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-

Thomas G. Bell
("Bell")

-and-

Trico Excavating Inc.
("Trico")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/307 and 98/349

DATE OF HEARING: September 8th, 1998

DATE OF DECISION: October 16, 1998

DECISION

APPEARANCES

Thomas G. Bell	on his own behalf
Meg Gaily	legal counsel for Trico Excavating Inc.
No appearance	for the Director of Employment Standards

OVERVIEW

On May 13th, 1998 a delegate of the Director of Employment Standards (the "delegate") issued a Determination in favour of Thomas G. Bell ("Bell") for $8,723.36 (including interest) under file number 087-931 (the "Determination"). The delegate determined that Bell's former employer, Trico Excavating Inc. ("Trico"), failed to pay Bell all of the wages he earned during the period from December 13th, 1995 to December 12th, 1997.

The monies found to be owing to Bell represent unpaid overtime pay ($4,274.25), statutory holiday pay ($3,192), a vacation pay "adjustment" ($1,052.94) and interest to May 13th, 1998 ($204.17).

I have two appeals before me brought by each of Bell and Trico pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Both appeals challenge the delegate's determination as to Bell's wage entitlements under the *Act.*

The delegate also assessed, in the same Determination, a $NIL penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.* Trico has not appealed the $NIL penalty.

FACTS

Certain facts are not in dispute. Bell was employed by Trico as an equipment operator from May 12th, 1991 to December 12th, 1997 and was paid an hourly rate of $21; all hours worked, including "overtime" hours, were paid at this latter rate. Bell was also paid a monthly vehicle allowance of $600. During the period spanned by the Determination, Bell received a total of $95,334 in wages and "bonuses". The parties agree that his wage entitlement during this same period was $99,608.25 taking into account the overtime provisions set out in Part 4 of the *Act.*

ADMISSIBILITY OF DISCOVERY EVIDENCE

At the outset of the appeal hearing, counsel for Trico indicated that it was her understanding that Bell proposed to submit, as part of his evidence, a transcript excerpt from an examination for discovery of a Trico officer, Mr. Cliff Noakes. This discovery was conducted as part of a ongoing civil suit between the parties in which Bell alleges that he was "wrongfully dismissed". Presumably, this action was commenced because Bell is of the view that he can recover a greater amount of severance pay in lieu of notice than the statutory minimum set out in section 63 of the *Act.* Counsel for Trico objected to the admission of the transcript excerpt.

I overruled the objection and allowed the transcript to be received into evidence for several reasons. First, this is not a situation where a third party is seeking to use the discovery evidence. Second, the civil dispute involves the same parties and the transcript excerpt concerns a matter that is a central issue in this appeal--the "bonus" monies. Third, if Mr. Noakes' testimony at the appeal hearing (he was present at the hearing but ultimately did not testify; indeed, the employer did not present any *viva voce* evidence) was contrary to his discovery evidence, the transcript could be put to him as a prior inconsistent statement under section 13 of the *Evidence Act.* On that basis, it appears not to matter whether the statement is put into evidence as part of Bell's case, or admitted during cross-examination. If (and as events transpired) Noakes did not testify, then I see no unfairness in allowing the excerpt to be put into evidence directly by Bell as part of his case. Fourth, and in general, the rules with respect to admissibility of evidence are typically relaxed in proceedings before administrative tribunals and, in my view, so long as evidence is clearly relevant and probative and is not privileged or otherwise noncompellable by statute (*see e.g.,* section 40 of the *Human Rights Code*), I am of the view that such evidence is admissible in an appeal hearing before the Tribunal.

I now turn to the substantive issues raised by the two appeals.

ISSUES AND ANALYSIS: BELL'S APPEAL

Were The Bonus Payments "Wages"?

The delegate found that Bell received "bonus" payments in December 1996 of $3,000 (drawn on a Trico account) and $2,000 (drawn on an account of a related company--Axis Environmental Services Inc.--"Axis"), respectively, and a further $1,000 bonus payment in December 1997. The delegate held that the entire $6,000 bonus payments were "wages" as defined in section 1 of the *Act* and thus credited this amount against Trico's liability to Bell.

On this latter point, the delegate's reasons read as follows:

> "The bonus monies paid to Bell and other employees were not discretionary payments as there is a company policy that all employees receive a bonus. The bonus is an incentive related to hours of work, production and efficiency because employees are aware of its existence and know throughout the year that working long hours and making extra effort to contribute to the company's productivity and

> efficiency will result in the payment of a bonus. These bonus payments constitute part of the wages paid to Bell during the period in question."

Bell disputes that he, in fact, received $6,000 in bonuses from Trico; he maintains that the $2,000 payment from Axis ought not to be credited to Trico and that the December 1997 payment of $1,000 included a vehicle allowance of $600 thus leaving a bonus of only $400. Accordingly, Bell maintains that he received $3,400 rather than $6,000 in bonus payments and, in any event, these monies were not "wages" and thus cannot be credited to Trico for purposes of calculating the latter's unpaid wage obligation.

I am satisfied that the delegate did not err when she treated the bonus payments as "wages" paid by Trico. The evidence before me shows that while the payment of a Christmas bonus was a discretionary matter on the part of Trico, once the decision was made to pay a bonus, the bonus amount was predicated on the individual employee's total hours worked, their work performance and the company's relative financial success during the year--the Christmas bonuses were not simply "gifts" from the employer to the employee.

"Wages" are defined in section 1 of the *Act* to include "money that is paid or payable by an employer to an employee for work" and "money that is paid or payable by an employer as an incentive and relates to hours of work, production and efficiency". It is clear that the Christmas bonuses were paid for "work"--*i.e.,* "labour or services an employee performs for an employer". The monies were treated as "wages" and recorded as such on the employees' T-4 documents submitted to Revenue Canada and in the employer's payroll records; only employees received the bonuses and the bonus amounts, as noted above, were based on a qualitative assessment of the employee's relative contribution to the company over the year in question and the company's overall financial performance for that year. While, undoubtedly, the bonus payments were discretionary payments, only discretionary payments that are "not related to hours of work, production or efficiency" are excluded from the section 1 definition of "wages". Bell's own testimony, in cross-examination, was that the bonus payments were related to the profitability of the company and that in a "good year" he expected to receive a more sizeable bonus.

I should add that even if the bonus monies were characterized as "gifts" and not "wages", I am nonetheless of the view that such amounts would be properly credited against the employer's unpaid wage liability. If, as alleged by Bell, the bonuses were gifts, then, by definition, the bonuses were paid without any legally sufficient consideration flowing from Bell to Trico--accordingly, I believe that it would be fair and proper, bearing in mind that one of the purposes of the *Act* is to promote the fair treatment of both employers and employees [see section 2(b)], and to prevent Bell from being unjustly enriched, to set-off the bonus payments against Trico's wage liability.

The Axis bonus

As noted above, there is no dispute between the parties that in December 1996 Bell received two separate bonus cheques--a $3,000 cheque drawn on a Trico account and another $2,000 cheque drawn on an Axis account. Both cheques were given to Bell at the same time. Bell maintains that Trico should not be credited for the Axis payment. The delegate held that the entire $5,000 bonus

payment was properly credited against Trico's unpaid wage liability, apparently accepting Trico's position that $2,000 of the bonus monies were paid from an Axis account simply because Trico was experiencing a cash-flow problem at the time. I understand that several other Trico employees' bonuses were also paid, at least in part, from an Axis account.

Trico and Axis are closely related firms. Both firms share the same office space. The firms have two common principals who, in essence, control both firms (Messrs. Noakes and Gibbons--there is a third principal, Mr. Vijay, in Axis); equipment is shared between the firms; employees are often shared between the firms. During 1966 Bell performed work on behalf of Axis but was only paid his regular wages by Trico. Although he received a T-4 form showing the $3,000 bonus from Trico, no such T-4 was issued by Axis for the other $2,000.

On balance, I am not satisfied that the delegate erred in crediting Trico with the full $5,000 paid to Bell in December 1996. There was evidence before the delegate upon which she could reasonably conclude that the $2,000 bonus paid from an Axis account was merely an internal bookkeeping matter and that the entire $5,000 was intended to be a payment to Bell on behalf of Trico. Alternatively, it would appear that both Trico and Axis are associated corporations as defined in section 95 and thus can be treated as a single entity for purposes of the *Act.*

The December 1997 Bonus

The delegate held that the $1,000 bonus paid in December 1997 did not include a $600 vehicle allowance. The $1,000 cheque was issued on December 16th, 1997, about four days *after* Bell's employment with Trico was terminated. The delegate reasoned that Trico would not have paid Bell his full vehicle allowance for December when, in fact, he was only employed for about one-half the month.

The evidence before me shows that, in general, the monthly vehicle allowance was paid at the end of the month, for that particular month, by a separate cheque. For example, the employer's payroll records show that the November 1997 vehicle allowance was paid to Bell on November 30th by way of a $600 Trico cheque numbered 3888. Bell's evidence before me is that he received two cheques in mid-December 1997--one for his regular wages and another $1,000 cheque. Bell testified that he was told by Mr. Doug Gibbons, who handed him the two cheques, that the $1,000 cheque represented his $600 vehicle allowance and a $400 bonus. This evidence was not contradicted by the employer. Neither the cheque itself nor the cheque stub is itemized.

In my view, the evidence before me is more consistent with the position advanced by Bell, namely, that the $1,000 December 1997 payment represented a $400 bonus and his $600 monthly vehicle allowance. "Allowances or expenses" are not, by definition, to be treated as "wages" (see section 1 of the *Act*). Accordingly, the delegate erred in characterizing the entire $1,000 payment received in December 1997 as wages--only $400 should have been so characterized.

Thus, in summary, $5,400 of the total $6,000 paid to Bell as "bonuses" ought to have been credited to the employer as "wages" paid.

ISSUE AND ANALYSIS: TRICO'S APPEAL

Vacation Pay & Statutory Holiday Pay

The delegate found, and the parties concede, that Bell was paid an additional 8% of his regular hourly wages. This latter amount was recorded on Bell's payroll statements as simply "vacation". Trico submits that of this amount, 6% was properly credited as vacation pay (section 58) but that the additional 2% was paid on account of statutory holiday pay (see Part 5 of the *Act*). The delegate rejected this latter submission.

The delegate was initially prepared to accept that employer's position that 2% of the total vacation pay ought to be credited against the employer's liability for statutory holiday pay but later reversed her position upon further review of the employer's original payroll records which only showed, as noted above, an item for "vacation" being 8% of Bell's gross wages. The delegate held: "As there is no indication in the payroll journal and/or on Bell's pay statements that statutory holiday pay was paid, I take the position that it was not paid."

The employer concedes that even if the 2% is credited against Bell's statutory holiday pay entitlement, Bell is still owed additional statutory holiday pay because his entitlement exceeds 2% of gross wages.

In her written submission, and again in oral argument, counsel for the employer argued that the only reason why vacation pay and statutory holiday pay were not separately accounted for in the employer's payroll records was due limitations in its payroll software. Whether or not that is, in fact, so (and I have no evidence before me one way or the other), I am nonetheless of the view that the delegate erred in finding that the employer failed to pay Bell *any* statutory holiday pay.

Bell, an employee with more than five consecutive years of service, was entitled under section 58(1)(b) of the *Act* to be paid a minimum of 6% of his total wages as vacation pay. Of course, the 6% is a statutory minimum and individual employees may bargain for a greater entitlement. However, that is not the situation here. Bell's evidence was that he never understood that he had a contractual entitlement to be paid 8% vacation pay; indeed, it was his apparent understanding that the the higher rate of vacation pay was paid in lieu of overtime pay. When specifically asked, Bell was unable to (and did not) contradict the employer's position that the additional 8% of wages that he received each pay period represented 6% vacation pay and an additional 2% for statutory holiday pay--as he put it "my pay was my pay" and he did not at any time ask his employer about specific payroll categories.

Accordingly, in my opinion, the 2% of wages that Trico paid to Bell each pay period ought to have been credited against its liability to Bell for statutory holiday pay.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be varied in accordance with the directions contained herein. This matter is referred back to the Director so that the appropriate

adjustments and interest calculations can be undertaken and an amended determination issued. As there is no appeal before me with respect to the $NIL penalty, and in view of the fact that the employer violated certain provisions of the *Act,* the $NIL penalty set out in the Determination is confirmed.

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Kenneth Wm. Thornicroft, ***Adjudicator***
Employment Standards Tribunal