

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Primco (PWL) Ltd.
("Primco")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/640

DATE OF HEARING: February 11, 1997

DATE OF DECISION: March 31, 1997

DECISION

OVERVIEW

The appeal is by Primco (PWL) Ltd. (“Primco”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against Determination No. CDET 004316 of the Director of Employment Standards (the “Director”), a decision dated October 11, 1996. In the Determination, Primco is found to have failed to pay wages as s. 17 of the *Act* provides and to owe Mario Kohler (“Kohler”) vacation pay and statutory holiday pay.

APPEARANCES

Rupert Shore	Counsel for the appellant, Primco
Pat Christiansen	Branch Manager of Primco
Stewart Kolenda	Operations Manager of Primco
Mario Kohler	On his own behalf
Catherine Hunt	Counsel for the Director
Ivy Hallam	Director's delegate

ISSUES TO BE DECIDED

At issue is the matter of whether wages were paid as s. 17 (1) of the *Act* provides.

At issue is the matter of whether vacation pay and statutory holiday pay have been paid as the *Act* requires. The appeal argues that the way Primco paid the employee vacation and statutory holiday pay is much like a salaried employee receives such pay in that Kohler received the same amount as if he had worked regular hours. The employer notes that its compensation system is one with which Kohler agreed and beyond that it is argued that the compensation scheme is fair and equitable and that the Determination awards the employee a financial windfall to which he is not entitled.

At issue is the matter of whether the Determination is contrary to s. 80 of the *Act*. The appeal argues that the Director has reached past the 24 months allowed by the *Act*.

FACTS

Primco is a wholesaler of flooring materials. Mario Kohler worked for the company as a sales representative from January 1, 1992 to March 22, 1996 when he quit.

Like all of Primco's sales representatives, Kohler was assigned a sales territory. Primco agreed to pay him commissions on all sales to his territory, not only those by him or through him but those made as a result of orders placed directly by customers, what might be termed "direct orders". Primco pays direct order commissions as a way of compensating sales reps for work for which they cannot earn commissions, the setting up and stocking of displays, delivering samples, handling complaints, customers calls, updating product and price binders, and product promotion work included.

Primco employees are paid once a month. On the 15th of each month, they are paid commissions earned in the previous month.

Kohler signed what is called the Salesman Employment Agreement on October 1, 1992. Part 5 sets out that credit for sales in an area begins "on or after the day" work commences and ends with sales shipped on the last day of work in the territory. Part 17 sets out that Kohler is to receive two weeks' vacation "after each year for the first three years" and three weeks a year thereafter. Part 14 deals with vacation pay and statutory holiday pay and is as follows:

The Company and the Salesman agree that the Salesman shall take annual holidays, and shall not work on statutory holidays and the Salesman acknowledges that, as he is receiving all of the commissions earned from his assigned sales Territory during his vacation, the commissions paid to the Salesman during his vacation or on the statutory holiday are the Salesman's vacation pay or statutory holiday pay whether or not they are designated as vacation pay in the Company's records and the Salesman's pay stubs. The vacation shall be taken in blocks of at least five (5) consecutive business days.

When taking vacations, Kohler was paid commissions on all sales to his territory, what I will call "vacation commissions". Vacation commissions include those resulting from direct orders as well as those on sales by other people assigned his territory in his absence. Kohler was paid vacation commissions on the 15th of the month following each vacation.

Primco's accounting system cannot differentiate between direct order sales and those of its sales reps and there is no payroll information available for periods of less than a month. The exact amount of vacation commissions is not known, nor is there an accounting of what was paid as statutory holiday pay. There is an analysis by Primco of Kohler's commissions for the months of October, 1995 and December, 1995 which shows that direct order commissions in those months were 56 percent, and 49 percent, of total earnings in those months, respectively. Figures are also available for a territory that went unserved by a sales rep for five months in 1995 and they show that sales were 61 percent of what they were in the comparable period of a year earlier when salesman Al Lowes was looking after the territory.

ANALYSIS

Kohler was paid once a month, and was paid for the sales of a month on the 15th of the following month. That is contrary to the *Act* in two respects, namely, that wages be paid at least semi-monthly and, secondly, within 8 days of the end of each period of employment. In section 1 of the *Act*, “pay period” is defined as a “period of . . . employment” and Section 17 (1) is as follows:

17 (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

The Determination is correct in finding that the employer has violated s. 17 of the *Act*.

Kohler’s employment contract calls for two weeks’ vacation leave after each year for the first three years of employment, for three weeks’ vacation leave after that, and for the paying of vacation commissions as vacation pay. That is not the same as providing for two weeks or three weeks of fully paid vacation. The two are quite different, vacation commissions reflecting the amount of sales in the vacation period, not 4 percent or 6 percent of total wages for the previous year. It follows that the contract of employment does not provide for three weeks of paid vacation in the year of 1995. The Determination is wrong in that respect.

Section 58 of the *Act* sets out the minimum that an employer must pay as vacation pay. It is as follows:

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 pay days, if agreed by the employer and the employee or by 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.

As a minimum then, Kohler is entitled to 4 percent of total wages as vacation pay. Total wages is considered to include any vacation pay which is due in a year, that being a form of compensation paid or payable by an employer to the employee for services or labour [*Pay Less Gas Co. (1972) v. British Columbia (Director of Employment Standards)* (1991) 38 CCEL at 117 (BCSC)].

Primco has been paying Kohler vacation commissions as vacation pay. The Determination ignores the employment contract, which is to the contrary, and treats those commissions, not as vacation pay, but as wages which Kohler is entitled to by virtue of work previously done, past services in other words of the Director's delegate. I am not convinced that is reasonable in all cases, sales are not always entirely due to field sales staff, and there is the contract. But I need not to pursue the matter further. Kohler is owed vacation pay simply because the *Act* requires it and because Primco is unable to show that it has complied with the *Act*.

Kohler is not a salaried employee but a commission salesman whose income varies greatly from week to week, month to month. As such, I need to know exactly what was paid as vacation pay if I am to establish compliance. But Primco does not know what it paid to Kohler in his vacation periods, if anything. It has not been checking to see whether it was paying the minimum required by legislation. I have not been shown that the minimum has been paid and as such I am unable to find that Primco has discharged its obligation to pay vacation pay. If the result of that is a windfall to the employee, so be it [*Lansdowne Pontiac Buick and the Director of Employment Standards*, (1997) B.C.S.C., February 7, 1997, at p. 3].

The need to pay the minimum required by the *Act* cannot be contracted out [*Machtinger v. HOJ Industries Limited*, (1992) S.C.C., 91 DLR 4th 491 at 505]. The standards of the *Act* are **minimum** standards. Agreements to waive those standards are void under the legislation as s. 4 of the *Act* makes plainly clear:

The requirements of the Act or the regulations 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 69 have no bearing on this matter as they refer to employees covered by collective agreements. Kohler is not covered by a collective agreement.

Primco's compensation package may be generally fair and equitable, or provide a greater benefit than the *Act* in other respects, but the *Act* demands strict compliance.

The hinge in this case - in other words that on which all of significance turns - is that the *Act* and case law under the *Act* demand that the employer comply with the strict requirement of the *Act*. There is, in my opinion, no room, according to the law, for the employer to raise questions based on the premise that "substantial compliance" with the *Act* will be taken as the equivalent of strict compliance with the *Act*. There is in my opinion no room in law for the employer to take the position that if the combined effect of: (One) non-compliance by the employer,

and (two) gratuitous payments by the employer, or payments made by the employer pursuant to an agreement with the employee, is that the employer has paid more to the employee than would be the case if the *Act* had simply been obeyed, the employer can seek relief...

[Lansdowne Pontiac Buick, cited above, (page 2)]

The Determination awards Kohler \$5,424 in vacation pay but incorrectly calculates vacation pay for 1995 at 6 percent. Adjusting for that, I find that Kohler is entitled to \$4,818, which is \$5,424 minus \$1,817 plus (4% of \$30,286).

I now turn to the matter of statutory holiday pay. Section 45 of the *Act* requires that when an employee is given statutory holidays off, as Kohler was, the employee must be paid for the statutory holidays. Primco's argument is that he was paid but again I am unable to see how. Primco does not show me what was paid as statutory holiday pay, if anything. If it is that his statutory holiday pay is the amount of commissions earned on those days, as the contract seems to say, he would receive nothing, Primco not being open for business on those days. If Kohler's vacation commissions include statutory holiday pay, the other possible meaning of the contract, they would then need to be in the order of 7.6 percent of total wages, 4 percent vacation pay plus enough to cover the *Act*'s nine statutory holidays, roughly another 3.6 percent of total wages (9/10th of 4 percent). The question of what that pay represented would remain but as noted above, Primco does not know what it paid in vacation commissions.

Primco does not know what it paid Kohler as statutory holiday pay, has no record of the amount of statutory holiday paid, and fails to show that it paid any statutory holiday pay. The finding of the delegate that statutory holiday pay is owed Kohler must be confirmed.

The final issue which I must decide is whether the Director may collect vacation pay due for work in 1993. The relevant section of the *Act* is s. 80 (a). It is as follows:

80 *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, 24 months before the earlier of the date of the complaint or the termination of the employment,

(b) . . .

plus interest on those wages.

(my emphasis)

Kohler filed a complaint after termination of his employment on March 22, 1996. It follows that the Director cannot reach past March 23, 1994 in collecting wages. They must be payable on or after that date.

Kohler's pay for the 1994 vacation to which he was entitled is based on total wages for 1993. He took his vacation later in the year, that is the evidence. The Director is entitled to collect that vacation pay because it was money payable in the 24 month collection period of the *Act*.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 004316 be varied in terms of the amount of vacation pay owed. The total amount of moneys owed Kohler, including interest, is reduced to \$7,525.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

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