Employment Standards TRIBUNAL

An appeal

- by -

Nao Fernando
(the "Appellant")

- 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: Alison H. Narod

FILE No.: 2001/172

DATE OF DECISION: August 21, 2001

DECISION

This is an appeal of a Determination made by a Delegate of the Director of Employment Standards, dated February 2, 2001. The Delegate determined that the Respondent Employer, the Office and Technical Employees Union, Local 15 ("OTEU"), had not contravened the *Employment Standards Act* as alleged by the Appellant, Nao Fernando. Among other things, Mr. Fernando alleged he was owed recompense for union dues which were deducted without authorization. Additionally, he alleged that he was owed car allowance and monies paid in lieu of benefits for 45 days of vacation he claimed were owed to him when his employment with OTEU terminated. The vacation pay claim was subsequently satisfied. I will deal with the issues of union dues, car allowance and monies in lieu of benefits, separately, below.

The parties have raised a preliminary matter respecting the admissibility of "without prejudice" letters sent by Counsel for Mr. Fernando to Counsel for the Employer. Counsel for Mr. Fernando says that the "without prejudice" letters were supplied to the Tribunal in error and should be disregarded. Counsel for the Employer says that the letters have been put into the record, any confidentiality or privilege has been waived and there can be no objection about the record being complete.

Neither Counsel relies on any portion of those letters in their submissions. In the absence of any reason submitted by the parties to believe that the contents of the letters are relevant, I ascribe no weight to them and have not considered them in rendering this decision.

a) Union Dues

The OTEU deducted union dues from Mr. Fernando's wages throughout his employment and remitted them to itself. The issue is whether it was entitled to do so under the *Act*.

The Determination

Mr. Fernando worked as a Business Agent for the Employer from March 1996 to December 1, 2000. He was a non-union employee in the sense that he was not a member of a bargaining unit represented by a bargaining agent. Moreover, there was no collective agreement in place governing his terms and conditions of employment. His Employer was at all relevant times a trade union which represented other persons in their employment relationships with their employers.

As a trade union, the OTEU represented employees of other trade unions and similar entities. In that capacity, the OTEU negotiated a collective agreement covering a number of those employers with the representative of the employers, the Vancouver & District Labour Council. This collective agreement is known as the Master Office Agreement for Trade Union Offices (the "Master Agreement"). Its current term is January 1, 1999 to December 31, 2001. Mr. Fernando was one of the persons who signed the current Master Agreement on behalf of the OTEU as

bargaining agent for the employees of those other employers. This Master Agreement is said to be of significance to Mr. Fernando's Complaint.

Article 3.1 of the Master Agreement states:

> "The Employer agrees that all employees shall maintain Union membership in the Office and Technical Employees Union as a condition of employment."

Article 3.4 of the Master Agreement states, in part:

> "The Employer agrees to deduct the amount authorized as Union dues, initiation and/or assessments once each month and to transmit the monies so collected to the Secretary/Treasurer of the Union by the fifteenth (15) of the following month, together with a list of employees from whom such deductions were made."

The Master Agreement specifically stated that it did not apply to Business Agents employed by the signatory employers.

There also exists an Agreement between the OTEU and its Business Agents for the period of January 1, 1996 to December 31, 1998, signed by three Business Agents (the "Agreement"). Mr. Fernando did not sign that Agreement. It commences with the following sentence:

> "It is agreed and understood by the aforementioned Parties that this Agreement shall be attached to and form part of the Master Agreement for Trade Union Offices currently in effect, and the term of this Agreement shall be January 1, 1996 through to December 1, 1998."

There is no dispute that pursuant to this sentence the Agreement incorporates the Master Agreement by reference. The Agreement goes on to state that where there is a conflict between it and the Master Agreement, the Agreement shall take precedence. It then sets out a number of terms additional to and/or which modify those set out in the Master Agreement.

The Delegate has the following to say about the subsequent history of this Agreement:

> "Updated terms were negotiated, agreed upon, accepted by the Board of the Employer and the Business Agents in all areas except one. Items such as rate of pay increases, and changes to other benefits, including the pension plans, were implemented by the Employer. Issues relating to overtime were not resolved. As a result, although there is correspondence relating to the acceptance of the Business Agents' proposals, and there is payroll evidence to show increases were paid, there is nothing formally signed."

Additionally, on July 21, 1999, Mr. Fernando signed a Letter of Agreement with his Employer (the "Letter of Agreement") stating, among things, that he waived his rights to certain benefits under Article 11 of the Master Agreement in exchange for "an amount equivalent to the

premiums required to provide such benefits to the EMPLOYEE in wages". The benefits referred to were health and welfare benefits.

The Employer was unable to provide evidence that it had obtained Mr. Fernando's written authorization to deduct union dues. The Employer acknowledged that it had deducted union dues, monthly, throughout Mr. Fernando's employment. According to the Determination, a portion of the dues were forwarded to the OTEU International and the remainder were deposited into general revenue towards administrative costs for the various benefit plans included in the Master Agreement, one of which is the Master Pension Plan, a plan which Mr. Fernando did not opt out of in the aforementioned Letter of Agreement. The Employer made its contributions to the Master Pension Plan and also made payments into a self-directed RRSP on Mr. Fernando's behalf.

The Employer told the Delegate that it had not obtained a written authorization from Mr. Fernando to deduct union dues because he had transferred from another OTEU local and, in order to transfer from one local to another, he was required to provide the Employer with a Withdrawal card which it believed was adequate to authorize deduction of union dues. This card, which was signed by Mr. Fernando, specified that he was a paid up member in good standing and would be required to pay his first month's union dues. However, it did not authorize deductions from his wages.

The Employer also stated that the union dues were deducted in accordance with the Master Agreement to which the Business Agents' Agreement was "attached". Payment of these dues was required in order for Mr. Fernando to participate in the benefits outlined in the Master Agreement, such as the pension plan, and for him to receive sick leave benefits.

According to the Delegate, Mr. Fernando argued that the Employer was not entitled to deduct union dues. Among other things, he pointed out that the Business Agents did not comprise a trade union and he was not covered by a collective agreement or a certification recognized by the Labour Relations Board. He contended that union dues may only be deducted for the purposes of a trade union in accordance with the *Labour Relations Code*. Accordingly, the Employer should reimburse the monies which had been deducted.

The Delegate referred to sections 21 and 22 of the *Act* and reproduced the following portions of sections 21(1) and (2) of the *Act* in her reasons:

> "21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations."

With respect to subsection 21(1), the Delegate noted that although the union dues deductions were not covered by a statute, they were deducted with Mr. Fernando's knowledge and in accordance with the Business Agents' Agreement. With respect to section 21(2), she said:

> "There was a portion of the Union dues kept by the Employer for administering the benefit plans for all the employees. Administering the benefit plans must be considered a cost for the Employer. However, it is not a cost of doing business. It is only a cost incurred for the benefit of the employees."

The Delegate said that Mr. Fernando's statement that union dues could only be deducted for the purposes of a trade union and in accordance with the *Labour Relations Code* was not entirely correct. She wrote:

> "Section 22 entitled Assignments sets out an employer's obligation to honour an employee's written assignment of wages. This section implies that there is a written assignment. That is, there is authorization from the employee to make certain deductions. The Employer was unable to supply a union check-off form."

The Delegate noted that although there was no signed union check-off form to cover the deductions, there was no dispute that the deductions were made for "union dues". Moreover, Mr. Fernando knew and accepted the fact of the deductions which were made throughout his more than four years of employment.

The Delegate went on to reproduce the following portion of section 22(3):

> "22 (3) An Employer must honour an assignment of wages authorized by a collective agreement."

She concluded that the Master Agreement was a collective agreement. The Business Agents, in their Agreement, accepted the terms and conditions of that Master Agreement, including the right to deduct dues. Moreover, Mr. Fernando acknowledged his participation in that Master Agreement by signing the above-noted Letter of Understanding. The Delegate then said:

> "Since the Employer must honour an assignment made by a Business Agent to deduct union dues in accordance with the Master Agreement, the Employer is in compliance with section 22(3) of the Act."

The Delegate went on to set out and consider the following portion of section 22(2);

> "22 (2) The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit."

The Delegate observed that Mr. Fernando received the benefits of the Master Agreement, such as paid sick leave and participation in the pension plan. This would benefit him in the future. The monthly contributions to his pension plan far exceeded the deductions from his pay cheque. Additionally, in the last year of his employment, he received 44.5 days of paid sick leave.

The Delegate noted there had been no request pursuant to section 22(2) that the Director authorize an assignment of wages for a purpose the Director considered was for the employee's benefit. Notwithstanding this, the Delegate stated:

> "In the absence of any formal request for the Director to consider this an authorized assignment, it must be determined whether the deductions were unauthorized merely because they were called "union dues". And what is the remedy for what appears to be a violation of the Act when there is a clear benefit to the employee.
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> Section 79 of the Act gives the Director discretion to issue a Determination and discretion as to whether to remedy a contravention of the Act. Section 79 states:
>
> > "79 (1) On completing an investigation, the director may make a determination under this section.
> >
> > (2) If satisfied that the requirements of this Act and the regulations have not been contravened, the director must dismiss a complaint.
> >
> > (3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:
> >
> > (a) require the person to comply with the requirement;
> >
> > (b) require the person to remedy or cease doing an act;
> >
> > (c) impose a penalty on the person under section 98."
>
> The use of the word "may" in Section 79(3) gives the Director the discretion whether to "require the person to remedy" a contravention of the Act.
>
> Section 2 of the *Employment Standards Act* sets out the purposes of the Act. Part 2(c) states the purpose is "to encourage open communication between employers and employees." In this case there was full knowledge of the deductions and the reasons for them. In fact, a deduction was made every week for over four years and the Appellant did not question it for the entire length of his employment. Only after he was terminated did he raise the issue on his complaint under the Act.
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> Another of the purposes of the Act is "to promote the fair treatment of employees and employers." In order to support the purpose of the Act, the Director must exercise discretion consistent with the Act. Consistent application of the Act is important and employers must comply with their obligations under the Act. However, the Director must be able to use discretion in deciding whether a person

> should be required to remedy the breach of the Act. A failure to recognize the discretion given to the director misapplies the Act.
>
> In this case there is no clear breach of the Act because it appears the Employer complied with Section 22(3) and the Appellant received a personal benefit for the deductions which were made. As this is consistent with the intent of the Act, I am using the discretion granted in the Act and I am not ordering any remedy to be paid to the Appellant."

Appellant's Argument

Counsel for Mr. Fernando says that the Delegate erred in fact and law in finding that:

1. Mr. Fernando was bound by a collective agreement or that section 22(3) applied in the circumstances;

2. Mr. Fernando had authorized the deduction in writing or at all;

3. even if he had agreed to the deductions, he should not be provided with a remedy, in effect finding that employees could contract out of the *Act*.

Counsel for Mr. Fernando says that Mr. Fernando and the other Business Agents employed by the Employer were represented by a trade union with authority to negotiate a collective agreement on their behalf, but they were not covered by a collective agreement. Accordingly, section 22(3) had no application since it only permitted honouring assignments allowed by a collective agreement. In this regard, Counsel relies on *Quinlan and Office and Technical Employees Union, Local 15* (1991) B.C.I.R.C. No. C204/91, a case in which the Industrial Relations Council, the predecessor to the Labour Relations Board, found that under the *Industrial Relations Act* [now the *Labour Relations Code*] the business representatives employed by the employer were not part of a trade union or association in a legal sense, did not comprise a bargaining unit, and therefore could not be said to have negotiated a collective agreement (page 13).

Counsel points out that the Agreement between the Business Agents and the Employer did not meet the definition of "collective agreement" either in the *Act* or in the *Labour Relations Code*. The definition of the *Act* incorporates by reference the definition of "collective agreement" in the *Labour Relations Code* and the *Code* defines it as "a written agreement between an employer … and a trade union.…"

Counsel for Mr. Fernando says that despite acknowledging *Quinlan* and notwithstanding that section 22(1)(a) of the *Act* only allows the deduction of union dues as permitted under the *Labour Relations Code*, the Delegate found that the Master Agreement is a collective agreement. Moreover, she found that because it was a collective agreement and permitted the deduction of union dues, the union dues deductions were allowed by section 22(3) of the *Act*. Counsel points out that no one suggests that the Master Agreement was binding on Mr. Fernando as a collective agreement.

Counsel argues that all that the Business Agents' Agreement did was to incorporate by reference the terms of the Master Agreement into their individual contracts of employment. Their contracts nevertheless remained individual contracts of employment. Apparently, the Delegate's logic was that because the Master Agreement was a collective agreement and was incorporated into their individual contracts of employment the result was that they, too, became covered by a collective agreement and its terms, including the provision permitting deduction of union dues. This is a fundamental misapprehension of the facts and law. The incorporation by reference could not render the deductions permissible under section 22(3) of the *Act*.

With respect to the Delegate's comment that it is not entirely correct that union dues can only be deducted for the purposes of a trade union in accordance with the *Labour Relations Code*, Counsel says that both section 16 of the *Code* and section 22(1)(a) of the *Act* require that the assignment of union dues to a trade union be in writing. The requirement for a written assignment of union dues cannot be rendered nugatory by containing it in a collective agreement. Even if a Appellant was bound by a collective agreement, a written assignment must still be made and in the absence of one, the deduction of union dues is unlawful under the *Act*.

Counsel says that the fact Mr. Fernando signed the Master Agreement is irrelevant. He signed it as the agent of the Employer. That cannot be construed as his agreement to the terms of the Master Agreement for his own terms and conditions of employment as an employee of the Employer.

With respect to the applicability of section 22(3), Counsel says that the obvious intention of that section is to provide for assignments contained in a collective agreement which a trade union has negotiated at arm's length with an employer on behalf of a bargaining unit, of which the employee is part. That is not the situation in the instant case. Mr. Fernando was covered by an individual contract of employment.

Counsel points out that when Mr. Fernando attempted to exercise his grievance rights under article 18 of his employment contract, the Employer denied he had the right to file the grievance on the bases that there was no collective agreement between the parties and that he was subject to a common law contract of employment.

Counsel goes on to say that the Delegate appeared to reason that since Mr. Fernando may have received a benefit from the union dues deductions (i.e. pension plan contributions and other perquisites), they might have been allowed by the Director if application had been made pursuant to subsection 22(2). However, as acknowledged by the Delegate, no application had been made for such authorization and the Director has no jurisdiction to make a *nunc pro tunc* order.

In any event, Counsel says, the union dues deductions were not made as deductions for the benefit of Mr. Fernando, but as union dues. The Employer cannot convert them into something else after the fact. This would convert the union dues into something that they never were. The parties could have, but did not, agree to co-payment or full payment of sick days and pension. Rather, the Employer agreed to fully pay these perquisites.

Counsel also says that the Delegate found that even if the union dues were properly deducted, she would not order the re-payment because Mr. Fernando agreed to them. This finding ignores and negates the provisions of section 4 of the *Act* which prohibits an agreement to waive requirements of the *Act* (except in circumstances that do not apply to non-union employees). Section 4 must apply to the union dues arrangement and therefore the Delegate erred in finding that Mr. Fernando was not entitled to challenge this arrangement as he had agreed to it.

Counsel states:

> "Put another way, while the Delegate may have a discretion not to order a remedy, that discretion is limited and must be exercised consistently with the Act. The Act disallows contracting out of its provisions. To refuse to order a remedy because in an indirect way the Appellant received a benefit is to exercise the discretion contrary to the provisions of the Act because it effectively allows an employee to contract out of the Act."

Counsel goes on to say the Delegate erred in ignoring the fact that Mr. Fernando did not authorize any deduction in writing, which is a statutory requirement under sections 1 and 22 of the *Act*. The Tribunal has expressly found that if the assignment is not in writing, an employer cannot deduct the monies (*Re: A.E. Bradford Trucking Ltd.*, BC EST # D265/96; *Re: Omineca Redi-Mix Ltd.*, BC EST # D176/97; *Re: Perfect Auto Ltd.*, BC EST # D481/98). Even if this could possibly signify agreement, the fact is that the Appellant cannot contract out of the *Act*. Therefore, the deductions were made contrary to sections 1 and 22 of the *Act*.

Counsel submits that the Delegate erred in fact and law in interpreting and relying on section 22 of the *Act* dealing with assignment of wages. The Employer's deduction of union dues from Mr. Fernando's wages do not fall within the meaning of an assignment in section 22(3) and do not fit within any category outlined in section 22(1). It is irrelevant that he agreed to them or that he indirectly may have received a benefit.

Employer's Argument

Counsel for the Employer confirms that Mr. Fernando has a common law contract of employment, the terms and conditions of which are set out in the Agreement between the Employer and the Business Agents it employed. That Agreement incorporates by reference the Master Agreement. Counsel says that Mr. Fernando confirmed that he was bound by these terms and conditions by signing the aforementioned Letter of Understanding. Thus, Counsel says, Mr. Fernando signed a contract confirming that he was bound by the terms and conditions of the Agreement, which incorporated by reference the collective agreement provisions dealing with the deduction of union dues. Accordingly, he had indeed made the written assignment that a portion of his wages making up union dues be deducted and remitted to the Employer.

Counsel says that section 22 of the *Act* requires the Employer to honour an assignment of wages made in certain circumstances. By the terms of Mr. Fernando's contract of employment, he agreed that the Employer would deduct union dues as a condition of employment. Mr. Fernando

benefited from the payment of these union dues, in that he continued to be employed as a Business Agent for the Employer while he continued paying those union dues. Secondly, he took the benefit of the Employer's bargaining with the Vancouver & District Labour Council to maintain and improve those terms and conditions of employment, which were incorporated into his contract of employment.

Counsel says that if Mr. Fernando had refused to pay the dues, his employment would have been terminated. It is inequitable to permit him to take the benefit of the payment of those dues for over four years and then later claim "aha – I gotcha". Even if he had a legal right to make such a claim, and Counsel submits he does not, he would be estopped from making it in the circumstances. The doctrine of estoppel requires one party (Mr. Fernando) by his words or conduct (accepting the benefit of the dues payments over the years) to cause the other party (the employer) to act to its detriment (permitting him to remain in its employ, and bargaining terms and conditions which would benefit him). All of those conditions would be made out in this case.

In any event, Counsel says, it is not necessary to rely on the doctrine of estoppel. This is because section 22(1)(b) of the *Act* requires the Employer to honour Mr. Fernando's written assignment of wages to (with the omission of words Counsel says are unnecessary):

> (a)n organization … if the amounts assigned are deductible for income tax purposes under the *Income Tax Act* (Canada).

This, it is submitted, is a complete answer to Mr. Fernando's claim. The Employer qualifies as an "organization" and the amounts assigned are deductible for income tax purposes under the *Income Tax Act*. Counsel has no doubt that Mr. Fernando claimed the tax deduction over the four years that he paid the dues.

Alternatively, Counsel says that it was well within the Director's jurisdiction pursuant to section 22(2) to authorize this assignment of wages because, in the circumstances, it was clearly for Mr. Fernando's benefit. Counsel also says, however, there is no need to rely on this section.

Finally, Counsel says, even if Mr. Fernando had a legal right to make such a claim, it would be unjust and inequitable to permit him to make it in the circumstances and, in his submission, Mr. Fernando was estopped from doing so.

Counsel says that the claim simply amounts to an extremely technical attempt to avoid payment of dues which Mr. Fernando agreed to pay. The *Act* was not intended nor designed for this purpose. It was designed to ensure that if monies were taken from an employee's pay cheque, the employee was aware of that fact and authorized it, rather than being forced into the situation against his or her will.

Counsel says there can be no question in these circumstances that Mr. Fernando, an experienced and knowledgeable union representative, knew full well that he was authorizing those deductions and he permitted those deductions without complaint. He made an informed choice to authorize the deductions and should not be permitted to resile from that agreement now.

Director's Submission

The Delegate for the Director reiterates that Mr. Fernando was required to be a member of the OTEU and have deductions made in order to be an employee of the Employer. As an employee, he participated in an "Agreement" with the Employer to receive the benefits under the Master Agreement along with the other Business Agents, although he waived certain terms in the Letter of Agreement in exchange for a monthly lump sum. The deduction of dues was accepted and acknowledged for over four years. The participation in the benefits was also acknowledged and accepted while employed.

Appellant's Reply

In response to the Delegate's submission, Counsel for the Appellant contends that the Delegate continues to misunderstand the *Act*. The monies deducted were deducted as union dues. Union dues may only be deducted where authorized in advance, in writing, and pursuant to a collective agreement between an employer and a trade union certified to represent those employees. In this case, there is no collective agreement between a trade union representing Mr. Fernando and the Employer.

This argument is grounded in the interplay between section 21(1) which disallows deductions from wages for any purpose except those permitted by the *Act* and section 22(1)(a) which permits an employee's written assignment of wages to a trade union in accordance with the *Labour Relations Code*. Section 16 of the *Code* requires an employer to honour an employee's written assignment of wages to a trade union certified as the bargaining agent for his or her employees (emphasis added by Counsel).

The OTEU does not fall into that category because in this case it is the employer and not a trade union certified as the bargaining agent for its employees as required under the *Code*.

The Delegate's contention that the deductions benefited Mr. Fernando and therefore are not the Employer's business expenses and do not offend against section 21(2) is untenable. The benefits (funding the RRSP and pensions) were terms the Employer was obliged to provide as part of the Master Agreement and the Letter of Understanding. They were not financed by deductions from Mr. Fernando's pay. Nor were the contributions co-funded. The Employer, having agreed to these as part of a compensation package for Mr. Fernando, could not deduct all or part of the cost of them to provide a benefit to him. Rather, as an amount required to be paid to retain employees, they are costs of doing business. Accordingly, in saying they were deducted in whole or in part for the provision of benefits, the Delegate allowed the Employer to violate section 21(2) of the *Act*.

With respect to the Employer's argument that Mr. Fernando agreed to the union dues deductions as part of his contract of employment or as a condition of employment, Counsel for Mr. Fernando says that section 4 of the *Act* and the cases cited in the original appeal submission say that an employer may not contract out of the *Act*. On the Employer's logic, if an employee as part of a contract of employment agrees to work all overtime at straight time hours and then later claims that he was entitled to be paid premium pay, his claim would not be successful because he had agreed to work those hours at straight time and had benefited from that agreement because the employer would not have agreed to employ him if he had not signed on. This would be a surprising argument for the Respondent, a union, and its Counsel to make.

With respect to the Employer's argument that the deduction would be allowed by section 22(1)(b), Counsel for Mr. Fernando points out that Counsel for the Employer offers only a bowdlerized version of the section. When the "unnecessary words" are restored, it states:

> "22 (1) An employer must honour an employee's written assignment of wages:
>
> (b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the *Income Tax Act* (Canada) …"

The term "other organization" falls within the *ejusdem generis* rule; i.e., organizations akin to charitable organizations. Trade unions are not such organizations. Moreover, if union dues fell within this category, there would be no need to have named trade unions in section 22(1)(a). The simple answer to the Employer's argument based on section 22(1)(a) is that the Director never authorized such deduction.

ANALYSIS

Section 4 of the *Employment Standards Act* provides that, subject to other provisions of the *Act* which do not apply to the instant case, the requirements of the *Act* are minimum requirements and an agreement to waive any of those requirements is of no effect.

Section 21 prohibits an employer from directly or indirectly making deductions from an employee's wages for any purpose, "except as permitted or required by this Act or any enactment of British Columbia or Canada". Additionally, pursuant to section 21(2) an employer is prohibited from requiring an employee to pay any of the employer's business costs, except as permitted by the regulations. Section 22 requires or allows an employer to honour an employee's written assignment of wages in certain specified circumstances. It states:

> "22 (1) An employer must honour an employee's written assignment of wages:
> (a) to a trade union in accordance with the *Labour Relations Code*,
> (b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the *Income Tax Act* (Canada),

(c) to a person to whom the employee is required under a maintenance order, as defined in the *Family Maintenance Enforcement Act*, to pay maintenance,
(d) to an insurance company for insurance or medical or dental coverage, and
(e) for a purpose authorized under subsection (2).

(2) The director may authorize an assignment of wages for a purpose that the director considers is for the employee's benefit.
(3) An employer must honour an assignment of wages authorized by a collective agreement.
(4) An employer may honour an employee's written assignment of wages to meet a credit obligation."

In the instant case, in order for the "union dues" deductions to be allowed, they must have:

1. been made pursuant to section 22 because they were
   (a) authorized by a written assignment of wages made to an entity or for a purpose listed in section 22(1), or;
   (b) permitted by sections 22(2) to (4); or
2. been otherwise permitted or required by the *Act* or any other enactment of British Columbia or Canada.

As noted above, there is no dispute between the parties that Mr. Fernando did not sign a union cheque-off form authorizing deductions from his wages to pay "union dues". There is an issue about whether or not Mr. Fernando made a written assignment of wages by signing the Letter of Understanding on July 21, 1999, which allegedly affirmed his participation in the Master Agreement which, in turn, became applicable to him because it was incorporated by reference in the Agreement between the Employer and the Business Agents.

However, the question of whether or not Mr. Fernando made a written assignment of wages is only relevant if the assignment was made to an entity or for a purpose listed in section 22(1) or was otherwise authorized by sections 22(2) to (4). I turn to that question first.

The Delegate found that there was no clear breach of the *Act* because the Employer complied with section 22(3), as it was an assignment of wages authorized by a collective agreement (that collective agreement being the Master Agreement in which Mr. Fernando agreed to participate, as signified by his signing the Letter of Agreement) and by his acceptance by conduct of the deductions. Moreover, the Delegate decided that it was consistent with the intent of *Act* to permit the deductions as Mr. Fernando had received a personal benefit from those deductions over the years. Accordingly, the Delegate purported to exercise her discretion to refuse to order a remedy.

Consequently, the Delegate relied on section 22(3) to find that the Employer had complied with the *Act* and on section 22(2) to find that the Appellant received a personal benefit for the deductions, and that the combination of these indicated there was no clear breach of the *Act*. She went on from there to find that it was consistent with the intent of the *Act* to make the deductions and used the discretion granted in section 79(3) of the *Act* to decline to order a remedy.

I will now address the findings of the Delegate under sections 22(3) and 22(2) and will then address the Delegate's exercise of discretion, further, below.

a) Section 22

As noted above, section 22(3) states that an employer must honour an assignment of wages authorized by a collective agreement. The Delegate found that the Master Agreement was a collective agreement. The term "collective agreement" is defined in the *Act* as follows:

> "collective agreement" means the same as in the Fishing Collective Bargaining Act, the Labour Relations Code or the Public Service Labour Relations Act."

The enactment relevant to this case is the *Labour Relations Code.* It defines "collective agreement", in part, as follows:

> "collective agreement" means a written agreement between an employer…and a trade union, providing for rates of pay, hours of work or other conditions of employment, which may include compensation to a dependant contractor for furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing."

There is no dispute that the Master Agreement is a "collective agreement" within the meaning of the *Labour Relations Code* and, therefore, the *Act*. However, the issue for the purposes of this case is whether or not it is a collective agreement in relation to the Appellant. I find that it is not. It is a collective agreement between an employer, and specifically those employers listed as employer parties to that collective agreement who are represented by the Vancouver & District Labour Council, and a union, the OTEU, as the bargaining agent for the employees of those listed employers. The OTEU is not an employer listed as an employer party to that Master Agreement. The OTEU does not represent Mr. Fernando or the Business Agents it employs as a union with respect to their employer. In fact, there is no union representing the Business Agents that is a union party to that Master Agreement. The OTEU cannot be party to that agreement as both employer and union. In short, it cannot contract with itself to create a collective agreement.

Accordingly, although the Master Agreement may be a "collective agreement" within the meaning of that term under the *Act* and the *Labour Relations Code* with respect to the parties to that agreement, it is not a "collective agreement" for the purposes of those enactments with respect to the Business Agents employed by the OTEU.

I note in this regard that the issue of whether or not the Business Agents were covered by a collective agreement was decided by the Industrial Relations Council in Decision No. C204/91. As mentioned above, in that case, the Council found that the Business Agents were not part of a trade union or association in the legal sense, and did not comprise a bargaining unit, and therefore could not be said to have negotiated a collective agreement.

Therefore, I find that the Delegate erred in finding that the Master Agreement was a collective agreement for the purposes of the *Act* and Mr. Fernando's Complaint. Since it was not a "collective agreement" for those purposes, the Employer was not permitted by section 22(3) of the *Act* to honour any assignment of Mr. Fernando's wages purportedly authorized by the Master Agreement. Accordingly, I find that the Delegate erred in concluding that there was no clear breach of the *Act* because the Employer complied with section 22(3).

With respect to the Delegate's finding that Mr. Fernando received a personal benefit for the deductions which were made, I note that she bases this conclusion on her findings that a portion of the dues were kept by the Employer for administering the benefit plans included in the Master Agreement. She also found that he received the benefits of the Master Agreement, such as paid sick leave and participation in the Master Pension Plan.

I have reviewed the Master Agreement and find that the Employer's promises to provide benefits are not linked to the provisions respecting deduction of union dues. Rather, the Employer's promises are independent of the requirement in the Master Agreement to deduct union dues from wages. For instance, Article 11.01 states that the Employer will allow a specified amount of sick leave with pay. Article 11.01 specifies that the Employer will make certain contributions to a pension plan. Accordingly, I find that the Delegate erred in linking these benefits to the union dues deductions and concluding that Mr. Fernando received a personal benefit from the deductions in the form of receipt of benefits provided by the Master Agreement.

I also note that the Master Agreement does not state that the parties have agreed how the union dues will be allocated. Although one might agree that use of a portion of the union dues towards administrative costs indirectly benefits employees, it can also be said that administration costs are a cost to the Employer of doing business. Indeed, in *Catt Steel Services Ltd.*, BC EST #D205/01, an Adjudicator held that such costs are a "business" cost in the sense contemplated by section 21(2) of the *Act*. I agree and find that the Delegate erred in finding the use of Mr. Fernando's union dues towards administering benefit plans was a benefit to him and not a use of his wages to offset the Employer's business costs.

I find the Employer's contention, that the benefit an employee receives from a deduction is a continuation of his employment and benefits, to be a proposition which, if accepted, would allow for the requirements of the *Act* to be rendered nugatory. It would be simple for an employer to argue that it would have terminated an employee's employment had he not agreed to a deduction and thereby defeat sections 21 and 22 of the *Act*.

Accordingly, I am not persuaded that the deduction of union dues was, for the purposes relied on by the Delegate, purposes that were for Mr. Fernando's benefit.

At this point, I pause to note that the Employer did not apply to the Director pursuant to section 22(2) to authorize an assignment of Mr. Fernando's wages for a purpose that was for Mr. Fernando's benefit. The Delegate acknowledges this. Accordingly, on the face of the Determination, the Delegate erred insofar as she relied on section 22(2) to support her finding that there had been no clear breach of the *Act*, because Mr. Fernando "received a personal benefit for the deductions which were made".

There are other grounds on which Counsel for the Employer says the deduction of Mr. Fernando's union dues are justified under section 22. In particular, he submits that the union dues deductions are justified by section 22(1)(a) and (b). Section 22(1)(a) permits an employer to honour an employee's written assignment of wages to a union in accordance with the *Labour Relations Code.* Section 22(1)(b) allows an employer to honour such an assignment to a "charitable or other organization … if the amounts assigned are deductible for income tax purposes under the *Income Tax Act* (Canada).

With respect to section 22(1)(a), I agree with Counsel for the Appellant that an employee's assignment of wages to a trade union can only be in accordance with the *Labour Relations Code* if it complies with section 16 thereof, which says an employer must honour an employee's written assignment of wages to a trade union certified as the bargaining agent for his or her employees under this Code …". The facts in the instant case do not fall within that provision, as there is no trade union certified as the bargaining agent for the Business Agents. Therefore the deduction of "union dues" from Mr. Fernando's wages could not be paid to the OTEU under section 16 of the *Code*, as it was not a trade union certified as a bargaining agent for Mr. Fernando.

With respect to subsection 22(1)(b), I again agree with Counsel for the Appellant that the deduction of "union dues" from Mr. Fernando's wages for payment to the OTEU was not a payment to a "charitable or other organization" within the meaning of section 22(1)(b). That phrase contemplates an organization with charitable status for income tax purposes. Had the legislature contemplated that "union dues" would satisfy that subsection, there would be no need for either section 22(1)(a) or section 22(3).

Finally, I note that Counsel for the Employer contends that Mr. Fernando is estopped from claiming that the Employer improperly deducted "union dues". The short answer to that argument is that the Employer has failed to establish at least one of the elements of estoppel, i.e., that there has been detrimental reliance. The Employer says it acted to its detriment by permitting Mr. Fernando to remain in its employ and bargaining terms and conditions which would benefit him. The Employer has failed to establish that permitting Mr. Fernando to remain in its employ was detrimental to it. As noted above, such a proposition would defeat the purpose of section 22, as it could be argued in any case respecting the propriety of deductions that an employer would have terminated the employee if the employee had not acquiesced to unauthorized deductions.

Similarly, the Employer has not established that Mr. Fernando made a representation by acquiescing to continued dues deductions which conferred a benefit to him and that that

representation was relied on to the Employer's detriment because it bargained terms and conditions with its Business Agents that benefited Mr. Fernando. As noted above, there was no evidence that the dues deductions were allocated in any way that benefited Mr. Fernando. The evidence before me indicates that the payment of union dues was beneficial, not detrimental, to the Employer. Moreover, the unauthorized dues deduction requirement commenced with the start of Mr. Fernando's employment and thus pre-existed the terms that were subsequently negotiated. In other words, there is no evidentiary nexus between Mr. Fernando's alleged representation (acquiescence to the dues deductions) and any alleged detrimental reliance the Employer placed on that representation.

In any event, I point out that this decision does not prevent an employer and its employee from agreeing that the employee will make payments to the employer at all. Rather, it prevents an employer from satisfying that agreement by making unauthorized deductions from the employee's wages. An employer has other recourse to obtaining monies owed to it as a result of promises made to it by an employee, such as through civil proceedings. It may, additionally, be able to satisfy the Director under section 22(2) that an assignment of wages may benefit the employee for reasons other than those raised in the instant case.

For the reasons set out above, I find that the Delegate erred in finding there was no clear breach of the *Act* because the Employer complied with section 22(3) and the Appellant received a personal benefit for the deductions which were made. Moreover, I find the Employer breached sections 21 and 22 in deducting union dues from Mr. Fernando's wages.

b) Section 79(3) and discretion

The foregoing does not end the matter. As noted by the Delegate, section 79(3) gives the Director the discretion as to whether or not to "require the person to remedy" a contravention of the *Act*.

The Delegate, having found that there was no clear breach of the *Act*, went on to find that the deductions were consistent with the intent of the *Act* and therefore used her discretion to decline to order a remedy.

However, having found that the Employer had not breached the *Act*, the Delegate did not have a discretion to decline a remedy. Section 79(2) of the *Act* states:

> "79(2) If satisfied that the requirements of this Act and the regulations have not been contravened, the director must dismiss a complaint."

The use of the word "must" in this section is mandatory and deprives the Director of any discretion if he or she finds there has been no contravention of the *Act*. Rather, the Director must dismiss the complaint. Accordingly, the Delegate erred in finding that she could exercise discretion after finding there was no clear breach of the *Act*.

In the event that I am wrong in finding the Delegate failed to find a breach of the *Act*, I will go on to consider whether or not the Delegate erred in exercising her discretion under section 79(3).

There are few decisions of the Employment Standards Tribunal reviewing circumstances where a Delegate decided that, although there has been a breach of the *Act*, he or she will nonetheless exercise his or her discretion to decline to order a remedy. One of these is *Tyler* BC EST #D153/00. In that case, an Adjudicator stated the following:

> "The Determination correctly notes that the Director has discretion under subsection 79(3) of the Act and that such discretion should be exercised in a manner that is consistent with the purposes of the Act. The Determination clearly considers the competing purposes, including those identified in Section 2, in exercising that discretion. The Tribunal has consistently adhered to the view first expressed in *Jody L. Goudreau et al.* (BCEST # D066/98), that because the Director is "an administrative body charged with enforcing minimum standards of employment…" and "… is deemed to have a specialized knowledge of what is appropriate in carrying out that mandate", the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act are limited:
>
> > The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
> >
> > > … a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to which he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> >
> > *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229

In the instant case, I find that the decision of the Director was unreasonable insofar as the Delegate made the above-noted errors, including misapplying the law to the facts of the case, and therefore erred at law. On the basis of the facts and laws set out above, I find that the Employer's deduction of "union dues" was not authorized by section 22 contrary to what was found by the Delegate and that the basis on which the Delegate purported to exercise the Director's discretion under section 79 did not support the exercise of that discretion and was an error.

Accordingly, I find that the deductions were made in violation of sections 21 and 22 and I set aside the Delegate's decision not to order a remedy. This portion of the Determination will be referred back to the Delegate to calculate the amount owing to Mr. Fernando for unauthorized

deduction of union dues.

In so saying, I expressly note that this decision does not prohibit a union obtaining a written assignment of wages from a non-union employee and making an argument in the future that such an assignment is otherwise justified by sections 21 and 22 of the *Act*. This decision is based on the facts and arguments made by the parties in support of their respective cases.

b) Car Allowance and Money in Lieu of Benefits

This issue relates to whether Mr. Fernando is entitled under the *Act* to payment of car allowance and monies the Employer agreed to pay in lieu of benefits in addition to the 45 days of outstanding vacation pay Mr. Fernando was owed at the time of his termination. Car allowance was provided for in the Business Agents' Agreement. The Employer agreed in the Letter of Agreement to pay Mr. Fernando the value of the premiums for certain health and welfare benefits and Mr. Fernando agreed to waive his rights to the benefits.

The Determination

The Delegate found that car allowance and monies paid in lieu of benefits would fall into the category of expenses. Since those are not considered wages, they would fall outside the jurisdiction of the *Act*. The Delegate noted that the definition of wages in the *Act* specifically excludes allowances and expenses.

She found, in the alternative, that the car allowance was paid to employees for the use of their vehicle in the course of the employer's business. When an employee ceases being employed, they are no longer conducting business on behalf of the employer. Thus, the car allowance would not be payable after Mr. Fernando's employment ended on December 1, 2000.

The Delegate found that, similarly, the monies paid in lieu of benefits would not be owing as the employee was no longer employed. The forty-five days vacation pay was a pay-out of accrued vacation.

Accordingly, the Delegate found that the Appellant was not owed any car allowance or monies in lieu of benefits.

Appellant's Argument

Counsel for the Appellant says that the Delegate erred in failing to apply section 67 of the *Act* in respect of the Appellant's claim for car allowance and monies in lieu of benefits. Section 67 states:

> 67 (2) Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment, must not be altered without the written consent of
>
> (a) the employee, or
>
> (b) a trade union representing the Employee.

It is argued that the car allowance is provided as a term or condition of employment. It is not retained on the basis of actual monies expended. Historically, Mr. Fernando received payment of car allowance during his vacation.

Counsel argues that once notice of termination was given to Mr. Fernando, all conditions of employment, including car allowance and monies in lieu of benefits, should have remained in effect and been reflected in any payment in lieu of notice. Mr. Fernando should not have suffered a loss because his employer chose to pay him in lieu of benefits rather then actually providing him with the benefits.

Moreover, Counsel argues that the car allowance and the monies in lieu of benefits were not expenses. The car allowance was a form of wages designed to provide a benefit to the Appellant. The monies in lieu of benefits were part of Mr. Fernando's remuneration, as were benefits, and could not be considered an employee expense. It is illogical to suggest that if the benefit is provided, the premiums are wages, but they are not wages if paid directly to the employee.

Counsel says that the payments in lieu of benefits would have continued during any vacation or notice period. Therefore, such remuneration should be reflected in the vacation time and notice period for which Mr. Fernando was paid out.

Employer's Argument

Counsel for the Employer argues that section 67(2) is not applicable to the instant circumstances. It was designed to ensure that an employee who is given working notice of termination of his employment does not have his or her terms and conditions of employment altered during that working notice period. Mr. Fernando was not given notice of termination. Rather, his employment was terminated without notice and he was paid two weeks' severance in lieu of notice.

Counsel also disagrees that the car allowance was a form of wages designed to provide a benefit to Mr. Fernando and not an expense. He says its purpose was to reimburse Mr. Fernando for expenses incurred in using his car for the employer's business, without requiring him to supply proof of all of his mileage expenses.

Counsel points to the car allowance provisions found in Appendix "B" of the most current, but unsigned, version of the Business Agents' Agreement. It reads:

> Car Allowance – Four hundred and fifty dollars ($450.00) per month, this is to be increased to five hundred dollars ($500.00) per month, January 1, 2000. An additional thirty-one cents ($0.31) per kilometre shall be paid for all kilometres over 1600 in any given month.

Counsel notes that $.31 per kilometre multiplied by 1600 kilometres is $496.00. Therefore, it is obvious that this amount was to reimburse Mr. Fernando for expenses related to the use of his car for his employer's business.

Counsel adds that the car allowance was not paid as part of Mr. Fernando's wages, but was always paid by way of a separate cheque reflecting the fact that this was an expense reimbursement.

Counsel says that once terminated, Mr. Fernando was no longer using his car for the Employer's business. Therefore, there was no need or contractual requirement for the Employer to reimburse him. He says that there is nothing in the terms and conditions of Mr. Fernando's contract of employment which requires the Employer to pay a car allowance in circumstances where the car is not being used for the Employer's business.

Counsel also argues that the Appellant's submission is internally inconsistent and says that the Appellant relies on section 37(2) as a "bootstrap" argument.

Counsel for the Employer made similar arguments with respect to Mr. Fernando's claim for monies in lieu of benefits. This payment was always made by way of a separate cheque and was designed to compensate Mr. Fernando for the cost of paying for his own benefit plan.

Counsel for the Employer says that benefit payments, when claimed in a termination proceeding, are only repayable to the employee during a notice period if the employee can show that he or she paid money out-of-pocket to replace the benefit. Mr. Fernando provided no such documentation to the Delegate.

In this regard, Counsel for the Employer relies on common law jurisprudence respecting claims for lost benefits in wrongful dismissal actions. He says these are treated as "special costs" and that there is a distinction between such lost benefits and wages in the case law. In this regard, he refers to the passage in *Johnson v. Moncton Chrysler Dodge (1980) Ltd.* 34 CCEL 164 (NBCA) at pages 4 to 5 of the QuickLaw version, where the court stated:

> In the absence of evidence to show that Mr. Johnson replaced or paid the cost of the fringe benefits itemized in c, [insurance] d [vehicle] and e, [gas] he is not entitled to be compensated for their loss, as they do not constitute out-of-pocket expenses.

Accordingly, Mr. Fernando's claim for car allowance and monies in lieu of benefits should be dismissed.

Delegate's Submission

The Delegate notes that the appeal relies on section 67(2) of the *Act*. That section provides that wages and all other conditions of employment may not be altered after notice of termination is received. The Appellant was not given notice of termination. The wage rate and all other conditions of his employment were maintained to the date of his termination. After that date, he was no longer employed. Thus, car allowance and benefits were no longer payable.

Appellant's Reply

Counsel for the Appellant, in reply, agrees with Counsel for the Employer that section 67(2) does not apply to the issues in this case. The Appellant does not claim for loss of car allowance and money in lieu of benefits during a notice period. Rather, his claim is that these matters are part of the wages to be paid during the 45 days of vacation pay-out.

Counsel for the Appellant points to the Letter of Understanding in which the parties, in paragraph 2, agree that:

> "The employer, in lieu of benefits noted in item (1) above, will pay the amount equivalent to the premiums required to provide such benefits to the employee in wages".

Those monies were due and payable as part of Mr. Fernando's wage package. Accordingly, this would be true for the payment of any wages paid for vacation.

With respect to the Employer's argument based on the common law principle that one can only make a claim for lost benefits if one replaces those benefits, Counsel for the Appellant says the claim in the instant case is not for lost benefits. Rather, it is for amounts the parties agreed that he would be paid as part of his wages. It is irrelevant whether the Appellant used the monies to purchase benefits or not. The amounts claimed were wages.

Counsel for the Appellant makes the same argument with respect to car expenses. Additionally, he says the Appellant was historically paid his car allowance during vacation periods. As such, the payment was clearly considered to be part of his wages.

ANALYSIS

I will deal with each of the issues of car allowance and monies in lieu of benefits, separately.

(i) Car Allowance

In my view, the car allowance was a payment made to reimburse the Appellant for expenses incurred when using his car for the purposes of performing his employer's business. Although it was paid as an allowance rather than as reimbursement for the exact out-of-pocket expenditure incurred by the Appellant, it reflects the parties' estimate of the likely average or typical expense that they anticipated that Business Agents would incur in using their cars for the Employer's business. Characterizing this as an expense is supported by the fact that the payment could be increased if a Business Agent's car usage exceeded 1600 kilometres per month by an amount that reflects the further expenses incurred per kilometre by the Business Agent.

I note that the Tribunal has held that the definition of "wages" under the *Act* does not include mileage expenses: *Re Boyko,* BC EST # D124/96. It has also held that amounts paid for a vehicle allowance are not wages: *Re Aleza West Contracting Ltd.*, BCEST # D089/99.

Accordingly, I agree with the Delegate that the car allowance in the instant case was an "allowance or expense" and was excluded from the definition of "wages" in the *Act*.

(ii) monies in lieu of benefits

Mr. Fernando claims entitlement to payment of monies in lieu of benefits in addition to the 45 days of vacation pay which was owing at the time of his termination and which was subsequently paid by the Employer. As noted, he does not claim severance pay under the *Act*, although it is agreed by all parties that he was terminated without notice.

I note that under section 58(1) of the *Act*, an employer is required to provide an employee with vacation pay based on a percentage of his total wages during the year of employment entitling the employee to the vacation pay. Although the employee's total "wages" for the purposes of that calculation may include monies paid in lieu of benefits during the year of employment, there is nothing in that section which indicates that an employer is required, in addition to that payment, to pay other sums accruing later, such as monies an employer may have agreed to pay an employee in lieu of benefits for a subsequent period of time. To do so would be to allow an element of pyramiding of benefits I cannot find was intended by the section.

Similarly, I note that in Article 9.01 of the Master Agreement, the OTEU agreed to provide employees with vacation pay based on whichever of two calculations produces the greater result: a calculation of vacation pay based on the employees' current wage rate (the "first calculation") or based on a percentage of their gross earnings for the period in which vacation was earned (the "second calculation"). Again, there is nothing in those calculations that indicates the Employer is to pay, in addition, monies the Employer may otherwise have agreed to pay the employee in lieu of benefits accruing at a later date.

In the instant case, the agreement of the parties, contained in the Letter of Agreement, spells out that these monies will be paid to Mr. Fernando "in wages". Accordingly, the parties have specifically agreed that they are wages. However, even if these monies are "wages" for the purposes of the *Act*, that does not end the matter if the requirements of the *Act* have been satisfied. As noted above, there is nothing in the *Act* that requires an employer to pay, in addition to vacation pay amounts accruing at a later date.

I note that the Master Agreement provides a more beneficial calculation of vacation pay than does the *Act*. The Tribunal has held that the requirements of the *Act* are the statutory minima. Nothing prevents the parties from agreeing to a higher rate. If a higher rate is agreed, as here, the Delegate has the jurisdiction to enforce the contract: *Re Baxter Carabetta Braun*, BC EST #D499/98, *Cariboo Resorts Ltd.,* BC EST #D128/01.

As noted above, Article 9.01 of the Master Agreement provides two formulae for calculating vacation pay and states that whichever calculation produces the greater result is the one to be used to calculate an employee's vacation pay. There is no suggestion that Mr. Fernando was not paid all monies in lieu of benefits owed to the date of termination. Nor is there any dispute respecting the amount of vacation pay already paid out to Mr. Fernando. Rather, it is said that

Mr. Fernando was entitled to the monies paid in lieu of benefits for the 45 days of vacation for which he was paid out, in addition to the amount of vacation pay he was paid out. However, there is nothing in the Business Agents' Agreement or Letter of Agreement that requires the Employer to pay Mr. Fernando at termination, an amount in addition to the vacation pay pay-out to which he is entitled.

I find that the Delegate did not err in concluding that Mr. Fernando was not entitled to monies paid in lieu of benefits in the calculation of his 45 days of vacation pay entitlement pay-out.

ORDER

Pursuant to section 112 of the *Act*, I find that the Delegate erred in finding the Employer did not contravene sections 21 and 22 of the *Act* by deducting union dues from the Appellant's wages.

The balance of the Determination is confirmed.

Accordingly, I order that the Determination be varied to reflect that the Employer contravened sections 21 and 22 of the *Act* in deducting union dues from Mr. Fernando's wages. Additionally, I refer the matter back to the Delegate to recalculate the monies owing to Mr. Fernando.

Alison H. Narod
Adjudicator
Employment Standards Tribunal