



An appeal

- by -

Lawrence R. Bellman

(“Bellman”)

- and –

Her Majesty the Queen in Right of the Province of British Columbia, represented
by the Ministry of Skills Development & Labour

(“PSERC”)

- 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: M. Gwendolynne Taylor

FILE No.: 02/631 & 02/637

DATE OF DECISION: June 25, 2003



DECISION

OVERVIEW

These are appeals filed by Lawrence Bellman ("Bellman") and the Public Service Labour Relations Commission ("PSERC") from a Determination dated November 29, 2002, issued by the Director of Employment Standards ("the Director") arising out of Bellman's former employment with the Director's office. The Director's delegate found that Bellman was entitled to receive \$1,404.45 as annual vacation pay on 8 weeks compensation for length of service, plus interest.

Bellman appealed the Determination on the grounds that the Director erred in law. Bellman claims entitlement to vacation pay for the year 2001 (\$8,817.55) and vacation pay on the amount paid as severance (\$15,733.90). He asks that the tribunal vary the Determination to award these amounts.

PSERC appealed the Determination on the grounds that the Director erred in law and that Bellman is not owed any further compensation. PSERC asks that the Tribunal cancel the Determination.

This decision is based on written submissions and serves as the decision for both appeals. The Tribunal received submissions from both appellants and from the Director. Bellman represented himself. Fuller, Pearlman, McNeil represented PSERC. Robert G. Payne was counsel for the Director.

For ease of reference, the legislative provisions referred to in this decision are attached as Appendix A.

ISSUES

1. Does the severance package agreement ("Settlement Agreement and Release") the parties signed on November 22, 2001 affect Bellman's claims under the *Act*?
2. Is Bellman entitled to vacation pay for 2001?
3. Is Bellman entitled to vacation pay on his severance amount?

FACTS

Bellman was employed as an Industrial Relations Officer from December 15, 1975 to March 25, 2002. He negotiated a severance package agreement ("Settlement Agreement and Release") which was dated November 15, 2001 and he signed a Release dated November 22, 2001. The following terms are taken from the November 15 agreement (where I have indicated "number of months" I have left out the number to preserve the confidentiality of the agreement):

- Last day of work, November 23, 2001;
- Special paid absence from November 24, 2001 to March 25, 2002, which exhausted 83 days earned and banked time; there was a provision for certain policies, procedures and benefits during this time;
- Pension effective April 1, 2002;



- Severance (number of months) of salary and benefits, subject to the standard withholding for tax and other statutory deductions required from severance payments; additional provisions applied, but are not germane to this decision;
- Final year vacation (2002) of 35 days and 1 day of archived vacation; and
- Retiring allowance of (number of months) salary;

The November 15 agreement, contains the following paragraph:

Larry Bellman will provide us with a signed and executed release in the form attached, which will release the Province from any further action or liability which might arise from your employment or the termination of his employment from the Province.

The November 22 Release contains the following paragraph:

... HEREBY REMISE, RELEASE AND FOREVER DISCHARGE the said Government of the Province of British Columbia, its successors and assigns and its officers, from all manner of actions, causes of action, debts, accounts, claims and demands whatsoever which I ever had, now have or hereafter can, shall or may have arising out of in or in any way connected with my employment or the severance of my employment from the Government of the Province of British Columbia on or about the 23rd day of November 2001 and without limiting the generality of the foregoing including any claims associated with the Supreme Court Action #14527, Penticton Registry.

IT IS DISTINCTLY UNDERSTOOD AND AGREED that this release is given pursuant to a settlement agreement reached on the 22nd day of November 2001, the terms of which are contained in the letter attached to this release and marked as "A", and this release is made subject to the terms of that settlement agreement.

THE DETERMINATION

The delegate considered the issue of whether the Settlement Agreement and Release precluded Bellman from filing a complaint under the *Act*. The delegate looked at s. 4 of the *Act* which provides that an agreement to waive the minimum statutory requirements has no effect. The delegate stated:

Based on the evidence provided and the provisions of section 4, I conclude that the settlement agreement and the release signed by Bellman would be considered to be agreements to waive the minimum requirements of the Act and therefore they are of "no effect" in regard to the issues raised by Bellman.

2001 Vacation Pay

The issue before the delegate was Bellman's contention that annual vacation accrues after the fact of employment and, therefore, any reference in the negotiations or the settlement agreement to vacation pay for 2001 was, in fact, for 2000. The employer's position was that it is policy that vacation entitlement is credited in January of each year and allows employees access to their full year's vacation as of January 1.

The delegate outlined the submissions of both parties and noted that Bellman had not provided "any evidence other than his assertions to challenge the employer's interpretation of the vacation policy." The delegate considered correspondence during the negotiations between Bellman's legal counsel and the employer's representative which included specific reference to the 2001 annual vacation. In finding that Bellman was not owed any additional vacation pay for 2001, the delegate stated:



In fact, in a letter dated October 3, 2001, Bellman's legal counsel states "A. Current Vacation Balance – Mr. Bellman accepts your proposal of using the 22.5 days (157.5 hours) as part of "Special Paid Absence Prior to Retirement". Bellman did not challenge the amount of outstanding 2001 annual vacation at that time. This reflects an acknowledgement of the employer's position set forth in correspondence that Bellman had a balance of 22.5 days of 2001 annual vacation. Bellman subsequently received the 22.5 days of annual vacation.

Vacation Pay on the Severance Payment

In outlining his entitlement in his submission to the delegate, Bellman argued that "Vacation pay on the severance package is a benefit that is addressed by the Employment Standards Act, which defines severance pay, referred as compensation for length of service in the legislation, as wages and wages attract vacation pay." Bellman submitted that the employer had been dilatory in concluding the settlement agreement and when the agreement was presented, the employer stated that it was a comprehensive offer that had to be accepted, or rejected, in its entirety. "It was with this threat and the now mounting costly legal fees that I concluded the matter and retired."

The employer submitted that Bellman had been paid the 2002 vacation pay in full as though he had worked the full calendar year. The delegate noted that payment of the 2002 vacation pay was not the issue. Rather, the issue was "whether he received annual vacation pay on his compensation for length of service (severance pay)." The delegate looked at s. 63, compensation for length of service. Since it provides for a maximum compensation of 8 weeks, the delegate calculated Bellman's vacation entitlement on 8 weeks based on Bellman's actual vacation rate rather than the 6% statutory minimum.

ARGUMENT

Bellman

2001 Vacation Pay

Bellman took issue with the delegate's statement that he had "not provided any evidence other than his assertions to challenge the employer's interpretation of the vacation policy." In Bellman's submission, the delegate erred in not applying the Act and the current Interpretation Policy. Further, the employer's evidence in the policy documents should have been sufficient to establish Bellman's view of the basis for vacation entitlement. Bellman outlined provisions in the Act and the policy documents which support his interpretation that vacation entitlement accrues after an employee has worked for a period of time, not at the commencement of the employment.

Vacation Pay on the Severance Payment

Bellman submitted that the delegate erred by applying the wrong sections of the Act. He acknowledged that there was agreement on the amount of his severance pay and his rate of vacation entitlement.

Bellman argued that the delegate incorrectly applied s. 63 instead of s. 58. Since Bellman did not make a claim for compensation for length of service, section 63 is not operable. He argued that sections 57 and 58(1) provides the statutory minimum entitlement to vacation pay. He drew particular attention to s. 58(3). The Current Interpretation Manual states that some employers pay a higher vacation rate than the statutory minimum and the Director will enforce any greater benefit. The Manual refers to the definition of 'wages' in s. 1 of the *Act* which includes compensation paid under s. 63, 'liability for length of



service'. The manual discussion notes that "previously paid vacation pay is also included in an employee's gross earnings, with the result that vacation pay is paid on vacation pay." Bellman submitted that if the legislature had intended to exclude liability for length of service or severance pay from the legislation for vacation pay, that could have occurred as part of the extensive amendments in 2002.

Taking all of these together, Bellman argued, entitles him to vacation pay, at the rate agreed for his annual vacation pay, on the full amount of the severance payment.

PSERC

PSERC's appeal addressed only the severance vacation pay issue. However, PSERC filed a reply to the Bellman appeal and the Director's submissions. The outline of argument here is a combination of PSERC's appeal and submissions. Part of PSERC's submissions was that, even if the Director is correct that the Settlement Agreement and Release cannot be relied on to contract out of the provisions of the Act, they can be relied on for items that Bellman is claiming that exceed the statutory minimum requirements.

2001 Vacation Pay

PSERC submitted that the evidence before the delegate was sufficient to support the delegate's finding that vacation entitlement accrued at the beginning of each year and that Bellman had been paid for 2001. However, even if that were not true, by paying him full vacation for 2002, he has received all vacation benefits that were due under the Act.

Vacation Pay on the Severance Payment

PSERC's appeal alleged that the delegate had erred in law in finding that vacation pay was payable on severance pay. PSERC relied on the Tribunal's decision, *Re John Chorney*, BC EST # D104/00, as authority for finding that an amount paid as severance does not meet the definition of wages and, therefore, does not attract vacation pay. The *Chorney* decision was applied in *Re Monika Schitteck*, BC EST # D414/01. In addition, PSERC noted that the B.C. Court of Appeal has ruled that at common law there is no presumption that an employee is entitled to vacation pay, in addition to severance (*Bavaro v. North American Tea, Coffee and Herb trading Company (2001) BCJ No. 381*).

PSERC also submitted that the delegate erred in finding that payments made in the severance package failed to meet the requirements of the Act. Section 63(1) requires that an employer pay "an amount equal to one week's wages. Section 63(3) provides that liability is discharged if the employee is given "a combination of notice and money equivalent to the amount the employer is liable to pay." Since the amounts paid to Bellman as severance and 2002 vacation pay far exceeded the statutory requirement, the payments fully discharged the Province's liability under s. 63(3). Regardless of how the payments were characterized in the severance package, the payments were made.

PSERC argued that the Settlement Agreement and Release are effective against any entitlement that exceeded the statutory requirements. Accordingly, the parties were free to "contract out of any obligation to pay vacation pay on severance," and, if vacation pay was payable on the minimum severance owing under the Act (which PSERC denied), only the 6% statutory minimum was owed.

PSERC discussed the purpose of severance pay both at common law and under the Act, which is to provide an employee with an income stream for the period of time the parties estimate to be appropriate for the employee to find employment. Under the Act, there is no requirement to pay severance if the



employer gives the employee the required notice of termination. If Bellman had received 8 weeks notice, he would have been entitled to vacation pay during that time. He would not, in addition, have been entitled to receive vacation pay on his salary. An employee who receives severance instead of notice should not be placed in a better position.

The Director

The Director's submissions were limited to replying on the issue of vacation pay on the severance payment.

Vacation Pay on the Severance Payment

The Director submitted that neither appellant had discharged the burden of demonstrating that the determination was incorrect.

The Director drew attention to the delegate's reference to the Employment Standards Guideline Manual provision that "vacation pay cannot be substituted for this compensation (statutory compensation for length of service). Vacation pay is payable on compensation. In the case where an employer provides compensation for loss of employment in the form of "salary continuance", annual vacation pay must be calculated on the compensation." (parenthesis added)

The Director submitted that under s. 63 the employer was obliged to pay an amount equivalent to 8 weeks wages, regardless of any payment in excess of the minimum. "Wages" is defined as including the amount of any liability under s. 63. Therefore, the amount required to be paid under s. 63 attracted vacation pay payable under s. 58. Regardless of whatever else the Settlement Agreement and Release included, it did not include "a specific sum as annual vacation on the 8 weeks of compensation for length of service that the complainant was entitled to receive under the Act." The Tribunal has held that the Director has jurisdiction to enforce the actual vacation pay rate rather than the statutory minimum (*Re Cariboo Resorts Ltd. (c.o.b. 108 Best Western Resort)*, [2001] B.C.E.S.T.D. No. 141; *Kenpo Greenhouses Ltd.*, [1997] B.C.J. No. 541 (S.C.))

The Director distinguished both the *Chorney* and *Schitteck* decisions on the basis that they addressed the definition of 'wages' as it applied to severance payments, not to payment for compensation for length of service under s. 63. If an employer chooses to pay severance in excess of the s. 63 obligation, the employer nonetheless must identify the s. 63 liability and pay vacation pay on that sum. The Director also referred to s. 68 in relation to the *Chorney* decision but I have not found it necessary to outline that argument.

REASONS AND DECISION

Nature of the Appeal

The appeals are brought under section 112 of the *Act*:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) The director erred in law;



- (b) The director failed to observe the principles of natural justice in making the determination;
- (c) Evidence has become available that was not available at the time the determination was being made.

The burden is on the appellants to demonstrate that there are grounds for dismissing or varying the determination. Both appellants alleged that the Director erred in law.

2001 Vacation Pay

Bellman appealed the delegate's determination that the 2001 vacation pay had been paid in the Special Paid Absence Prior to Retirement and that Bellman was not owed any further annual vacation for the year 2001.

I find that Bellman's appeal fails for two reasons. The first reason is that this issue was settled by the Settlement Agreement and Release. The delegate did not give reasons for saying that the Agreement and Release would be considered agreements to waive the statutory minimum requirements. Having fully acquainted myself with the evidence and submissions, I find there is nothing to support a contention that there are any statutory minimum requirements that were waived by the Settlement Agreement and Release.

I find that delegate's pronouncement on this issue far too broad. It is as though the delegate would view any settlement agreement that touched on matters covered by the legislative minimum requirements to be of no effect. This issue was not fully argued in submissions by the parties. However, I consider it to be of sufficient importance that I looked to previous Tribunal decisions. There is a line of cases which expound the view that:

In my view, the entire scheme of the *Act* is undermined if bona fide settlements can be overridden simply because one party--with the benefit of hindsight--subsequently concludes that they made a bad (or at least not an optimal) bargain. If bona fide settlement agreements can be reopened even in the absence of misrepresentation, fraud, undue influence, duress or noncompliance with the agreement, then one has to wonder why any party would want to settle any dispute. In my view, a principle that discourages, rather than encourages, the timely settlement of unpaid wage disputes ought to be very closely scrutinized. In the absence of any evidence before me showing that the settlement agreement in the present case was anything other than a bona fide agreement, neither void nor voidable, I am of the view that the settlement should stand.

Re Alnor Services Ltd., BC EST # D211/99

The Tribunal will not overturn bona fide settlements particularly when the settlement was reached after the complainant received legal advice and where the effect of the settlement is to pay the complainant something more than the minimum entitlements provided for in the Act--see e.g., *Ellerton Rudy Small (a.k.a. Rudy Small) operating as R.S. Group Home* BC EST # D032/98 and *Alnor Services Ltd.* BC EST # D199/99.

Re *Charlotte Bowie*, BC EST # D286/99, and see also *Re John Clancy*, BC EST #D059/01

In *Re Director of Employment Standards - and - Domtar Inc.* BCEST #RD611/01; Reconsideration of BCEST D393/01, the Tribunal Adjudicator found that a settlement agreement did not purport to cover all claims arising from the employment. The Reconsideration Panel stated:



In my view, the adjudicator's decision is not in any fashion inconsistent with the Clancy decision (or other Tribunal decisions such as Bowie, B.C.E.S.T. Decision No. D286/99 and Golden Day Cake House Ltd., B.C.E.S.T. Decision No. D282/01) where the evidence disclosed that the settlement was intended to be a complete and final resolution of all claims that the complainant might otherwise have had with respect to the termination of his employment.

In my view, the Clancy decision and the instant case do not represent, as is asserted by the Director, different approaches to settlement agreements and releases. There is but one approach, namely, to inquire into all the relevant surrounding circumstances to determine if the settlement was a bona fide settlement that was intended to cover all, or just some aspects, of a multifaceted claim.

I do not accept Bellman's contention that there was a threat or duress which undermined the Settlement Agreement and Release. He was represented by counsel, there were negotiations, and the agreement was finalized and documents executed. It is clear that the parties intended the Settlement Agreement to be a final settlement of all matters related to Bellman employment, including the 2001 vacation pay. This case is similar to the other cases decided by the Tribunal. I agree with the rationale stated in those cases and I see no reason not to apply it in this case.

I find that the delegate erred in law in finding that Bellman was not barred from raising this complaint. However, this finding does not assist either appellant per se on the 2001 vacation pay issue.

My second reason, effectively an alternative reason, is that I find that Bellman has not substantiated that the delegate erred in law by concluding that the evidence substantiated a finding that the 2001 vacation pay was paid. The delegate considered the evidence that was presented and preferred the employer's interpretation. The delegate made special note of the evidence contained in negotiation documents that preceded the signing of the Severance Agreement and Release and noted that Bellman did not challenge the amount of the 2001 vacation entitlement at that time. The delegate accepted that as evidence that the 2001 vacation pay was paid.

An appeal to the tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination. Bellman alleged that the delegate erred in interpretation of the Act and policy documents. In my view, Bellman was really alleging that the delegate came to the wrong conclusion of fact. The tribunal will not substitute its opinion for that of the Director without some basis for doing so. I find that the delegate's finding was reasonable and well supported by the evidence.

Vacation Pay on the Severance Payment

Both Bellman and PSERC appealed this aspect of the Determination. I have found that PSERC's appeal succeeds, but largely for a reason advanced by Bellman.

I find that the Director erred in finding that Bellman was entitled to vacation pay on the severance payment. Specifically, I agree with Bellman that section 63 has no applicability to this case. This is a case about retirement. Bellman did not claim, and would not have been entitled to, compensation for length of service.

Section 63(1) and (2) set out an employer's liability to pay compensation for length of service. Section 63(3) deems the liability to be discharged if the employer gives adequate notice (defined), or gives a combination of notice and money, or if the employee terminates the employment or retires. The employer did not terminate the employment. Or, if the employer did terminate, that was not stated in the submissions. The Settlement Agreement and Release refer to Bellman's retirement. Since the employer



did not terminate Bellman's employment, I find that PSERC's submissions about "wages equal to" and "combination of notice and money equivalent to" are not relevant.

Bellman agrees that this is not about s. 63 compensation. However, in order to argue entitlement to s. 58 vacation pay, he has to find a way of defining the severance payment as 'wages'. As I understand his submission, he argues that since s. 63 compensation, which is a form of severance, is included in the definition, so is non-section 63 severance.

I disagree. The purpose of s. 63 compensation is to make an employee 'whole' when the employer has not provided adequate notice before terminating and did not have just cause for terminating. Put another way, s. 63 compensation replaces the salary and vacation pay the employee would have received if the employer had not improperly terminated the employment. That is not at all the same thing as a severance package negotiated between the parties as a condition of retirement or on termination of employment.

I do not accept Bellman's contention that "wages" include general severance payments or that severance payments attract vacation pay. This finding is supported by the Chorney and Schitteck decisions. In Schitteck, Adjudicator Stevenson found:

The severance payment made to Schitteck was not an amount required to be paid under the Act. Nor does it fit within any of the other matters that would be included in the definition of wages under the Act. It was not paid for work, it was not paid as an incentive for work, it was not money that was required to be paid under a contract of employment (see Re John Chorney, supra).

I add to this ground of appeal my view that this point was also settled by the Settlement Agreement and Release. If there had been an issue of s. 63 compensation, it may have been appropriate for the delegate to consider the claim. However, it so clearly is not a s. 63 case and does not raise any other statutory claims that, in my view, the Director should have refused to investigate once the Severance Agreement and Release were produced.

ORDER

Pursuant to section 115, I order that the Determination be cancelled.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal



Appendix A

An appeal by Lawrence R. Bellman - and - Ministry of Skills Development and Labour
(PSERC)

Employment Standards Act, R. S. B. C. 1996, C. 113

"wages" includes

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
- (d) money required to be paid in accordance with
 - (i) a determination, other than costs required to be paid under section 79 (1) (f), or
 - (ii) a settlement agreement or an order of the tribunal, and
- (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

- (f) gratuities,
- (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
- (h) allowances or expenses, and
- (i) penalties;

Requirements of this Act cannot be waived

- 4. The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4), has no effect.

Part 7 -- Annual Vacation

Entitlement to annual vacation

- 57 (1) An employer must give an employee an annual vacation of
 - (a) at least 2 weeks, after 12 consecutive months of employment, or
 - (b) at least 3 weeks, after 5 consecutive years of employment.



- (2) An employer must ensure an employee takes an annual vacation within 12 months after completing the year of employment entitling the employee to the vacation.
- (3) An employer must allow an employee who is entitled to an annual vacation to take it in periods of one or more weeks.
- (4) An annual vacation is exclusive of statutory holidays that an employee is entitled to.

Vacation pay

- 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 paydays, if
 - (i) agreed in writing by the employer and the employee, or
 - (ii) provided by the 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.

Liability resulting from length of service

- 63
- (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
 - (2) The employer's liability for compensation for length of service increases as follows:
 - (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
 - (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
 - (3) The liability is deemed to be discharged if the employee
 - (a) is given written notice of termination as follows:
 - (i) one week's notice after 3 consecutive months of employment;
 - (ii) 2 weeks' notice after 12 consecutive months of employment;
 - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
 - (b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or
 - (c) terminates the employment, retires from employment, or is dismissed for just cause.



- (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
 - (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
 - (b) dividing the total by 8, and
 - (c) multiplying the result by the number of weeks' wages the employer is liable to pay.
- (5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

Rules about payments

- 68 (1) A payment made under this Part does not discharge liability for any other payment the employee is entitled to receive under this Act.
- (2) The termination pay requirements of section 64 apply whether or not the employee has obtained other employment or has in any other way realized or recovered any money for the notice period.
- (3) If an employee is not covered by a collective agreement, the director may determine that a payment made to the employee in respect of termination of employment, other than money paid under section 64, discharges, to the extent of the payment, the employer's liability to the employee under section 63.