

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Frank Markin  
("Markin")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 98/73

**DATE OF HEARING:** May 15, 1998

**DATE OF DECISION:** June 3, 1998

**DECISION**

**APPEARANCES**

for the appellant:

In person

for Advance Orchard Co. Ltd.

Garfield Marshall

Monica Marshall

Lynn McGrath

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Mr. Frank Markin (“Markin”) of a Determination which was issued on January 16, 1998 by a delegate of the Director of Employment Standards (the “Director”). In that Determination the Director denied a claim by Markin for vacation pay from his former employer, Advance Orchard Co. Ltd. (Advance). The Director found that vacation pay had been included in the hourly rate paid to Markin and had been paid to him on each pay cheque. The Director recognized that Advance had failed to conform to the requirements of the *Act* in respect of the payment of vacation pay to Markin, but decided Advance had conformed to the intent of the *Act* and no further amount was payable.

**ISSUE TO BE DECIDED**

The issue is whether Markin has established that the Director was wrong in denying his claim for vacation pay.

**FACTS**

Markin commenced his employment with Advance in October or November of 1991. He was employed as a farm labourer. He terminated his employment March 17, 1997. The employment was seasonal and the number of hours and the amount of work available varied depending on the time of year. He worked steady for most of the year and intermittently for a 2 to 2½ month period between November and February. During his

employment he was always paid more than minimum wage and from March, 1995 to the date of his termination had been receiving \$9.45 an hour.

Advance is an experienced employer. Until recently, it had maintained a long standing policy of notifying employees that their regular hourly rate of pay included 4% vacation pay and of paying the vacation pay on each employee's scheduled pay days. Markin was aware of this policy. The employees, including Markin, were notified of this policy in two ways: first, most, if not all, of each employee's pay statements were stamped with the notation, "holiday pay is included in pay rate". The pay statement did not, however, show any breakdown between what portion of the hourly rate was regular hourly wage rate and what portion was the vacation pay component of the hourly rate of pay. Following Markin's complaint, Advance began separating the vacation pay and the regular hourly wage rate and showing both on the pay statements and the notation was removed.

As well, each employee was required to fill out and sign a time sheet showing the work they performed in each pay period during their employment. Advance introduced a sampling of three of these time sheets done by Markin, one for a period April 1-14, 1993 and two for periods in 1996. On each of the time sheets the following notation appeared:

All vacation pay (4%) is already included in all hourly and contract wages and therefore is paid with each cheque.

In early 1996, Advance prepared an Employee Information Sheet for the purpose of identifying, particularly for new employees, a number of policies and expectations applicable to the workplace. Included in the Employee Information Sheet, at point 5, was the following reference to vacation pay:

- 5). All pay rates are calculated with holiday pay included. That is to say, that a pay rate of \$7.40 per hour is arrived at by adding the base rate of \$7.12 and the holiday pay of 4% of \$0.28. This is also pointed out on all time sheets and pay slips of each employee. To qualify for statutory holiday pay, the required number of pre-worked days as defined by regulations, must be worked.

There was some controversy about whether Markin had been given an Employee Information Sheet in early 1996 to sign and had refused. For the purpose of this decision, I do not need to address that controversy. It is sufficient to conclude that Markin never agreed to either the calculation or the method of payment of vacation pay, even though he

knew of them. Both were matters upon which Advance established the policy and practice and employees became aware of it or, after early 1996, were notified of it in writing.

Markin did not complain of either the calculation or the method of payment of vacation pay until he terminated his employment with Advance. Apparently, no other employee has ever complained.

## ANALYSIS

Section 58 of the *Act* reads:

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 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 vacation pay.*
- (2) *Vacation pay must be paid to an employee*
- (a) *At least 7 days before the beginning of the employees 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.*

There is no issue that Advance has not complied with the requirements of the *Act* for paying vacation pay. In the Determination, the Director concluded compliance with the requirements of the *Act* was not necessary because the intent of the *Act* was met:

While I agree that the employer has not paid vacation pay in the manner outlined in the Employment Standards Act, I do believe the employer has met the intent of the Act and that there is not any further wages owing to you. . .

. Based on the fact you were employed almost seven years and only when you terminated it vacation pay became an issue. I am not prepared to ask your former employer to pay vacation a second time.

I disagree with the conclusion of the Director. Advance has not met either the requirements or the intent of the *Act* and the Director was wrong to deny the claim.

The *Act* does not allow the inclusion of vacation pay as part of an hourly or unit wage scheme. That conclusion has been reached by the Tribunal in several decisions: *Foresil Enterprises Ltd.*, BC EST #D201/96, *W. M. Schultz Trucking Ltd.*, BC EST #D127/97, *Kirkham Silviculture Ltd.*, BC EST #D263/97 and *Pro Fasteners Inc.*, BC EST #D556/97. The Tribunal has identified a number of factors which contribute to that conclusion, most significantly, a concern that allowing vacation pay to be included as part of an hourly or unit wage scheme has the potential to cause an employee's regular wages to be reduced as their vacation entitlement increases. In this case, the Director has accepted (and the evidence supports) that Markin had been employed by Advance for more than five years. As such, he would have become entitled to 6% vacation pay effective October or November, 1996 (the fifth anniversary date of his employment). There is, however, no indication that this increased statutory entitlement was implemented. His hourly wage rate stayed the same. In effect, his base hourly rate was reduced by the 2% increase in vacation pay entitlement mandated by the *Act*. That concern was also relied on by the Court in *Atlas Travel Service Ltd. -and- Director of Employment Standards*, unreported, Vancouver Registry No. A931266, October 7, 1994 (Braidwood) in dismissing an argument that a scheme in which holiday and vacation pay were included in the commission wage structure of the complaining employees did not contravene the *Act*:

By the contract the travel agents signed with Atlas Travel, after two years of employment, an employee would be entitled to three weeks of vacation. Assuming a base commission of 50 per cent, the *Employment Standards Act* provides for two per cent vacation pay per week. Therefore, with two weeks of vacation, the employee is receiving 46 per cent commission. With three weeks of vacation, that commission drops down to 44 per cent. That is an absurd result, for an employee's "total wages" ought not to decline with seniority in order to fund an statutory obligation which rests with the employer.  
(pages 5-6)

Also, the Tribunal has stated that the *Act* requires vacation pay be calculated on the previous year's total wages, which includes vacation pay paid in the previous year; see *Laporte, Michael & Niemi, Douglas and Intercity Appraisals Ltd.*, BC EST #D151/97. The *Act* does not contemplate, or allow, vacation pay to be calculated solely on an employee's regular hourly wage.<sup>1</sup> By doing so, Advance has calculated vacation pay for its employees, including Markin, on an amount which is, after the first year of employment, *at least* 4% less than the amount required by the *Act* to be used for calculating vacation pay. It should also be apparent from this conclusion that Advance is still in contravention of its statutory obligation respecting payment of vacation pay. Compliance with the *Act* is not achieved simply by separating the hourly rate and 4% of that rate on the pay statements of employees. Further, payment of vacation pay on each scheduled pay day is not allowed by the *Act* unless the employer and the employee agree (assuming no trade union is involved).

It follows that the appeal must succeed and the matter is referred back to the Director. In responding to the original complaint, Advance noted that Markin had been overpaid an amount of \$651.97. This overpayment was acknowledged by Markin during the hearing as owing to Advance by him. This amount may be applied to reduce the vacation entitlement calculated to be owing.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated January 16, 1998 be referred back to the Director.

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**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**

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<sup>1</sup> The caveat to this statement is if the regular hourly wage also represents "total wages" during the first year of employment.