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-

Allstar Dental Laboratories Ltd.

("Allstar")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE NO.: 96/784

DATE OF DECISION: April 8th, 1997

DECISION

OVERVIEW

This is an appeal brought by Allstar Dental Laboratories Ltd. ("Allstar" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from Determination No. CDET 004862 issued by the Director of Employment Standards (the "Director") on November 28th, 1996 (the "Determination"). This Determination was subsequently varied by the Director by way of a memorandum dated January 16th, 1996 (although I presume this latter date is in error and should be January 16th, 1997) (the "Amended Determination"). I note that no appeal has been filed with respect to the Amended Determination although it may be that the employer was under the impression that, having appealed the initial Determination, it was not required to file a new appeal regarding the Amended Determination.

In the initial Determination dated November 28th, 1996, the Director held that Allstar owed its former employee, Maria Sepe ("Sepe"), the sum of $2,598.63 on account of unpaid vacation pay (section 58). In the Amended Determination, the Director found Allstar liable in the amount of $4,296.48 on account of unpaid vacation pay and interest.

FACTS

According to the facts as set out in the Reason Schedule to the November 28th Determination and the subsequent Amended Determination, Sepe was first employed in 1974 as a ceramist with a firm known as "Ando Labs" which was later "taken over" in August 1983 by Ceramic Arts Dental Ltd. ("Ceramic Arts"), the main principal of which was one Keith Takei. At some point in time (precisely when is not set out in either the Determination or the Amended Determination) Allstar acquired either the shares or assets of Ceramic Arts and Sepe continued her employment with Allstar. Indeed, it would appear that Sepe has been continuously employed since 1974 by a series of "successors" to her original employer.

I would note, however, that the Director has not made a finding that any of the firms who have employed Sepe at one time or another were "associated" within section 95 of the *Act,* or that subsequent employers were "successors" within section 97 of the *Act.* However, in light of the fact that Allstar admits Sepe's employment dates from August 1983, these questions are moot and the Director did not have to address them. I might also note that Sepe, in her complaint dated February 10th, 1996 and filed with the Employment Standards Branch on February 13th, 1996, names "Keith Takei - Ceramic Art Dental Lab" as her employer.

According to the information provided by Allstar in its Notice of Appeal and in a subsequent written submission to the Tribunal dated February 24th, 1997, Sepe was employed by Ando Dental Laboratories Ltd. from 1974 to 1983 when that firm closed its ceramic department and "laid off" all of its employees in the ceramic department. Apparently, sometime after 1974 Mr. Mark Ando, the principal of Ando Dental, sold his interest in Ando Dental (Allstar does not make it clear whether this was a sale of assets or shares) to a company known as Sybron Corporation, although Mr. Ando continued with Sybron in some capacity until 1978 when he resigned from Sybron. In August 1983 Allstar states that it purchased "part of the assets of Ando Labs" (February 24th submission, p. 5). According to Allstar, Sepe's employment with Ando/Sybron was terminated prior to the asset purchase although she subsequently was hired, effective August 3rd, 1983, by Allstar.

Sepe's employment with Allstar was terminated, without notice, but with 8 weeks' wages as compensation for length of service, on January 24th, 1996.

ANALYSIS

In light of Allstar's admission that Sepe's employment commenced with that firm no later than August 3rd, 1983, at the time of her termination in late January 1996, under the *Act* Sepe would have been entitled to three weeks annual leave and vacation pay based on 6% of total earnings (see sections 57 and 58).

Sepe's employment was terminated on or about January 24th, 1996 at which time she was paid 8 weeks' wages as compensation for length of service but, according to the Director, she was not paid an additional 6% as vacation pay on this latter severance payment. Section 58 of the *Act* directs that an employee is to be paid

vacation pay at the rate of either 4% or 6% of "total wages" earned. Section 1 of the *Act* defines "wages" to include compensation for length of service owed to an employee by reason of section 63. Thus, in my view, an employer can only discharge its entire liability under section 63 of the *Act* by paying the appropriate number of weeks' wages inclusive of 4% or 6% vacation pay, as the case may be depending on the employee's length of service.

Given that Sepe was entitled to three weeks' annual vacation and vacation pay at a rate of 6%, as well as 6% vacation pay on her severance pay under section 63, her entitlement should be a simple arithmetic calculation. Unfortunately, the parties cannot agree as to what Sepe was paid as total wages and/or vacation pay during the relevant time periods.

Section 80 of the *Act* provides that an employer's liability for unpaid wages is limited to the amount that became payable in the 24 month period preceding the earlier of the date of termination or the date of complaint. In this case, the date of termination, January 24th, 1996, is the earlier date and thus, the employer's liability runs from January 25th, 1994.

An employee does not gain an entitlement to a vacation leave under the *Act* until he or she has completed twelve consecutive months of employment, after which time the employee is entitled to a two week unpaid vacation during the next ensuing twelve months. It is the employer's *statutory obligation* to ensure that employees take all the vacation leave to which they are entitled [see section 57(2)].

The vacation leave itself is without pay, however, the employer is also obliged under the *Act* to pay to the employee his or her vacation pay, at the 4% or 6% rate, "at least 7 days before the beginning of the employee's annual vacation" [section 58(2)(a)--N.B. vacation pay may be paid as part of the employee's regular paycheque only if both the employer and employee agree, *cf.* s. 58(2)(b)].

Thus, both vacation leave and vacation pay entitlements will always be in "arrears"; that is, the employee accrues an entitlement to vacation leave and vacation pay over the course of $YEAR_X$ but cannot demand vacation leave or vacation pay until $YEAR_{X+1}$.

In the instant case, and in light of the 24 month "liability ceiling" set out in section 80 of the *Act,* Sepe earned an entitlement to a 3 week vacation leave during the twelve month period running from August 1993 to July 1994 (based on her August 3rd commencement date with Allstar). Thereafter, her annual vacation leave and vacation pay entitlements would have accrued, to date of termination, as follows:

Year of Employment	Vacation Leave Earned	Vacation Pay Entitlement
Aug. 1993 to July 1994	3 weeks	6% of earnings Aug. 1992-July 1993
Aug. 1994 to July 1995	3 weeks	6% of earnings Aug. 1993-July 1994
Aug. 1995 to January 24, 1996	3 weeks	6% of earnings Aug. 1994-July 1995
January 24th, 1996	NIL	6% of earnings Aug. 1995-Jan. 24, 1996

Note that by reason of section 57(3) of the *Act*, Sepe's earned vacation pay for the period August 1995 to January 24th, 1996 was required to have been paid to her with 48 hours of her termination.

As noted above, Allstar's liability under section 80 of the *Act* runs as and from January 25th, 1994. Thus, to the extent that Allstar did not pay Sepe her vacation pay earned during the period August 1992 to July 1993, the employer is obliged to pay that amount as it was accruing due to Sepe on or after January 25th, 1994. Similarly, the employer is obliged to pay vacation pay as set out above for the periods August 1993 to July 1994, August 1994 to July 1995 and August 1995 to January 24th, 1996.

Unfortunately, the parties cannot agree on Sepe's earnings during the relevant time periods. Nor do the parties agree as to what was paid to Sepe as vacation pay during the relevant time periods. In light of the discrepancy between the parties as to these matters, and in the absence of a formal appeal from the Amended Determination, it is my view that the most appropriate course of action is to cancel both the Determination and the Amended Determination and refer this matter back to the Director for further investigation and, if appropriate, issuance of a new Determination. Once the wage figures have been agreed between the parties, the calculation of Sepe's vacation pay entitlement should be a simple matter of arithmetic. Of course, if the parties cannot agree, the Director is free to issue a new Determination which may be appealed by the employer.

ORDER

Pursuant to section 115 of the *Act,* I order that both Determination No. CDET 004862, and Amended Determination CDET 004862, be cancelled and that this matter be referred back to the Director for further investigation and, if appropriate, issuance of a new determination consistent with these Reasons.

Kenneth Wm. Thornicroft, ***Adjudicator***
Employment Standards Tribunal