

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-

The T. Eaton Company Limited

(“Eaton's” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/183

DATE OF HEARING: November 24th, 1997

DATE OF DECISION: January 5, 1998

DECISION

APPEARANCES

Adele L. Burchart for The T. Eaton Company Limited
Raymond Winger on his own behalf
No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by The T. Eaton Company Limited (“Eaton's” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on February 26th, 1997 under file number 6069 (the “Determination”).

The Director determined that Eaton's owed its former employee, Raymond Winger (“Winger”), the sum of \$1,781.08 on account of unpaid vacation pay (section 58 of the *Act*) and interest (section 88 of the *Act*).

The appeal was heard at the Tribunal’s offices in Vancouver on November 24th, 1997 at which time I heard two witnesses, Patrick Mobberley and Maureen Wilson, on behalf of the employer; Winger testified on his own behalf. The Director did not attend the appeal hearing.

FACTS

Winger was employed by Eaton's for some 28 years prior to his retirement on February 29th, 1996. This appeal concerns Winger’s entitlement to vacation pay on retirement.

The Employer’s Paid Time Off Program

In 1980 the employer implemented a “Paid Time Off” (“PTO”) program pursuant to which Winger was entitled to 45 paid days away from work each year. In Winger’s case, the 45 days consisted of a “core” of 20 days plus another 25 “bonus” days based on his years of service. Pursuant to the terms of the PTO program, Winger’s entitlement to 9 statutory holidays under the *Act* was included in his 45-day total.

A brochure which describes the PTO program (and which, I find, was made available to Winger) specifically deals with the question of PTO entitlement on retirement:

“What am I entitled to if I leave the Company?”

After you terminate your regular service with Eaton's, your paid time off is recalculated according to your actual service and earnings in your final year with the Company as described below:

a You will have been paid for any Public Holidays for which you were eligible and which occurred before your service terminated.

b Your Core Vacation entitlement is recalculated as a percentage of your earnings during the current Legislation Year as set by provincial law.

c Your Flexible Days are prorated according to your actual regular service during your final Vacation Year and calculated at your usual daily rate for paid time off.

In no event will your final entitlement on termination be less than the minimum entitlement set by provincial law.

Any excess paid time off taken during your final Vacation Year is considered a vacation advance. Similarly, any unused entitlement is paid to you in cash. If you are contemplating leaving the company part-way through a Vacation Year, you are advised to schedule and take only as much paid time off as you will have actually earned that year *before* you terminate your regular service.

What am I entitled to when I retire?

When you retire, your paid time off entitlement is generally calculated as it would be if you were leaving the Company for any other reason (see above). However, if you qualify for approved retirement with benefits and your age plus years of regular service total 85 points or more, your Eaton's entitlement will *not* be reduced in your final Vacation Year, even though it may not have been fully earned that year."

It should be noted that upon his retirement, Winger did not have 85 or more "regular service points"; he had 83 points and would have had 84 points had he worked for another two months in 1996.

The Employer's Voluntary Retirement Program

In 1995 Eaton's announced a "Voluntary Retirement Program" ("VRP"); this program was restricted to certain employees, including Winger, and was only in effect during the period December 27th, 1995 to February 23rd, 1996--eligible employees had elect into the VRP program during this latter period. Under the VRP Guidelines (which I also find were made available to Winger), an eligible employee could select one of three options.

After several discussions between Winger and Eaton's personnel and between Winger and a third-party benefit consultant retained by Eaton's to advise its employees, Winger decided, on or about February 21st, 1996, to select "Option 2: Immediate Pension". Winger fixed his retirement date at February 29th, 1996 although he had could have worked past that date had he wished to do so.

It is important to note that the decision to elect early retirement in accordance with the VRP was entirely Winger's; he was under no compulsion to retire early. It should also be noted that the VRP provided pension benefits that would not otherwise have been available to Winger had he simply decided to leave Eaton's employ in February 1996.

Under the terms of the VRP, vacation pay entitlement upon retirement was linked to the retiring employee's "service points". If the employee had 85 points and retired "during February 1996 or later, the entire balance of the 1996 vacation year's entitlement" was to be paid out. In other words, these retiring employees would receive their full entitlement even though they would not, in the ordinary course of events, have been so entitled. I might add that this approach to the payment of PTO benefits on retirement is entirely consistent with that set out in the employer's PTO brochure, referred to above, which stated that PTO entitlements would not be reduced in the final Vacation Year for retirees with 85 or more service points.

On the other hand, for employees, such as Winger, with less than 85 service points:

"...the 1996 vacation entitlement will be pro-rated by complete months worked from February 1, 1996, less days taken, and any balance paid out. Specifically, the 1996 vacation entitlement equals 1/12 times current year entitlement for each completed calendar month in the fiscal year (include leaving month if termination occurs on the last working day in the month) **plus** legislated minimum from previous July 1 to fiscal year end. In no case will the employee receive less than the legislated provincial minimum."

In accordance with this formula, on retirement Winger's PTO entitlement was calculated as follows:

6% of gross earnings for July 1st, 1995 to January 27th, 1996	= \$1,536.92
1/12th of 1996 vacation entitlement	= \$ 444.72
Total Vacation Pay payable	= <u>\$1,981.64</u>

Prior to his electing Option 2 under the VRP, Winger spoke with Patrick Mobberley, the manager of the Lansdowne store where Winger worked and a man that Winger had known for some 25 years, about various aspects of the VRP and, in particular, the provisions regarding payment of PTO benefits. In response to Winger's inquiries, Mobberley sent an internal electronic mail communication to Margaret Watts, who was an HRM officer located in Toronto. The e-mail communication, transmitted January 15th, 1996, reads, in part:

"We have a sales associate who is seriously considering accepting the V.R.P. offer. He would like to know what his exact entitlement for vacation payout would be. His name is Ray Winger...If he were to leave on Feb. 29, can you tell us what he would receive?"

On January 16th, 1996, Mobberley received the following reply:

“The amount below for vacation payout it is approximately (sic) \$2,075.00. I this point I cannot give you the axact (sic) amount due to the 1996 vacation is not set up as yet (sic).

This amount should be very close to the system calculation.”

Upon receiving the payout figure, Mobberley immediately telephoned Winger and advised the latter regarding his likely PTO entitlement. It is to be noted that the estimated payout--\$2,075.00--differs by less than \$100 from the actual payout of \$1,981.64.

Winger admits to being advised that the PTO payout figure was likely to be about \$2,000 but says that “he never sat down and calculated it” and that he had no information as to how the payout figure was calculated.

As noted above, on retirement Winger was paid the sum of \$1,981.64 on account of his PTO entitlement. There is no dispute about the fact that this latter figure was calculated in accordance with the provisions of the VRP, however, Winger says that he ought to have received 8/12ths of his PTO entitlement (less statutory holidays, *i.e.* $8/12 \times [45-9] = 24$ days). Winger says he is entitled to 8/12ths of his PTO entitlement (excluding statutory holidays) based on his vacation year commencement date of July 1st, 1995 and his actual retirement date of February 29th, 1996 (*i.e.*, 8 months).

ANALYSIS

The relevant portions of the Determination read as follows:

“The complainant maintains that he was never fully apprised of the fact that his vacation pay would be recalculated as a result of accepting the VRP...

He also maintains that he was told during the discussions on the VRP that he would continue to receive the usual 1/12th of his vacation entitlement for each full month worked during the accrual period from July 1, 1995 to June 30, 1996...

I have determined that Complainant is entitled to the 10 days vacation pay as claimed...

Although the employer asserts that detailed instructions of the VRP were reviewed with the complainant, I could not find any evidence to indicate that the complainant was given a copy of the instructions relating to his vacation pay. There is also no evidence that the complainant was given a copy of the PTO pamphlet (sic) dated February 1, 1984.”

The evidence before me is not consistent with the findings of fact contained in the Determination.

First, I am satisfied that Winger was, or at the very least should have been, well aware of the effect of early retirement on his PTO payout. This effect was originally discussed in the PTO brochure which Winger admitted to probably having received although he says that he never read “the fine print”.

Second, the evidence of Maureen Wilson, the personnel officer at the Lansdowne store, which I accept, is that she discussed the VRP program with Winger on several occasions. In addition, Winger was given, and availed himself, of the opportunity to discuss the terms and conditions of the VRP with Patterson and Associates, a consulting firm retained by Eaton’s to give advice to would-be retirees.

Third, in response to an inquiry from Winger, Maureen Wilson provided to him those pages of the VRP Guidelines (pp. 6 and 7) that deal specifically with the calculation of vacation pay on retirement. Winger, for his part, testified that he only received pages 7 and 8 of the Guidelines but, on balance, I am satisfied that he actually received pages 6 and 7. For one thing, the top of page 7 (which clearly deals with vacation payouts) is an obvious continuation of material from page 6 and is meaningless without page 6--had only pages 7 and 8 been forwarded, I cannot reasonably conclude that Winger would not have requested that page 6 also be forwarded.

Fourth, Winger was sufficiently concerned about his vacation pay entitlement that he asked his store manager, Mr. Mobberley, to inquire on his behalf--only to be given an estimated payout figure within \$93 of the actual amount.

Fifth, there is no evidence before me that Winger was told, as set out in the Determination, “during the discussions on the VRP that he would continue to receive the usual 1/12th of his vacation entitlement for each full month worked during the accrual period from July 1, 1995 to June 30, 1996”. Indeed, before me Winger only went so far as to state that he “never doubted getting two-thirds or three-quarters of my vacation pay”; Winger never testified that someone employed by, or acting on behalf of, Eaton’s mislead him as to his vacation payout, if anything, he mislead himself.

To summarize, the evidence before me clearly shows that Winger was, or should have been, on notice that his acceptance of the VRP would affect his vacation pay entitlement. He made specific inquiries on this point and was properly advised. Winger has received all the vacation pay that he is entitled to under his contract of employment and under the VRP; there is nothing that I can see in the VRP that contravenes the vacation pay provisions of the *Act*. Indeed, the employer’s plan appears to be substantially more generous than the vacation pay allotment set out in the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter be cancelled.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal