC had contravened section 58 of the *Act* by failing to pay Gault annual vacation pay on his total wages, as required by that provision.

12. The Director found Gault was entitled to annual vacation pay and determined that amount of vacation pay owing by calculating the total wages earned by him in 2008 and 2009 and multiplying that amount by 6% to find the total vacation pay earned during that period. The Director found Gault had earned annual vacation pay in the amount of $5,928.51. The Director then calculated the annual vacation pay Gault had been paid over that period, an amount of $3,554.74, and deducted that amount from the first amount to arrive at a final figure– $2,184.61 – to which section 88 interest was added and is the amount of wages owing set out in the Determination.

ARGUMENT

13. Counsel for IEC makes two arguments on the appeal. The first argument is described as follows:

> 1. The Director erred in its interpretation of Section 58 of the Act by concluding that Section 58 requires an employer BOTH to pay a certain percentage AND to multiply that percentage by the Employee's total wages to come to the minimum vacation pay required to be paid to the Employee.

14. The gist of the argument is that so long as the amount of the annual vacation pay is equal to, or greater than, 4% of total wages, the formula used by an employer to arrive at that amount does not have to be determined by using a specific formula.

15. The second argument is summarized by counsel for IEC as follows

> 2. The Director erred in law by finding a "term and condition of employment" that the Employer had agreed to pay the Employee vacation pay as a percentage of "total wages" where there was no evidence to arrive at that conclusion and, indeed, the evidence was directly to the contrary.

16. Counsel says there was no evidence that IEC agreed to pay 6% annual vacation pay. He says IEC simply "calculated" annual vacation pay on 6% of regular wages because it believed it was required to by Alberta labour standards legislation.

17. In response to the first argument, the Director says the *Act* was correctly interpreted; that the words "at least" in section 58(1) permit the Director to enforce an agreement that exceeds the minimum standards for annual vacation pay.

18. In response to the second argument, the Director says there was evidence that supported the finding that IEC had agreed to pay Gault 6% annual vacation and, once that finding had been made, the provisions of the *Act* required that percentage be paid on "total wages". The Director says the first finding was one of fact for which there was some evidence and the second conclusion was merely a function of applying the *Act*.

19. In the final reply, counsel for IEC complains about the scope of the Director's response, saying it is "inappropriate" for the Director to be using terms such as "intriguing" when describing IEC's arguments and providing "recollection" of facts not found in the section 112(5) Record. Counsel contends the Director is not allowed to do anything other than "explain" the decision made.

ANALYSIS

20. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *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;*
>
> (c) *evidence has become available that was not available at the time the determination was made.*

21. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

22. This appeal is grounded in the contention the Director erred of law. The Tribunal noted in *Britco Structures Ltd.*, BC EST # D260/03, that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;

4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle.

23. Counsel for IEC says the Director misinterpreted the *Act* and acted without evidence.

24. Before addressing these arguments, I will answer the submission of counsel for IEC that the response of the Director to the appeal was "inappropriate" in its tone and content. The Tribunal has accepted there are sound practical and policy reasons for allowing the Director to make submissions in an appeal and for not unduly limiting the Director's involvement in that regard: see *British Columbia Securities Commission*, BC EST # RD121/07 (Application for Judicial Review dismissed, *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244). While the Tribunal has continued to recognize the Director's role is not to be the statutory agent or advocate of the employee and the Director must appreciate that there can be a fine line between explaining the basis or analytical process for a decision and advocating on behalf of one of the parties, there is nothing in the submissions made by counsel for IEC on this ground that would allow me to conclude the Director has gone beyond his accepted role. The issues in this case involve an interpretation of the *Act* and the authority of the Director over individual contracts of employment, matters about which the Director has an interest going beyond the interest of the complainant and justify the scope of the response made by the Director.

25. Returning to the two arguments, IEC accepts the Director may enforce individual employment agreements that exceed the minimum standards found in the *Act*. There is ample authority for that proposition in any event. However, as the Tribunal stated in *Director of Employment Standards (Re Kocis)*, BC EST # D331/98 (Reconsideration of BC EST #D114/98), the legislature has not given the Director a roving mandate over private agreements. The authority of the Director is limited to giving effect to and enforcing such employment agreements. More specifically, the Director has no authority to amend such agreements.

26. The above statement of principle within the *Act* answers both arguments made by IEC in this appeal.

27. First, the terms of the employment agreement between IEC and Gault was that he would be paid annual vacation pay of 6% of regular wages. While there was some initial confusion about whether the annual vacation pay was 4% or 6% of regular wages, the facts as they are set out in the Determination allow for no other conclusion than that reached by the Director: "that the payment of 6% for annual vacation was a term and condition of employment for the Complainant". I do not accept the suggestion from counsel for IEC that the agreement with Gault was simply to pay provincial minimum standards. Such a suggestion has no support on the evidence. In respect of the employment agreement on annual vacation pay, it is absolutely clear from the Record that Gault did not agree to any retroactive amendment to it. Accordingly, the Director had the authority to enforce the agreement that was in place. The problem for IEC was that agreement contravened the *Act* because it did not pay annual vacation pay on "total wages". The Director was required to address and rectify the contravention.

28. Even though the first argument made by IEC in this appeal is wrapped in a question about the interpretation of section 58 of the *Act*, the effect of that argument would require the Tribunal to find the Director had authority to retroactively amend the terms of the employment agreement. Since the Director has no authority to do that (and no such finding would be made by the Tribunal), the Director did not err in failing to base the annual vacation pay owed on a comparative analysis between what was paid under the employment agreement and what ought to have been paid under the *Act*. The Director correctly exercised the authority available to him under the *Act*, which required giving effect to both the terms of the employment agreement and the provisions of the *Act*.

29. The first argument also fails on an application of Section 21(1) of the *Act*, which states:

> *(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

30. The wages paid to Gault as annual vacation pay up to December 31, 2009, were 6% of regular wages. That amount was paid in error by IEC. The Director addressed this error in the Determination, concluding, correctly, that a lack of knowledge of their obligations under the *Act* did not provide IEC with a defense for failing to comply. The response of IEC to their contravention of the *Act* was to apply wages already paid for annual vacation toward compliance with the statutory minimums for annual vacation pay. That response contravenes the prohibition in section 21 against *"requiring payment of . . . part of an employee's wages for any purpose"*. The Tribunal has consistently found an employer is not entitled to engage in "self-help", fashioning its own remedy by attempting to "set-off" wages it has paid an employee against costs it has incurred. The prohibition in section 21 is a broad based blanket prohibition whose exceptions are few and are apparent in the provision. The circumstances here are not included in those exceptions. The prohibition in section 21 applies to an attempt by IEC to use wages already paid to Gault to set off their statutory liability.

31. Finally, I find the following comments from *Old Country Restaurant*, BC EST # D561/98, to be relevant to this argument:

> The Tribunal is a creature of statute. Its powers are defined and limited by the *Employment Standards Act*. Those powers do not include remedying errors made by an employer, or making awards to correct situations of unjust enrichment. In this instance, the employer seeks to have the Tribunal "right the balance" in light of a perceived unfairness. I have no jurisdiction to do so, even where I might agree such an award is appropriate.

32. In respect of the second argument, an application of the statement of principle compels a conclusion in favour of IEC.

33. While the Director correctly found the terms of the employment agreement required IEC to pay 6% annual vacation pay, that agreement was to pay annual vacation on "regular wages", not "total wages". Section 58 of the *Act* does not require IEC to pay Gault 6% annual vacation pay on "total wages", IEC's statutory obligation is to pay 4% annual vacation pay on "total wages". The Director's finding that IEC was required to pay 6% on "total wages" is not supported by the employment agreement, any other evidence in the Record or the *Act*. I find, therefore, Director erred in law by amending the agreement to require IEC to pay 6% annual vacation on total wages.

34. The Director was entitled to give effect to the employment agreement, to pay 6% on regular wages, and required to give effect to the *Act*, to pay 4% on total wages, but had no authority to amend the employment agreement to require payment of more than minimum standards. In the circumstances, the correct approach was to leave the annual vacation already paid on regular wages intact, but to require payment of the balance of annual vacation pay owing in accordance with the requirements of the *Act* calculated on 4% of the difference between regular wages and total wages.

35. The Determination will be referred back to the Director for the purpose of making that calculation.

36. In the meantime, I order the effect of the Determination be suspended until the refer back matter has been decided.

ORDER

37. Pursuant to section 115 of the *Act*, I order the Determination dated May 28, 2010, be referred back to the Director for recalculation in accordance with the terms of this decision.

David B. Stevenson
Member
Employment Standards Tribunal