

BC EST #D 556/97

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 -

(“ Pro Fasteners Inc. ”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

Adjudicator: Paul E. Love

File No.: 97/768

Date of Decision: January 14, 1998

DECISION

OVERVIEW

This is an appeal by Pro Fasteners Inc., pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination issued on September 26, 1997. In this appeal the employer claims that no vacation pay is owed to the employee and that the Director's delegate erred in determining that there was a breach of s. 58 of the Act. The employer's argument that the employee's failure to object to the employer's policy constitute an estoppel to enforcement of the Act, was rejected.

ISSUES TO BE DECIDED

Is the employer entitled to treat commissions received by an employee while taking a vacation as vacation pay within the meaning of s. 58 of the Act?

Does the failure of an employee to object to the employer's policy afford the employer a reason for this Tribunal to set aside or vary a Determination?

FACTS

John Engbrecht worked as a commissioned salesperson from March 21, 1991 to September 9, 1996. He was paid \$1,800.00 per month plus commissions. The commissions were calculated and paid monthly. His salary of \$1,800 per month was continued in all months when a holiday was taken. The employer's policy was not to pay vacation pay as it continued to pay the employee the entire commission for a month in which a holiday was taken. The Director's delegate came to the conclusion that Mr. Engbrecht was entitled to the sum of \$2,079.21, being the total of vacation pay owing for 1994 (\$756.24), 1995 (\$1,224.92) plus interest owed on those sums.

The Director's delegate calculated vacation pay earned as a percentage of total income received in a year. She determined the entitlement by subtracting the total value of the vacation days taken, from the vacation pay earned. In other words:

Vacation Pay owing = Vacation pay entitlement - Value of Vacation taken

Vacation Pay Entitlement = Gross wages in a year x 4 % or 6 % depending on the years of service

Value of Vacation Taken = (Vacation days taken) x (rate of pay per day)

Rate of Pay per Day = $\$1800 \times 12 / 52 / 5 = \83.07

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The employer did not pay vacation pay but paid the employees monthly salary and commissions, as if the employee did not take vacations. In a submission dated October 12, 1997 the employer advanced a method of vacation pay entitlement based on the value of vacation days taken and the value of the commission received in a month in which a vacation was taken which was prorated.

Value of Vacation taken + (Monthly commission)/(20 days per month) x days of holidays taken

The employer's analysis resulted in a calculation of vacation pay owing of \$188.11.

ANALYSIS

Issue # 1: Are commissions received during a holiday, properly characterized as vacation pay?

The employer argues that it is entitled to treat commissions paid during the employee's holiday as vacation pay because the employer loses income when a salesperson is on a vacation. The employer also says it serviced the employee's clients. There, however, does not appear to have been any evidence of this point. I do not agree with the approach taken by the employer. The Act clearly sets out the method for calculation of holiday pay.

By virtue of section 57(1) of the Act an employer must give an employee who has more than 12 months service but less than 5 years service an annual vacation of two weeks.

An employer must also, after 5 calendar days of employment, pay to the employee 4 % of the employees total wages during the year as vacation pay. After 5 years service the employee is entitled to 6 %.

Wages is defined in s. 1 of the Act as:

including salaries, commissions or money, paid or payable by an employer to an employee for work

Total wages in a year means the gross amount of all wages. The vacation pay is calculated on the total wages.

There appears to have been no evidence before the Director's delegate to support prorating a commission paid in a vacation month based on the number of vacation days taken. The employer had a policy for doing what was done, but it also appears to be a practice which violates s. 58 of the Act.

Issue #2 Estoppel

The employer argues that the failure of the employee to object to its method of calculating holiday pay is a reason for this Tribunal to set aside or vary the Determination.

It appears that by virtue of s. 4 of the Act, an agreement to waive a statutory, with the exception of matters within sections 43, 49, 61 and 69 (which are of no concern here) is of no effect. The Act is designed to provide a minimum set of standards for all employees other than excluded employees (s. 2 and 3). There is some doubt in this case as to whether the employee agreed with the employer's actions, or whether there was mere acquiescence because the employee was unfamiliar with the provisions of the Act. In this case the acquiescence or failure of the employee to object to the employer's policy did not afford the employer a reason for this Tribunal to set aside or vary a Determination.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated September 26, 1997 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal