

An appeal

- by -

QI Systems Inc.
("Employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/267

DATE OF DECISION: July 22, 2002

DECISION

OVERVIEW

This is an appeal filed by QI Systems Inc. (the “Employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on April 23rd, 2002 (the “Determination”) pursuant to which the Employer was ordered to pay its former employee, Bevan Thistlethwaite (“Thistlethwaite”), the sum of \$3,698.43 on account of unpaid vacation pay and section 88 interest.

By way of a letter dated July 5th, 2002 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the Act and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

THE DETERMINATION

Thistlethwaite was employed as a Software Manager at an annual \$72,000 salary from September 1st, 1996 (the Employer says the actual commencement date was November 1st and this is not contested by Mr. Thistlethwaite) to September 30th, 1999. The parties agree that Thistlethwaite was entitled to 2 weeks’ paid vacation during his first year of employment and 3 weeks’ paid vacation in each year thereafter. Although this latter entitlement exceeds the minimum vacation pay entitlement provided for in the Act, the Director has the authority to enforce a contractual entitlement to vacation pay that exceeds the statutory minimum (see *Director of Employment Standards (Evinger)*, Reconsideration Decision BC EST # D331/97).

The delegate determined that Thistlethwaite received his full vacation entitlement up until December 31st, 1997 but was owed an additional \$1,440 for the 1998 calendar year and \$1,740 for the 1999 calendar year (a total \$3,180)--the balance payable under the Determination represents section 88 interest.

The thrust of the dispute between the parties concerns the paid vacation taken by Mr. Thistlethwaite in late 1997 and early 1998.

THE PARTIES’ POSITION

The Employer

In its appeal documents, the Employer states:

“Mr. Thistlethwaite, during 1997 requested from senior management 5 weeks vacation (from December 1, 1997 to January 9, 1998) to travel to Australia. Senior management agreed to this request with some reluctance...QI agreed with Mr. Thistlethwaite that his vacation would include his 2 weeks entitlement for the period November 1, 1996 to October 31, 1997, as well as his 3 week entitlement for the period November 1, 1997 to October 31, 1998....QI also agreed with Mr. Thistlethwaite that further vacation time during the November 1, 1997 to October 31, 1998 period would comprise a charge against subsequent vacation entitlement. He agreed verbally...

Mr. Thistlethwaite took one week of paid vacation in each of October 1998 and August 1999 (both weeks for his entitlement year November 1, 1998 to October 31, 1999).

Mr. Thistlethwaite's employment terminated September 30, 1999, he was paid \$1,500 vacation pay in October 1999 to complete our vacation pay obligation."

The Employer says that it satisfied its 2-week obligation for the period November 1st, 1996 to October 31st, 1997 (i.e., Mr. Thistlethwaite's first year of employment) and its 3-week obligation for the period November 1st, 1997 to October 31st, 1998 (i.e., Mr. Thistlethwaite's second year of employment) and that, in fact, it "overpaid" Mr. Thistlethwaite with respect to the matter of vacation pay.

Mr. Thistlethwaite

Mr. Thistlethwaite concedes that he received a 5-week paid vacation for the period December 1st, 1997 to January 9th, 1998 but denies any agreement with respect to "setting off" any excess vacation against his future entitlement. Mr. Thistlethwaite says that the excess vacation was a form of "bonus" or was otherwise a form of compensation for having worked a large number of extra hours in the previous period. He also agrees that he received one week's paid vacation in each of October 1998 and August 1999 (not, as stated in the Determination, August 1998; see his April 30th, 2002 submission).

ANALYSIS

Clearly, Mr. Thistlethwaite received his vacation entitlement for his first and second years of employment when he took five weeks of paid vacation commencing on December 1st, 1997 together with the additional vacation week in October 1998 (a total of six weeks against a total entitlement of five weeks). However, whether or not there was a verbal agreement that additional paid vacation would be "carried forward", section 59 of the *Act* states that a previous vacation pay "overpayment" cannot be deducted from a subsequent year's entitlement unless there is a written agreement to that effect. There is no such written agreement here.

Thus, at the termination of his employment there remained a balance due on account of vacation pay even after accounting for the Employer's final vacation pay payment of \$1,500 and the one week paid vacation taken in August 1999.

I calculate Thistlethwaite's vacation pay entitlement as follows:

Employment Year	Entitlement	Vacation Taken
Nov. 1/96-Oct. 31/97	2 weeks	None
Nov. 1/97-Oct. 31/98	3 weeks	6 weeks*
Nov. 1/98-Sept. 30/99	3 weeks x 11/12=13.7 days	1 week (Aug./99) plus \$1500

* 5 weeks for the Dec. 1/97 to Jan. 9/98 plus 1 week in October 1998 thus satisfying the Employer's obligation for Mr. Thistlethwaite's first two years of employment. By reason of section 59(2), there is no "carry forward" of the "extra" one week.

Thus, in the end result, Mr. Thistlethwaite is entitled to the following additional vacation pay:

$\$72,000 \times 11/12 \times 6\% = \$3,960 - [1 \text{ week} + \$1,500 = \$2,950] = \$1,010$ plus section 88 interest.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to reflect an amount payable by the Employer to Mr. Thistlethwaite in the amount of \$1,010 together with interest to be calculated in accordance with the provisions of section 88 of the *Act*.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal