



An appeal

- by -

Metropolitan Fine Printers Inc.
(“MFP”)

- 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.: 2012A/87

DATE OF DECISION: October 24, 2012

DECISION

SUBMISSIONS

Ib S. Petersen	on behalf of Metropolitan Fine Printers Inc.
Henry Ducluzeau	on his own behalf
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Metropolitan Fine Printers Inc. (“MFP”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 4, 2012.
2. The Determination found that MFP had contravened Part 7, section 58 of the *Employment Standards Act* (the “*Act*”) in respect of the employment of Henry Ducluzeau (“Mr. Ducluzeau”) by failing to pay Mr. Ducluzeau annual vacation pay and ordered MFP to pay Mr. Ducluzeau an amount of \$5,506.54, an amount which also included interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties on MFP under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
4. The total amount of the Determination is \$6,006.54.
5. MFP has filed this appeal, saying the Director erred in law by interpreting section 57(2) to find Mr. Ducluzeau was entitled to annual vacation pay.
6. MFP seeks to have the Determination cancelled.
7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “record”.

ISSUE

8. The sole issue in this appeal is whether MFP has shown the Director erred in law by interpreting section 57(2) of the *Act* to find Mr. Ducluzeau was entitled to annual vacation pay under the *Act*.

THE FACTS

9. The Determination sets out the following findings of fact:
1. MFP operates a printing business.
 2. Mr. Ducluzeau was employed by MFP from June 25, 2008, to March 31, 2011, as a sales executive.
 3. On July 4, 2008, MFP prepared a letter, which Mr. Ducluzeau accepted by affixing his signature, setting out terms of his employment.
 4. The letter included, *inter alia*, an outline of Mr. Ducluzeau's compensation, company benefits he would be provided and his vacation entitlement.
 5. in respect of his vacation entitlement, the letter read:

Vacation entitlement while you are paid as a salaried employee shall be based on 4 weeks per annum. Metropolitan uses the calendar year to calculate vacation, consequently your entitlement for the remainder of 2008 shall be 2 weeks.
 6. The letter also refers to "a copy of our employee handbook" which, it says, is being provided to Mr. Ducluzeau "for your reference".
 7. The handbook has a page of information on vacations that included a description of how vacations are earned and scheduled, a statement of scheduling principles and a chart setting out vacation entitlement as follows:

<i>Service at January 1</i>	<i>Vacation Entitlement</i>	<i>Related % of Earnings</i>
<i>Less than 12 months</i>	<i>1 day for each calendar month up to a maximum of 10 days</i>	<i>4%</i>
<i>1 year to 2 years service</i>	<i>2 weeks</i>	<i>4%</i>
<i>3 to 9 years service</i>	<i>3 weeks</i>	<i>6%</i>
<i>Greater than 9 years</i>	<i>4 weeks</i>	<i>8%</i>
 8. The Director found the 4 weeks of vacation to which Mr. Ducluzeau was entitled relates to 8% of earnings.
 9. Mr. Ducluzeau was terminated on March 31, 2011, and, on termination, he was paid \$1200.00 annual vacation pay and \$10,000.00 in termination/severance pay.
 10. Mr. Ducluzeau did not take all of the vacation to which he was entitled.
 11. He took the following vacations during his employment:
 - 2008: July 28 to August 1 – 5 days
 - 2009: January 22 to 28 – 5 days
July 27 to August 7 – 9 days
 - 2010: July 19 to 30 – 10 days
November 23 to 30 – 6 days
 - 2011: none

12. The employee handbook says the full vacation entitlement must normally be taken during the applicable year. It also says a maximum of 5 days of unused vacation may be carried forward on condition the unused vacation days are taken in time off prior to March 31 and that such carry-overs are requested in writing and approved by a Supervisor/Manager and Human Resources.
 13. Mr. Ducluzeau never asked to carry forward any unused vacation from one calendar year into the next.
 14. Allowing employees to take vacations in the year in which they are earned is a greater benefit than provided in the *Act*.
 15. The annual vacation and vacation pay MFP provided to Mr. Ducluzeau is a greater benefit than provided in the *Act*.
 16. MFP did not breach the *Act* by using a common date – January 1 to December 31 – for calculating vacation entitlement.
 17. MFP gave Mr. Ducluzeau entitlement to 4 weeks annual vacation and a related 8% of earnings.
 18. MFP did not pay Mr. Ducluzeau for any vacation that was unused, and deemed by MFP to have been lost, at the end of the calendar year.
 19. Any vacation pay that was payable prior to September 30, 2010, fell outside the claim period allowed in section 80 of the *Act*.
 20. Vacation entitlement that started to accrue from January 1, 2009, was not payable until December 31, 2010, and fell within the recovery period.
10. The Director concluded, based on application of the minimum standards found in sections 57 and 58 of the *Act*, that Mr. Ducluzeau did not lose his earned and unused vacation pay at the end of the calendar year. Applying that conclusion, the Director found MFP had not paid Mr. Ducluzeau all vacation pay earned in the calendar years 2009, 2010, and 2011.

ARGUMENT AND ANALYSIS

11. Counsel for MFP says the Director erred in interpreting section 57(2) of the *Act* by treating that provision as an independent statutory requirement rather than reading that provision in the context of section 57(1).
12. He argues vacation entitlement in this case is determined entirely by the contract of employment, which was found by the Director to have been superior to what is found in the *Act*. Counsel accepts the Director may enforce vacation entitlements in contracts of employment that exceed the minimum requirements of the *Act*, but says when doing so the Director must allow the contract of employment to stand on its own terms and not, as he did in this case, read into that contract provisions that are intended to apply in the context of the minimum requirements of the *Act*.
13. Counsel says in this case the Director ought to have given effect to the contract of employment and concluded Mr. Ducluzeau lost vacation entitlement that was carried forward into the following year and remained unused past March 31. Counsel points out the *Act* required MFP to only provide Mr. Ducluzeau with a maximum of two weeks' annual vacation and the Director found that, except for 2011, the annual vacation taken by Mr. Ducluzeau exceeded the those requirements. He submits the Director erred when he applied the minimum standards provision in section 57(2) to the contract of employment.

14. The Director has filed a very brief response, indicating his belief that the Determination speaks for itself and there is nothing which can be added to it.
15. Mr. Ducluzeau has also filed a submission asserting his belief that the Determination is correct. The submission contains some assertions of fact that are not found in the Determination and are not consistent with what appear to be conclusions reached by the Director. I am unable to give them any effect in considering this appeal.
16. Counsel has filed a final reply, which primarily addresses the matter referred to in the preceding paragraph. Otherwise, the reply does no more than restate the arguments made in the initial appeal submission.

ANALYSIS

17. This appeal, which contends the Director's view of section 57(2) is wrong, is unusual since the liability imposed on MFP under the *Act* did not emanate from a breach of section 57, but from a breach of section 58 of the *Act*. Sections 57 and 58 are two different statutory annual vacation entitlements found in the *Act*; the former establishes entitlement to annual vacation time off; the latter establishes entitlement to annual vacation pay. As I stated in *Renshaw Travel Ltd.*, BC EST # D050/08, at para. 41:

Vacation time off under Section 57 is without pay. Under Section 57(2), an employer is required to ensure an employee takes an annual vacation to which they are entitled under that section. However, the employer is also obliged under Section 58 of the *Act* to pay to the employee his or her annual vacation pay, "at least 7 days before the beginning of the employee's annual vacation". Meeting the statutory obligation to ensure employees are given annual vacation time off does not lead to a conclusion that an employee has been paid annual vacation pay.

18. Subsection 58(3) requires any vacation pay to which an employee is entitled when the employment terminates to be paid to the employee at the time set by section 18 for paying wages.
19. The definition of "wages" under the *Act* is inclusive. Vacation pay falls within the definition, as it is "money, paid or payable by an employer to an employee for work": see *John Andrew, a Director of Officer of Ximex Networks Inc., in Receivership*, BC EST #D068/99, and *Richard A. Mott, a Director or Officer of United Used Auto & Truck Parts Ltd.*, BC EST # RD219/02.
20. The amount Mr. Ducluzeau was entitled to be paid as annual vacation pay up to the time of his termination were 8% of earnings. The Director was clearly correct in finding Mr. Ducluzeau's vacation pay entitlement under his employment agreement was 8% of earnings. That finding is well grounded in the evidence and is not disputed by MFP. The vacation pay entitlement amount is "wages"; it is "payable" as it accrues and, accordingly, must be paid, either as described in section 58(2) or as set out in section 18. The proposition that is implicit in this appeal is that if entitlement to vacation time off can be lost, entitlement to vacation pay can also be lost. Regardless of the merits of the first part of that proposition – and I do not find it necessary to reach any conclusion about that – the prohibition in section 21(1) of the *Act* operates against the second part of that proposition.
21. Section 21(1) of the *Act* 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.*

22. 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 the suggestion in this appeal that if entitlement to annual vacation *time off* is lost because it has been left unused, then the vacation *pay*, which to reiterate is wages under the *Act*, is lost along with it. Section 21 does not allow that result since such would be a deduction or withholding of wages. The effect of section 21(1) in this case is reinforced by section 4 of the *Act*, which would operate to void any agreement that could be said to result in an employee losing wages to which they were entitled under the *Act*.
23. For the above reasons, the appeal is denied. The Director did not err in finding Mr. Ducluzeau did not lose his earned and unused vacation pay and was entitled to receive the unpaid amounts of his vacation pay entitlement on termination.

ORDER

24. Pursuant to Section 115 of the *Act*, I order the Determination dated July 4, 2012, be confirmed in the total amount of \$6,006.54, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal