

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 -

Durack Contracting Co. Ltd.
("Durack")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/449

DATE OF HEARING: October 7, 1999

DATE OF DECISION: November 8, 1999

DECISION

APPEARANCES

Ernie Durack	on behalf of Durack Contracting Co. Ltd.
Wendy Durack	on behalf of Durack Contracting Co. Ltd.
Judy Nording	on behalf of Durack Contracting Co. Ltd.
Roderick Vander Wiel	on his own behalf

OVERVIEW

This is an appeal by Durack Contracting Co. Ltd. (“Durack”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 25, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Durack alleges that the delegate of the Director erred in the Determination by concluding that Roderick Vander Wiel (“Vander Wiel”) was owed wages for statutory holiday pay, annual vacation pay and compensation for length of service in the total amount of \$8,618.75 (includes interest).

ISSUES

The issues to be decided in this appeal are:

1. Is Vander Wiel owed Statutory Holiday pay as calculated by the delegate of the Director?
2. Is Vander Wiel owed Annual Vacation pay as calculated by the delegate of the Director?
3. Is Vander Wiel owed compensation for length of service?

FACTS

The following facts are not in dispute:

- Vander Wiel was employed by Durack from March 28, 1996 to October 9, 1998 which includes periods of layoff.
- Vander Wiel was primarily hired to drive logging truck but on occasion drove a gravel truck;
- the last period of layoff experienced by Vander Wiel prior to his termination was from March 15, 1997 to June 22, 1997, a period of approximately 14 weeks;
- Vander Wiel was paid on a percentage of the truck basis when driving logging truck and on a day rate basis when driving gravel truck;

- the pay statements issued to Vander Wiel indicated an hourly rate plus overtime rates which were arrived at by converting the percentage and day rates;
- Vander Wiel received one payment of vacation pay in the amount of \$260.00 on Nov 30, 1997;
- Vander Wiel was laid off for shortage of work on October 9, 1998 but never recalled to work;

Vander Wiel testified that he was not paid statutory holiday pay. Vander Wiel further stated that he was hired at the rate of 33% of the truck gross but he never was advised what the actual gross of the truck was. Vander Wiel further stated that he initially was only looking for statutory holiday pay and that he did not think annual vacation pay was an issue until he was told by the delegate of the Director that some annual vacation pay might be owing. Vander Wiel further stated that on one occasion he joked that the reason another employee was late was that employee had probably stopped to smoke a joint or something. Vander Wiel further stated that after the meeting with the other employee and Ernie Durack he continued working and thought the matter had been dropped. Vander Wiel finally stated that when he was laid off on October 9, 1998 he fully expected to be recalled to work and it wasn't until later that Durack advised him there was no more work for him as a result of the conflict with a fellow employee.

Ernie Durack ("E.D.") testified on behalf of Durack and stated that:

- Vander Wiel was told when he was hired that the 33% was an inclusive amount which included annual vacation pay and statutory holiday pay;
- Vander Wiel was a good driver and a good employee;
- a meeting was held with Vander Wiel, the other employee and E.D. at which time Vander Wiel was asked to apologize to the other employee, Vander Wiel declined to do so;
- the Company decided to lay Vander Wiel off at the fall break up which was only a short time away;
- he did not give written notice to Vander Wiel, however, Vander Wiel was told that the reason for his lay off in October 1998 was the conflict he had with another employee;

Judy Nording ("Nording") testified on behalf of Durack and stated that:

- she does the bookkeeping for Durack;
- up until 1997, the rate of pay for log truck drivers was 30% of the gross;
- the rate was specifically increased to provide for the inclusion of annual vacation pay and statutory holiday pay;
- calculations show that the rate of 30% plus annual vacation pay plus statutory holidays comes out to less than 33% of the gross;
- the pay statements clearly show the regular hours, overtime hours, vacation pay and statutory holiday pay earned by the employee;
- this method of compensation was discussed with the Employment Standards Branch about 10 years ago and Durack was told it was acceptable;

- the calculations by the delegate of the Director are incorrect as they include periods for which annual vacation pay and statutory holiday pay has already been paid;
- the calculations by the delegate of the Director in regard to statutory holiday pay is incorrect as statutory holiday pay should only be calculated on the straight time hours;
- the Record of Employment (“ROE”) indicates the reason for issuing as “A” - shortage of work;

The delegate of the Director determined that the period of time for which wages would be recoverable to be from June 23, 1997 to October 9, 1998. The delegate of the Director determined that the practice of Durack in paying an all inclusive rate to its employees was not consistent with the intent of the *Act*. The delegate of the Director further determined that Vander Wiel was owed for annual vacation pay and statutory holiday pay. The delegate of the Director finally determined that Vander Wiel was entitled to compensation for length of service.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Durack.

The *Act* sets forth a number of requirements to be met by an employer. Among those is the requirement to keep payroll records. Section 28 of the *Act* provides:

Section 28, Payroll records

(1) For each employee, an employer must keep records of the following information:

(a) the employee's name, date of birth, occupation, telephone number and residential address;

(b) the date employment began;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

(e) the benefits paid to the employee by the employer;

(f) the employee's gross and net wages for each pay period;

(g) each deduction made from the employee's wages and the reason for it;

(h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

(i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;

(j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

(2) Payroll records must

(a) be in English,

(b) be kept at the employer's principal place of business in British Columbia, and

(c) be retained by the employer for 7 years after the employment terminates.

(emphasis added)

Furthermore, an employer is obligated to provide wage statements in accordance with the provisions of Section 27 of the *Act* which provides:

Section 27, Wage statements

(1) On every payday, an employer must give each employee a written wage statement for the pay period stating

(a) the employer's name and address,

(b) the hours worked by the employee,

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis,

(d) the employee's overtime wage rate,

(e) the hours worked by the employee at the overtime wage rate,

(f) any money, allowance or other payment the employee is entitled to,

(g) the amount of each deduction from the employee's wages and the purpose of each deduction,

(h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for,

(i) the employee's gross and net wages, and

(j) how much money the employee has taken from the employee's time bank and how much remains.

(2) If requested in writing by an employee or by a trade union representing an employee, a wage statement may be provided electronically to the employee.

(3) To cancel a request made under subsection (2), an employee or trade union must notify the employer in writing.

(4) If a wage statement would be the same as the wage statement given for the previous pay period, another wage statement need not be given until a change occurs.

The evidence of the payroll records kept by the Employer was that for the period of time Vander Wiel drove gravel truck, he was paid annual vacation pay in addition to his earnings. No statutory holidays occurred during the period that Vander Wiel drove gravel truck. The payroll records for the period of time Vander Wiel drove logging truck clearly indicate that the total remuneration of 33% included annual vacation pay but no mention is made of statutory holiday pay.

I have reviewed the decision of the B.C. Supreme Court in **Atlas Travel Service Ltd. [99 B.C.L.R. (2nd) 37 (S.C.)** where the issue of a scheme for payment of wages which purported to include annual vacation pay was being considered. The Court went on to say on pages 5,6 :

“This argument fails on a logical basis. By the **Employment Standards Act** , s.36(1) (b), after five years of employment, an employee shall be entitled to three weeks of vacation. By the contract the travel agents signed with Atlas Travel, after two years of employment, an employee would be entitled to three weeks of vacation. Assuming a base commission of 50 per cent, the **Employment Standards Act** provides for 2 per cent vacation pay per week. Therefore, with 2 weeks of vacation, the employee is receiving 46 per cent commission. With 3 weeks of vacation, that commission drops down to 44 per cent. This is an absurd result, for an employees “total wages” ought not to decline with seniority in order to fund a statutory obligation which rests with the employer.

The **Employment Standards Act** sets up a scheme whereby an employer is obligated to pay an employee something in addition to their wages for annual vacations and general holidays. Section 37 (1) states that the annual vacation pay shall be calculated on the employee’s total wages. Therefore, the applicant’s attempt to have the employee’s commission include their vacation and holiday pay does not comply with the **Employment Standards Act.**”

While the Court’s decision in **Atlas Travel supra** dealt with the provisions of the former *Employment Standards Act* (the “former Act”) those provisions were not substantially changed when the current *Act* came into force on November 1, 1995. The intent of the annual vacation and statutory holiday provisions is to provide an entitlement **in addition** to an employee’s regular wages. The requirements of the current *Act* with respect to payment for annual vacations and statutory holidays are found in Sections 45 and 58 of the *Act* which state:

Section 45, Statutory holiday pay

An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:

(a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;

(b) in any other case, an amount calculated in accordance with the regulations.

Section 58, Vacation pay

(1) An employer must pay an employee the following amount of vacation pay:

(a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;

(b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.

(2) Vacation pay must be paid to an employee

(a) at least 7 days before the beginning of the employee's annual vacation, or

(b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.

(3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

Based on the evidence provided, I conclude that the practice of including annual vacation pay and statutory holiday pay in the percentage rate paid to Vander Wiel is contrary to the provisions of the *Act* as set forth in Sections 45 and 58 *supra*.

The amount of annual vacation pay owing to Vander Wiel as calculated by the delegate of the Director is incorrect as the delegate failed to take into consideration the vacation pay of \$170.00 paid for the gravel truck time in June 1998. I have reviewed the payroll records provided. The amount of statutory holiday pay calculated by the delegate of the Director for the statutory holidays is correct.

Therefore, based on the evidence provided, I conclude that the amount of wages owing to Vander Wiel for annual vacation pay is to be adjusted by deducting the amount of \$170.00

from the vacation pay calculated by the delegate of the Director. The amount of vacation pay owing is therefore \$2,483.27 - \$170.00 = **\$2,313.27**.

With respect to the issue of compensation for length of service, the evidence provided on behalf of Durack was straightforward. Durack maintains that Vander Wiel was laid off due to the conflict with another employee however, there was no written notice provided and further, the ROE indicated that Vander Wiel was laid off on October 9, 1998 due to a shortage of work. The *Act* provides that where a lay off of an employee exceeds the period defined as a 'temporary' lay off, the employee is then deemed to have been terminated. Vander Wiel was not recalled to work during the 'temporary' lay off period therefore he is deemed to have been terminated.

Durack alleges that just cause existed for the termination of Vander Wiel. However, the fact that Vander Wiel was permitted to continue working until the break up period and the fact that the ROE indicates a lay off for shortage of work, the allegation of just cause is not substantiated by either the documents or the actions of Durack. In the absence of just cause, with no written notice being provided, Durack is required to pay compensation for length of service.

Based on the evidence provided and on the balance of probabilities, I conclude that Vander Wiel is owed compensation for length of service in the amount as calculated by the delegate of the Director (\$3,348.99)

The appeal by the Employer is therefore allowed to the extent as set forth above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 25, 1999 be varied to be in the amount of **\$8,053.14** together with whatever interest has accrued pursuant to the provisions of Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal