Employment Standards TRIBUNAL

An appeal

- by -

B.D. Engine Brake Inc.
("B.D.")

- 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: David B. Stevenson

FILE No.: 2001/134

DATE OF DECISION: June 15, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by B.D. Engine Brake Inc. ("B.D.") of a Determination that was issued on January 19, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that B.D. had contravened Part 3, Section 18(2) and Part 7, Sections 58(1) and (3) of the *Act* in respect of the employment of Kulwant Kondolay ("Kondolay") and ordered B.D. to cease contravening and to comply with the *Act* and to pay an amount of $369.15.

B.D. says the Director incorrectly calculated the total wages earned by Kondolay and failed to take into account that Kondolay was overpaid an amount equivalent to three days wages on his final pay cheque.

The Director and Kondolay have filed replies to the appeal.

ISSUE

The general issue in this appeal is whether the vacation pay calculation made in the Determination is correct. More specifically, the question raised by B.D. is whether the Director incorrectly calculated the total wages earned by Kondolay.

FACTS

Kondolay worked for B.D. from January 05, 1999 to May 31, 2000 as a transmission builder. At the time of his departure from B.D., he was earning $2,496.00 semi-monthly.

Kondolay claimed he had not received all vacation pay owed. B.D. took the position that Kondolay had been paid all wages owed, arguing that Kondolay did not do any company work during the last week of his employment and that his pay for that time more than offset any vacation pay that might be owed.

The Director calculated, from a review of payroll records, that $353.31 in vacation pay was outstanding and ordered that amount, together with accrued interest, be paid. The Director based that calculation on a conclusion that the total wages earned by Kondolay from January 05, 1999 to May 31, 2000 was $77,036.50.

ARGUMENT AND ANALYSIS

I have decided the Determination must be cancelled and this matter must be referred back to the Director. The reasons for that decision follow.

In this appeal, B.D. asserts that total wages earned by Kondolay during his employment were $75,884.50, not $77,036.50, as calculated by the Director. The same assertion was made to the Director during the investigation and was detailed in a fax communication dated September 07, 2000. The difference between the total wage calculation of the Director and the amount asserted by B.D. to be the total wages earned is $1,152.00, an amount described by B.D. in the September 07, 2000 communication as "Paid May 25-31 while not working". The crux of the issue raised by B.D. in this appeal is the same point of disagreement between B.D. and the Director that arose during the investigation. B.D. argued that the amount of $1,152.00, paid to Kondolay for the last week of his employment, for days he allegedly did not work, should not have been included in total wages for the purpose of calculating vacation pay, but should have been allocated to Kondolay's vacation pay entitlement. The Director believed otherwise.

Nothing new has been added to the facts provided to the Director during the investigation. As a matter of fact, it is simply beyond controversy that B.D. paid Kondolay his regular semi-monthly wage up to and including May 31, 2000. B.D. says that was done in error, because they were unable to stop or recall Kondolay's automatic payroll deposit. That does not, however, alter the fact it was paid. The more critical question, for the purposes of this appeal, is whether the amount should have been found to be wages, since the *Act* says vacation pay is to be paid on *"the employee's total wages during the year of employment entitling the employee to the vacation pay"*, see subsection 58(1) of the *Act*. The following comment is found in the Determination:

> Because the employer paid the Complainant for the last week of employment, knowing the Complainant was not performing company work, does not justify the Employer to now use the said wages to compensate unpaid vacation pay.

The Director seems to have accepted the money was wages because it was paid, without considering the effect of B.D.'s assertion that no work was performed.

Section 1 of the *Act* defines wages:

> *"wages" includes*
>
> *a) salaries, commissions and 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 a determination 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 benefits, 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.

On its face, the claim by B.D. that Kondolay was paid for time he did not work raises the possibility that the money paid to him in the last week was not within the definition of wages in the *Act*, since paragraph (a) of the definition says wages is money paid for "work". If the money was not wages, it should not have been included in total wages for the purpose of calculating vacation pay. It does not appear that point was considered in the Determination. There may be a simple enough explanation for that, which was alluded to in the complaint itself and is more directly raised in the reply to the appeal filed by Kondolay.

In his complaint, Kondolay wrote, "Employer shook my hand Friday May 26 and said good luck and I didn't have to come back to finish notice". In his reply to the appeal, he submits that the reason he did not work out his notice was because he was advised by Mr. Brian Roth, an owner of B.D., on May 26, 2000 that he could consider that day his last. After that day, Kondolay says he was not allowed back on the premises. Those circumstances clearly raise the possibility that Kondolay was dismissed by his employer on May 26 (during the notice period) and, in the circumstances, would be entitled to length of service compensation under Section 63 of the *Act* for the period ending May 31, 2000. The Tribunal has said that an employer cannot respond to an employee's notice of termination by terminating that employee without giving notice, or severance pay in lieu of notice, unless that employer has just cause to terminate (see *Re Gray*, BC EST #D151/96). If B.D. terminated Kondolay without notice, then the money he was paid up to May 31 would be wages under paragraph (c) of the definition and B.D. has no argument at all about allocating the money to vacation pay. The Director may have felt that question did not need to be directly addressed because Kondolay had been paid by his employer to that date in any event. The complaint, however, raises that point and it should have been considered. It might have avoided this appeal.

The Determination will be referred back, partly, in order to allow to allow the Director consider that point before considering whether the money paid to Kondolay for the last week of his employment, which was not paid as vacation pay, can be used by B.D. to compensate Kondolay for unpaid vacation pay. That issue is moot if B.D. was required to pay Kondolay the balance of the notice period as length of service compensation.

I will make one final comment, which relates to the second reason for referring this matter back to the Director. B.D. says the vacation pay calculation done by the Director is wrong. I agree, but not in the sense argued by B.D. The Director has calculated vacation pay on total wages for a period of almost seventeen months. However, subsection 58(1) of the *Act* sets out how vacation pay is calculated. Under that provision, vacation pay is calculated on an *"employee's total wages **during the year** of employment entitling the employee to vacation pay"*. In this case, the Director should have calculated vacation pay in two steps - one calculation for the first year of employment, being January 05, 1999 to January 04, 2000 and another for the period of employment in the second year, from January 05, 2000 to the date of termination, May 31, 2000. Vacation pay paid or payable for the first year meets the definition of wages and becomes part of Kondolay's total wages for the purpose of calculating his vacation pay entitlement in the second year of employment. In other words, his "*total wages during the year of employment entitling the employee to vacation pay*", calculated for the period from January 05, 2000 to May 31, 2000, would include not just his regular monthly wage (and length of service compensation, if applicable), but also his vacation pay entitlement for the first year. A correct calculation of vacation pay should result in an entitlement of approximately $115.00 more than calculated by the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 19, 2001 be cancelled and the matter referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal