



An appeal

- by -

Cariboo Resorts Ltd. operating 108 Best Western Resort
(the "Appellant")

- 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: E. Casey McCabe

FILE No.: 2000/828

DATE OF DECISION: March 14, 2001

DECISION

SUBMISSIONS:

Joe Simons	for the employer
Adam de Turbeville	for the employer
Allan Barton	for himself
Hans Suhr	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Cariboo Resorts Ltd. (the employer) from a Determination dated November 14, 2000. That Determination found that the employer owed Allan Barton \$11,058.46 in vacation pay and accumulated interest pursuant to section 58 of the *Act*.

ISSUE(S) TO BE DECIDED

1. Was Mr. Barton entitled to vacation pay following a one year contract of employment ending October 16, 1997?
2. Was Mr. Barton entitled to vacation pay after February 16, 2000?
3. Was Mr. Barton entitled to vacation pay accrued during the notice period?
4. Did Mr. Barton’s annual salary include vacation pay?

FACTS

The employer operates the 108 Best Western Resort, a hotel/resort business in 108 Mile House. Mr. Barton worked as the General Manager of the resort from October 16, 1996 to February 15, 2000. Mr. Barton and the employer entered into a one year contract of employment in 1996. In 1997, the parties agreed to a three year contract of employment that was to end October 16, 2000. On November 16, 1999, Mr. Barton tendered his resignation, giving three months notice. The employer accepted Mr. Barton’s resignation. Mr. Barton was informed by the employer that his last day of work would be January 15, 2000, but that the employer would continue to pay him until the end of the three month notice period.

The Director’s Delegate determined that Mr. Barton’s contract of employment provided for 4 weeks of vacation per year. The Delegate found as a fact that Mr. Barton had taken one week of vacation in October 1999 and that the pay Mr. Barton received during the last month of employment could be considered vacation pay. The Delegate further determined that the 2 year limitation period provided in the *Act* did not bar Mr. Barton from receiving vacation pay earned in 1996-97 as that pay was due and owing as late as October of 1998.

ANALYSIS

Joe Simons, the employer representative, filed this appeal. The employer's submission outlines three grounds for appeal. Firstly, the Director's Delegate erred when he determined that Mr. Barton was entitled to annual vacation pay following a one year contract of employment concluding on October 16, 1997. Secondly the employer takes the position that the Director's Delegate erred when he determined that the Respondent was entitled to annual vacation pay after February 16, 2000 since that day was the last day of the notice period for the contract of employment that was terminated by the Respondent in November 1999. Thirdly, the Director's Delegate erred when he determined that the Respondent was entitled to annual vacation pay accrued during the notice period of November 16, 1999 through February 16, 2000. The employer takes the position that Mr. Barton is owed only three weeks of vacation pay. The employer states that Mr. Barton's salary included vacation pay.

The employer's argument questions whether salary includes vacation pay. That issue was addressed in Re Golden Sikh Cultural Society, [1998] B.C.E.S.T.D. No. 382 (QL). The answer was that it does not.

Section 58 of the *Act* states;

- (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.

These requirements are the statutory minimum; however, nothing prevents the parties from agreeing to a higher rate. If a higher rate is agreed, the Delegate has the jurisdiction to enforce the contract. Re Baxter Carabetta Braun, [1998] B.C.E.S.T.D. No. 526. Mr. Barton's contract of employment clearly stated that he was entitled to 4 weeks vacation a year. Even if the parties had agreed that the salary included vacation pay, section 4 of the *Act* states:

The requirements of this *Act* or the regulation are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61, and 69.

Sections 43, 49, 61 and 64 have no relevance to this case. What is important is that Mr. Barton is entitled to annual vacation. The file indicates that he worked through his vacation periods. That fact does not disentitle him to vacation pay. He is entitled to four weeks of annual vacation per

employment year or compensation in lieu. In this case the parties had agreed through the employment contract that his vacation entitlement would be four weeks per year. Although he did not actually take four weeks off work he is nonetheless entitled to the pay in lieu.

The employer also argues that the Director's Delegate erred in determining that Mr. Barton was entitled to annual vacation pay after February 16, 2000. On page 6 of the Determination, Mr. Barton's vacation pay is calculated up to February 15, 2000. Since the Delegate did not determine that Mr. Barton was entitled to vacation pay after February 16, 2000, this ground of appeal must fail. The entitlement to vacation pay was based on work history prior to February 16, 2000.

The employer's appeal of the finding that Mr. Barton was entitled to vacation pay at the end of the first contract of employment is similarly without merit. As previously stated section 58 of the *Act* requires that employees receive vacation pay and by the terms of the contract of employment Mr. Barton was entitled to four weeks of vacation. In a letter dated April 11, 2000, the employer's solicitor states that "Mr. Barton cannot import into a contract that he broke a term that he be entitled to vacation pay at the end of a fixed term contract." In support of this assertion, counsel relies on Paddon v. Phillips Barratt Kaiser Engineering Ltd., [1987] B.C.J. No. 2027 (SC). A review of the material on file indicates that this is the only statement that is relevant to the above assertion. Even if this assertion is correct there is no finding that Mr. Barton breached the first contract. As such, this case does not support this allegation.

Even if this ground of appeal is given a sympathetic reading as actually meaning that Mr. Barton was not entitled to vacation pay earned outside of the 2 year limitation period set out in the *Act*, it would not help the employer. It is settled law that vacation pay earned outside of the limitation period but that was payable within the limitation period, is recoverable. See Re Khalsa Dwan Society, [1996] BC EST D.No 101(QL). The Delegate correctly finds that vacation pay which was earned by Mr. Barton but not paid to him is validly claimed because it would have been payable after February 1998 which is within the two year time limit for filing claims under Section 80 of the *Act*.

The employer's final argument that vacation pay does not accrue during the notice period is said to rely on McGraw v. Canadian Forest Products Ltd., [1989] B.C.J. No. 1746 (S.C.). That case did not deal with the question of vacation pay under the *Act*. Under the *Act*, vacation pay is earned not only while a person is actually working, but also where that person is on vacation. Re Pay Less Gas Co. (1972), [1991] B.C.J. No. 2721 (SC). There can be no question that Mr. Barton is entitled to vacation pay while he was actually at work. In the McGraw case vacation pay was not included where the payment was in lieu of notice. Nor does this case help with the month off with pay given to Mr. Barton. The employer cannot have it both ways. Either the month off with pay was a vacation, in which case vacation pay still accrues, or the employer terminated the employment, in which case Mr. Barton would still be entitled to his contractual 4 week vacation with holiday pay. Either way, this ground of appeal must fail.

ORDER

The Determination dated November 14, 2000 is confirmed.

E. CASEY MCCABE

**E. Casey McCabe
Adjudicator
Employment Standards Tribunal**