

BC EST #D472/99

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 -

S & W Holdings Ltd.
("S&W")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE NO.: 1999/485

DATE OF HEARING: October 8, 1999

DATE OF DECISION: October 25, 1999

DECISION

APPEARANCES

for the appellant	Stewart Pearson
for the individual	no one appearing
for the Director	no one appearing

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by S&W Holdings Ltd. (“S&W”) of a Determination which was issued on July 15, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that S&W had contravened Section 58(3) of the *Act* in respect of the employment of Hubart Ducharme (“Ducharme”) and ordered S&W to pay an amount of \$3054.81.

Neither Ducharme nor the Director attended the hearing, although Ducharme did call the Adjudicator to advise that he was unable to attend due to work commitments, and neither filed any submission on the appeal.

ISSUE TO BE DECIDED

The issue in this appeal is whether S&W has shown that the conclusion in the Determination that Ducharme was owed vacation pay of \$3054.81 when his employment was terminated in October, 1998 is wrong.

FACTS

S&W sells and delivers bulk oil products in the Revelstoke area under an agency agreement with Imperial Oil, a partnership of Imperial Oil Limited and McColl-Frontenac Petroleum Inc. (“Imperial Oil”). S&W began selling and delivering bulk oil for Imperial Oil on January 6, 1997. When S&W became the agent for Imperial Oil, he purchased two trucks and some office equipment from the previous agent, who operated the business up to January 5, 1997.

Ducharme was employed by the previous agent until January 5, 1997 and he commenced his employment with S&W on January 6, 1997. Ducharme had worked for a series of four agents over a period of approximately 28 years. On September 30, 1998, Ducharme

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notified Stewart Pearson, the owner of S&W, he would be leaving his employment effective October 15, 1998. As Ducharme was going to work for a competitor, Mr. Pearson decided he would pay him for the period up to October 15, 1998 and let him go immediately. Ducharme's last day of employment with S&W was October 1, 1998. Shortly after, Ducharme filed a complaint alleging he had not been paid all wages owed.

The Director investigated and concluded that adjustments were owed by S&W for overtime and annual vacation pay. The Director, correctly in my opinion, treated the amount paid to Ducharme for the period from October 1, 1998 to October 15, 1998 as length of service compensation.

Following the investigation and as a result of correspondence between the Director and S&W, S&W provided an adjustment cheque in the amount of \$979.23. The Determination noted that this amount was sent to Ducharme to "satisfy his overtime claim".

During his term of employment with S&W, Ducharme and Mr. Pearson had an arrangement where Ducharme would bank his overtime hours, at the appropriate rate, and take days off. Neither side has complained about how this arrangement was set up and the Director has accepted it. On that basis, I do not need to consider it any further. From January 6, 1997 to October 1, 1998, the evidence, which was provided by Ducharme and was accepted by the Director, indicated that Ducharme worked the following overtime hours during his 21 months of employment:

1997:	January (6, 14, 15, 20, 23, 27)	11.5
	February (4, 11, 13, 14, 27)	12
	June (18)	2.5
	July (15, 16, 17, 18, 22, 24, 27)	14
	August (2, 5, 7, 10, 12, 21)	18
	September (3, 9, 10, 16, 25)	20.5
	October (1, 6, 8, 15, 20, 28)	12.5
	November (26)	4.5
	December (22, 23)	<u>5</u>
	1997 total:	100.5
1998:	January (22, 28)	6
	May (20, 21)	5
	June (24, 25, 29)	6
	July (5, 9, 19, 21, 23)	12
	August (10, 13)	8.5
	September (8, 15, 16, 23)	<u>19</u>
	1998 total:	56.5
	Total overtime hours 1997 and 1998	157

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The total hours banked by Ducharme was 1.5 times the number of overtime hours worked, or 235.5 hours.

In respect of the calculations for annual vacation and vacation pay, the following conclusions of fact are noted:

1. Ducharme was entitled, pursuant to Section 57 of the *Act*, to an annual vacation of 3 weeks and, pursuant to Section 58 of the *Act*, to annual vacation pay of 6%.
2. Ducharme had taken 2 weeks annual vacation in 1998, for which he was considered paid an equivalent of two weeks wages, \$1615.38.
3. Ducharme's total vacation pay entitlement during his employment with S&W was \$4515.00. This calculation was based on gross wages of \$75,250 (calculated on Ducharme's monthly salary of \$3500 for 21 months) plus the \$1750 paid as length of service compensation).

The Determination draws no conclusion about Ducharme's vacation pay entitlement for 1997, but it is fair to conclude that he was not entitled to receive any vacation pay from S&W in 1997, and, even though he was entitled to take 3 weeks annual vacation in that year, S&W was not required by the *Act* to pay him during that time off.

The evidence showed that Ducharme actually took 344 hours time off through 1997 and 1998, including 225 in 1997 and 119 in 1998. As the above outline of banked overtime hours indicates, in 1997, Ducharme took off and was paid for approximately 75 hours more than he had accrued under the banked overtime arrangement. It is a safe conclusion that the time off was taken as part of Ducharme's annual vacation entitlement. The fact that Ducharme was paid during this period of time off, however, does not appear to have been taken into account when the vacation pay and overtime calculation was made. It means that Ducharme was paid about \$1536.00 to which he was not entitled and for which S&W was not credited when the calculation was made.

ANALYSIS

The issue in this appeal has two aspects. First, S&W raised a question about whether the Determination was correct that Ducharme was entitled to 3 weeks annual vacation and 6% vacation pay during his period of employment with S&W. S&W took the position that Ducharme's employment was terminated by the previous agent and he was re-hired by S&W as a new employee. S&W said they did not buy the business from the former agent, but merely took over the agency under an agreement with Imperial Oil, who had terminated a similar agreement with the former agent. Consequently, S&W said that Ducharme should only have been entitled to 2 weeks annual vacation in 1998 and 4% vacation pay.

In my opinion, Section 97 applies to this case and has the effect of deeming Ducharme's employment to be continuous and uninterrupted between the former agent and S&W. Section 97 states:

97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

While S&W may not have acquired the "business" directly from the former agent, they did purchase a substantial part of the entire assets of that business. The Director was correct to conclude that Ducharme was entitled under the *Act* to 3 weeks annual vacation and 6% vacation pay during his term of employment with S&W, and more to the point, was entitled to 3 weeks annual vacation in 1997 and 1998. That time off had been earned in 1996 and 1997.

The second aspect of the appeal is whether the Director correctly calculated the amount owing. Mr. Pearson professed to some confusion about how the final calculation was made, particularly as he had already forwarded a cheque to the Director in an amount of \$979.23. He said he had attempted to contact the investigating officer to get some clarification on the Determination, but was unable to do so. While it is not entirely clear on the face of the Determination, it does appear that \$979.23 represents the net difference in dollars, including some interest, between the number of overtime hours worked in 1998 (56.5 times 1.5, or 84.75) plus the vacation hours (2 weeks, or 80 hours) less the number of "time off" hours paid (119). S&W has not shown the Director made any error in not taking that payment into account when the vacation pay entitlement was determined.

I have some difficulty with the vacation pay calculation. Based on the evidence I received, and as I indicated above, in 1997 Ducharme received about \$1538.00 more than he was entitled to receive under the *Act*. That amount seems to have been ignored by the Director, even though it was probably paid to Ducharme in conjunction with vacation time off. In my opinion, the fair thing is to consider this amount as part of the statutory vacation pay obligation of S&W. I am supported by this view by the following statement of the purpose in Section 2 of the *Act*:

2. *The purposes of this Act are to . . .*
- (b) *promote the fair treatment of employees and employers,*

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Treating that amount as part of S&W's statutory vacation pay does not violate any other object or purpose of the *Act* or adversely affect any other statutory right or obligation that either Ducharme or S&W had.

In result, the amount of \$1538.00 should have been considered to have been received by Ducharme as part of his vacation pay entitlement and reduced the amount ordered to be paid accordingly.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 15, 1999 varied to show the amount ordered payable as vacation pay as of the date of the Determination to be \$1361.62. Interest will be payable on that amount pursuant to Section 88 of the *Act*.

David B, Stevenson
Adjudicator
Employment Standards Tribunal