

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 -

Baxter Carabetta Braun
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 98/549

DATE OF DECISION: November 6, 1998

DECISION

OVERVIEW

This is an appeal by Baxter Carabetta Braun (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination on July 29, 1998 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that the Employer had failed to pay a former employee, Sandi L. E. Grant (“Grant”), vacation pay pursuant to her contract of employment. The Employer’s appeal argued that Grant was only entitled to the vacation pay provided by Section 58(1) of the *Act*.

ISSUE TO BE DECIDED

The issue in this case is the amount of Grant’s entitlement to vacation pay.

FACTS

The facts in this case were not in dispute. Grant was employed by the Employer as an accountant from September 24, 1997 until February 6, 1998. Grant’s contract of employment stated:

You will commence full time employment with our firm on or before October 1, 1997. Your salary will be \$3,450 per month (\$41,400 annually) with three weeks annual vacation. This salary will be in effect until September 30, 1998 at which time we perform all staff and salary reviews for the firm. . . .

Grant stated that the Employer urged employees to take time off over Christmas, and she had complied with the request by taking time off without pay. Grant offered her resignation on February 6, 1998. The Employer elected not to accept her notice and requested that she cease her employment immediately. It issued Grant a cheque for her vacation pay, calculated on the basis of six per cent of her gross earnings. Grant requested compensation for length of service. Mr. Hardy Baxter (“Baxter”), an officer of the Employer, contacted the Employment Standards Branch. According to Baxter, he was told that Grant was entitled to one week’s pay as compensation for length of service and that her vacation pay would be at the rate of four per cent of gross earnings. The Employer issued a second cheque to reflect the compensation for length of service and the reduced entitlement to vacation pay.

Grant filed a complaint on February 18, 1998 claiming that her vacation pay should have been calculated on the basis of six per cent of her gross wages.

In the course of her investigation Baxter told the Director's Delegate that Grant would have been entitled to six per cent vacation pay (or three weeks' vacation) had she remained an employee for one year.

The Determination found that the Employer had violated Section 58(1) of the *Act* and ordered it to pay \$288.54, including interest through July 29, 1998.

ANALYSIS

In its appeal, the Employer argued that the *Act* provided that vacation pay accrued at the rate of four per cent, based on information provided by two different representatives of the Employment Standards Branch. The Employer received an Information Bulletin that stated that an employee was entitled to vacation pay calculated on the basis of four per cent during her first year of employment. The Employer conceded that Grant would have received vacation pay of six per cent had she worked for the firm one year.

The Director's Delegate pointed out that the Information Bulletin the Employer attached to its appeal was out of date, as it was based on an earlier *Employment Standards Act*, which was replaced by the current *Act* on November 1, 1995. She argued that Section 58(1) of the *Act* is a minimum entitlement, and the Determination was based on Grant's contract of employment.

Section 58(1) of the *Act* states:

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

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

The operative words in this case are "at least." While the *Act* provides for vacation pay at the rate of four per cent in the absence of any contract of employment, it contains minimum standards for vacation pay and other terms of employment. Those standards can be overridden by individual contracts of employment that meet or exceed the requirements of the *Act*. The Director has the authority to enforce such a contract of employment.

In this case, Grant's contract clearly stated that she was entitled to six per cent vacation pay, and it takes precedence over the *Act*. The Employer acknowledged that her contract provided for six per cent vacation pay, although it claimed that the contract had no effect in the first year of Grant's employment. Such a limitation would require a clear statement in the contract, which the contract does not contain.

ORDER

For these reasons, the Determination of July 29, 1998 is confirmed as issued in the amount of \$288.54, plus any further interest that has accrued, Pursuant to Section 88 of the *Act*, since the Determination was issued.

Mark Thompson
Adjudicator
Employment Standards Tribunal