

An appeal

- by -

Walter E. Johnson
("Johnson")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/122

DATE OF DECISION: October 15, 2004

DECISION

INTRODUCTION

This is an appeal filed by Walter E. Johnson (“Johnson”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). This matter comes back before me as a result of a “referral back” order I issued, pursuant to section 115(1)(b) of the *Act*, on July 7th, 2004 (see B.C.E.S.T. Decision No. D122/04).

Mr. Johnson originally appealed a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on November 17th, 2003 (the “Determination”). Mr. Johnson’s appeal was not filed within the statutory appeal period, however, by way of my decision issued on May 3rd, 2004 (B.C.E.S.T. Decision No. D066/04) I extended the appeal period pursuant to section 109(1)(b) of the *Act*.

The Determination was issued following an oral hearing held on September 23rd, 2003. The delegate concluded that Mr. Johnson’s former employer, Orbital Technologies Inc. (“Orbital”), had fully complied with the parties’ written employment agreement with respect to the payment of commissions and that no additional vacation pay or any other monies were payable by Orbital to Mr. Johnson. Indeed, the delegate concluded that Orbital “overpaid” Mr. Johnson with respect to his vacation pay entitlement. Thus, the delegate dismissed Mr. Johnson’s complaint since the *Act* “has not been contravened” and “no wages are outstanding”.

The merits of the appeal were addressed in my reasons for decision issued on July 7th, 2004 (B.C.E.S.T. Decision No. D122/04). In those reasons, I confirmed the Determination as it related to the payment of commissions. However, I was unable to determine, based on the material before me, whether or not Mr. Johnson had a valid claim for additional vacation pay. It appeared as though there might be a calculation error with respect to that aspect of his claim and, accordingly, I referred that issue back to the Director for further investigation.

The relevant portions of my reasons (at pp. 6-7) with respect to the vacation pay claim are reproduced below:

Vacation Pay

Mr. Johnson claimed \$4,519.17 in unpaid vacation pay (Record, Exhibit 16). However, my calculations indicate that his vacation pay claim should be for \$4,540.19. The delegate reviewed Mr. Johnson’s T-4 record of earnings for the years 2001 and 2002 (Record, Exhibit 17) and concluded that he had, in fact, been “overpaid” by \$11.65 on account of vacation pay. Regrettably, the delegate’s calculations are not set out anywhere in the reasons or in an accompanying appendix or table.

Mr. Johnson asserts that the delegate’s calculation is incorrect. Counsel for Orbital merely says that Mr. Johnson’s claim for additional vacation pay “is an attempt to overturn an express finding of fact”. However, I do not consider this particular issue to be a pure factual question. The interpretation of the parties’ vacation pay agreement is a matter of law and if the delegate incorrectly calculated Mr. Johnson’s vacation pay entitlement, that error, at the very least, is one of mixed fact and law. Either way, that sort of error is reviewable on appeal to this Tribunal.

Given that the delegate correctly determined that the relevant period for calculating Mr. Johnson's unpaid wage claim was the last six months of his employment, upon the termination of his employment Mr. Johnson was entitled to any vacation pay that became payable during this latter 6-month period [see subsections 58(3) and 80(1)]. That being so, it is not clear to me why the delegate referenced 2001 earnings as evidenced by Johnson's T-4 for that year.

I note that Mr. Johnson had earnings in 2003 that, presumably, would have attracted vacation pay; the delegate's reasons do not refer to Johnson's 2003 income. I am wholly unable to determine from the delegate's cursory reasons, or from the record, or counsel's submission, or Mr. Johnson's material, whether or not Mr. Johnson's entitlement to vacation pay has been correctly determined. The delegate has a legal obligation to provide reasons that adequately explain the basis for making an order for payment of wages or, as in this case, for refusing to make a payment order. The failure to give adequate reasons may be characterized as an error of law or a failure to abide by the principles of natural justice. Accordingly, I am referring the matter of Mr. Johnson's vacation pay entitlement back to the Director so that proper reasons (and, if appropriate, a calculation schedule) may be issued on this aspect of Mr. Johnson's claim.

After these latter reasons have been issued, the parties shall be given an opportunity to make submissions with respect to the correctness of the delegate's reasons and/or calculations and the Tribunal will then make a final ruling on this aspect of the appeal.

I then issued the following Order (at p. 7):

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that the matter of Mr. Johnson's vacation pay entitlement be referred back to the Director so that proper reasons may be issued on this aspect of Mr. Johnson's claim. Pursuant to section 115(1)(a) of the *Act*, I order that in all other respects the Determination be confirmed.

THE DIRECTOR'S REFERRAL BACK REPORT

The Director's delegate prepared a brief report, dated July 14th, 2004, in which he summarized the parties' respective positions but did not attempt to reconcile their conflicting views regarding Mr. Johnson's entitlement, if any, to vacation pay. In my view, the delegate's July 14th report does not comply with my Order since it does not set out any reasons supporting the delegate's conclusions for dismissing Mr. Johnson's vacation pay claim. Indeed, the delegate's report does indicate whether the delegate now believes whether his initial conclusion was correct or incorrect.

The parties' competing positions are set out in the following table:

	<i>Orbital's position</i>	<i>Mr. Johnson's position</i>
<i>Johnson's total gross earnings</i>	\$280,024.36	\$280,720.88
<i>6% vacation pay payable</i>	\$16,801.46	\$16,843.25
<i>Vacation pay received</i>	\$16,813.11	\$12,303.06
<i>(Overpayment)/Amount Due</i>	(\$11.65)	\$4,540.19

The delegate, in his July 14th report, simply concluded:

The dispute at hand is whether the complainant has received the amount of annual vacation pay the employer claims that it has paid to the complainant.

Perhaps as part of the employer's submission to the Tribunal, it would provide evidence of payment of the annual vacation pay in question.

Proof of payment of the annual vacation pay should resolve this matter.

THE PARTIES' POSITIONS

By way of a letter dated July 14th, 2004, the Tribunal's Vice-Chair forwarded the delegate's report and requested that they file written submissions with respect to its contents. I now have before me the following written submissions from the parties:

- Mr. Johnson (July 26th and August 19th, 2004)
- Orbital (August 5th and 27th, 2004; September 2nd, 2004)
- Director's delegate (September 7th, 2004)

Mr. Johnson's reply to the delegate's report

Mr. Johnson maintains that his total earnings are as reflected in the above table (\$280,720.88) and that he was either paid or took vacation days in the total amount of \$12,303.06 thus leaving an unpaid shortfall on account of vacation pay of \$4,540.19. In calculating his total earnings Mr. Johnson relied, in part, on his 2001 and 2002 T4 Statements of Earnings issued by Orbital.

Orbital's reply to the delegate's report

Orbital accepts Mr. Johnson's assertion that his documented earnings totalled \$280,720.88 but also notes that this latter amount includes the value of certain taxable benefits which Orbital's counsel submits should be excluded from Mr. Johnson's total earnings when calculating his 6% vacation pay entitlement. Counsel submits that "wages" as defined in the *Act* do not include the imputed value for "taxable benefits" that are reported to the Canada Customs and Revenue Agency pursuant to the *Income Tax Act*. Thus, Mr. Johnson's earnings total \$280,024.36 ("net of taxable benefits") and, in turn, 6% vacation pay on that amount equals \$16,801.46.

Orbital's counsel also asserts that Mr. Johnson received paid vacation time (\$10,250.08) and actual vacation pay (\$6,563.03) in the total amount of \$16,813.11 and thus Mr. Johnson has been "overpaid" on account of vacation pay by \$11.65.

With respect to the value of vacation pay actually received (as compared to paid vacation time), Orbital says that it paid vacation pay to Mr. Johnson by way of two separate cheques dated March 17th, 2003 (\$3,478.75) and April 11th, 2003 (\$3,084.28) totalling \$6,563.03.

FINDINGS

As noted in the Determination, Mr. Johnson was hired by Orbital as a sales representative and was so employed from May 1st, 2001 until March 18th, 2003. He was paid an annual salary of \$100,000 plus commissions and other benefits. Mr. Johnson was away from work on disability leave during the period August 21st, 2002 to January 3rd, 2003. The parties agree that Mr. Johnson was entitled to 6% vacation pay pursuant to their employment agreement--either by way of cash payment, or paid time off, or some combination of the two. Although the parties' agreement provided for a greater measure of vacation pay than would otherwise have been payable under section 58, the contractual vacation pay entitlement may nonetheless be enforced under the *Act* (see *Creative Screen Arts. Ltd.*, B.C.E.S.T. Decision No. 024/98).

Vacation pay is payable on all "wages" earned. I agree with Orbital's counsel that "taxable benefits" under the federal *Income Tax Act* are not necessarily "wages" for purposes of the *Act*. Not all forms of taxable compensation constitute "wages" under the *Act*--for example, gratuities and discretionary bonuses are components of taxable income but both forms of compensation are specifically excluded from the statutory definition of "wages" in section 1 of the *Act*.

However, even if I accept Mr. Johnson's figures regarding the amount of his earnings that attract vacation pay, I find that his claim must fail at least insofar as the *Act* is concerned. Section 80(1)(a) of the *Act* states that an employer can only be ordered, by way of a determination, to pay wages "that became payable in the period beginning (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of employment". Mr. Johnson says that the parties agreed, at the outset of the hearing before the delegate, to extend the delegate's jurisdiction so that the employer's liability would extend throughout the entire span of Mr. Johnson's employment. Orbital denies that such an agreement was ever concluded (and one has to wonder why Orbital would agree to such an arrangement), however, I am of the view, in any event, that the parties cannot by agreement give an administrative tribunal a statutory power it would not otherwise have. Thus, even if there were such an agreement (and the evidence before fails to satisfy me on that score), I would consider such an agreement to be null and void.

Orbital's unpaid wage liability under the *Act* extends from a point in time 6 months prior to the termination of Mr. Johnson's employment (i.e., from September 18th, 2002 to March 18th, 2003). Mr. Johnson was on short-term disability leave during the period September 1st, 2002 until January 5th, 2003. Mr. Johnson was not "working" during this latter period (i.e., providing labour or services for his employer), and thus he did not earn any "wages" during that period that would have attracted vacation pay since "wages" (with a few exceptions that are not germane to this case) are only paid for "work".

Taking Mr. Johnson's own figures, he was paid \$66,083.52 during 2003 a figure that includes \$42,181.76 in wages paid prior to his employment ending on March 18th, 2003, \$16,626.76 as "severance pay" and \$7,275 as "commissions". Some of these latter amounts would not attract vacation pay (for example, severance pay over and above any amount payable under section 63 as compensation for length of service--see *John Chaney*, B.C.E.S.T. Decision No. D104/00). However, even if one assumed that the entire \$66,083.52 attracted 6% vacation pay, the amount payable would be \$3,965.01. Again, *taking Mr. Johnson's own figures*, he concedes having been paid vacation totalling \$6,563.03 by way of two separate cheques dated March 17th, 2003 (\$3,478.75) and April 11th, 2003 (\$3,084.28). Accordingly, any liability that Orbital might otherwise have had on account of vacation pay that became payable in the 6 months prior to the termination of his employment on March 18th, 2003 [see section 80(1)(a)] has been fully satisfied.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal