Employment Standards TRIBUNAL

An appeal

- by -

School District #59
("SD #59")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Wayne R. Carkner

FILE No.: 2001/395

DATE OF HEARING: October 12, 2001

DATE OF DECISION: November 2, 2001

DECISION

APPEARANCES:

For the Appellant	Peter A. Csiszar – Counsel - for the Appellant (the "Appellant") M. Downey ("Downey") K. Essenlink ("Essenlink")
For the Respondent	Patrick O'Reilly (the "Respondent") John Kendrew – Provided oral evidence via speakerphone ("Kendrew") Dave Nybakken – Provided oral evidence via speakerphone ("Nybakken")
For the Director	No appearance

OVERVIEW

This is an appeal by School District #59 pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued by the Director of Employment Standards (the "Director") on April 26, 2001. The Determination concluded that at the time of O'Reilly's retirement from SD #59 the Respondent was entitled to a vacation bank equivalent to 204.75 days and assessed a remedy of $75,865.59. The remedy was comprised of $71,508.93 for vacation pay and interest, pursuant to Section 88 of the *Act,* in the amount of $4,356.66.

The Appellant alleges that the Director has contravened Sections 77 and 80 of the *Act* and that these contraventions are fatal to the Determination and, accordingly, the Determination should be canceled.

The Respondent submits that the Director has properly applied the *Act* and that the Determination should be confirmed.

The Director submits by written submission that no contraventions of the *Act* occurred either during the investigation or within the Determination's interpretation of the *Act.*

This appeal was conducted by way of an oral hearing, including oral evidence provided by both the Respondent and the Appellant. There were also extensive written submissions provided by all parties to this appeal prior to the hearing.

ISSUES

1. Did the Director contravene Section 77 of the *Act* by not affording SD #59 a proper opportunity to respond to the actual issue under investigation in the complaint filed by the Respondent?

2. Did the Director contravene Section 80 of the *Act* by considering the days in the vacation bank that were earned prior to the 24 month period preceding the Respondent's retirement?

3. Did the Director grossly err in the calculation of vacation pay owing to the Respondent?

FACTS AND ANALYSIS

Downey, who was appointed as Superintendent of SD #59 in September 2001, was the Assistant Superintendent over the two years prior to his recent appointment. In this position he was responsible for the Human Resource and Labour Relations functions of SD #59 for the educational staff. He outlined the structure of the Senior Education Staff of SD #59. It was comprised of the Superintendent, the Assistant Superintendent and three Directors of Instruction. Downey had, prior to becoming the Assistant Superintendent, filled the position of a Director of Instruction (the "DI"). The Respondent held a DI position at the time of his retirement, as did Kendrew. Nybakken was the Assistant Superintendent for ten years prior to his retirement and a DI prior to that. All of these positions were contract positions of two or three year durations with renewal contracts being signed at the conclusion of the previous contract.

Downey testified that when SD #59 received notification of the complaint he contacted the Delegate of the Director (the "Delegate") to set up a meeting. He was informed that the complaint was for unpaid vacation owing to the Respondent at the time the Respondent retired. Downey stated that this meeting with the Delegate lasted approximately 20 to 25 min. Downey testified that the Delegate took no notes at this meeting. Downey testified that he twice informed the Delegate that he did not understand what the complaint was about and requested more detail as to precisely what the complaint consisted of to allow him to properly respond. Downey stated that no further clarification was provided at this meeting.

A second meeting was convened with the Delegate and both Essenlink and Downey attended. Downey and Essenlink both testified that this meeting could not have lasted more than ½ hour. Some documents were presented to the Delegate. Downey was unhappy with the tenure of this meeting as he felt that the Delegate was acting as an advocate for the Respondent. Downey testified that he again asked for a clarification of the complaint and none was provided and there was no discussion of a vacation bank. According to Downey the vacation bank was mentioned at the first meeting but he was not concerned, as the Respondent's bank had been paid out when he retired. Downey stated that there was no mention of a claim for an unpaid bank in excess of

200 days. Downey further stated that none of the correspondence with the Director prior to the issuance of the Determination referred to a vacation bank of this size.

Essenlink, who has been SD #59's Secretary Treasurer since 1993, testified that she attended with Downey at the second meeting with the Delegate and that no mention of a vacation bank arose. Essenlink stated that she was unhappy with the meeting as the Delegate seemed to have made a predetermination of the complaint. Essenlink stated that she concluded this from the demeanor of the Delegate and the fact that he had not taken any notes at the meeting.

Both Essenlink and Downey testified that had they been aware of the content of the claim they would have presented substantial evidence to the Delegate dealing with the specific issue of the vacation bank and the consistent application of this contractual language over the years.

The Delegate's Determination keyed around a clause in SD #59's contract with the Respondent. This clause, contained in Appendix 1 of the contract, read as follows:

> "O'Reilly is entitled to the following vacation and time off provisions:
>
> I. **VACATION**
>
> 1. The vacation year shall be September 1st to August 31st.
>
> 2. Up to 50% of the annual vacation entitlement may be carried forward to a subsequent year.
>
> 3. O'Reilly is entitled to:
>
> **EIGHT (8) weeks' vacation annually**
>
> Extensive vacation periods (more than five consecutive days) must be agreed to by the Superintendent of Schools and O'Reilly."

This excerpt was taken from the Respondent's employment contract that was signed and dated the 9th day of May 1996 and the language is consistent in all the previous and subsequent contracts. Prior to 1994 the employment contracts of the Senior Education Staff allowed for six weeks of annual vacation entitlement.

This document along with a document dated March 8, 1998, purported to have reconciled the Respondents vacation bank at 269.75 days. The Delegate outlined at page 8 of his Determination:

> "A plain reading of this clause [the vacation clause quoted above] indicates that 50% of the annual vacation entitlement may be carried forward to "a" subsequent year. There is no mention of any forfeiture of time, nor that the carried forward portion is restricted only to the next year. Having said that however, I do not

> believe that a third parties interpretation is relevant or in this case binding. We must look at what the interpretation was of the employer and of the employee. The employer ran a cumulative time bank with the knowledge of the employee for several years up until February 1999 without any loss of vacation time/pay.
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> In the letter to Mr. O'Reilly dated March 4, 1998, the employer acknowledges the cumulative bank, advising as at February 1998 the balance was 269.75 days. On February 12, 1999 the employer forwarded another letter to Mr. O'Reilly advising of adjustments and his new balance of 92 days.
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> Mr. O'Reilly retired on June 30, 2000. The employer operated a holiday bank, which was available to Mr. O'Reilly and in the letter of March 4, 1998 acknowledged the vacation pay as owing. The employer then changed their interpretation or procedure and reduced the outstanding time/pay by a substantial amount. From the documentation supplied, [by the respondent] this occurred on February 12, 1999.
>
> I do not feel there is any argument on whether the employer can change their interpretation, policy or procedure on how or what they pay for vacation pay subject of course to the minimum standards of the Act. I do not agree however that they can do so retroactively. In my opinion, this is not an issue of incorrect calculation or error on the employer's part. In the letter of March 4, 1998, it is apparent that there were questions about the interpretation and the application of vacation time/pay. Some 11 months later the employer retroactively changes the reconciliation, it appears without any acknowledgement or explanation of their previous commitment to budget and pay the vacation bank."

Downey testified that in applying the vacation carryover provisions the Senior Staff were allowed to carry over 50% of their entitlement to the following year. The Senior Staff were then expected to use that vacation in the following year along with a minimum of 50% of the vacation entitlement of the following year. At no time were employees allowed to carry over in excess of 50% of a year's vacation. Essenlink stated that the only way an excess of 50% of one years vacation could be carried over would be through a direct application to the School Board for authorization. She was aware of this as, due to extenuating circumstances she had to apply for herself.

In cross-examination both Kendrew and Nybakken agreed that this was the understanding of the Senior Staff over the years though neither of them liked this application of the contract language. Even the Respondent stated that was the position of SD #59 though he disagreed with this interpretation of the contract language and never agreed with it.

Downey testified that it was the responsibility of the Senior Managers to utilize their vacation at their own discretion when opportunities arose except that authorization was required for extended leave. Downey did concede that it was difficult to use all the vacation entitlement

within the required timeframe as the Senior Staff resources were stretched and their schedules were very busy.

Essenlink testified that the records for the Senior Staff were not kept efficiently prior to 1998 as the Senior Staff were responsible to report their own leaves and that the vacation reconciliation that had been issued on March 4,1998 to the Respondent was in error due to a front end loading problem. An attempt was made to rectify this problem by reviewing all of the records available. Essenlink stated that her concern was that the contracts were properly applied and that the records corresponded with this. She was concerned with possible liabilities to SD #59 if the records were inaccurate.

Essenlink testified that when she became employed with SD #59 in 1993 the application of the employment contracts were outlined to her including the application of the vacation bank. The application of the vacation bank for the Senior Staff was based on a maximum of 50% being banked. This bank must then be used in the following vacation year. At any given time only 50% of the previous year's vacation could be in the vacation bank. Essenlink testified that this is how she applied the contracts since her arrival at SD #59. Essenlink reiterated that the reconciliation letter issued to the Respondent on March 4, 1998 was in error as the system erred in carrying forward and accumulating the bank on an ongoing basis. The vacation reconciliation dated February 12, 1999 more accurately reflected the vacation owed at that time including the current year.

Based on this un contradicted evidence, I can only conclude that SD #59 was not afforded a reasonable opportunity to respond to the actual substance of the Respondent's complaint and therefore I find that the Delegate failed to comply with Section 77 of the *Act.*

The evidence provided clearly shows that SD #59 has consistently applied the vacation bank language of the Senior Education Staff.

Further, based on the evidence provided in this hearing I must conclude that the Delegate, as he had not provided SD #59 the opportunity to present evidence dealing with the main issue of the complaint, has reached an absurd conclusion in his interpretation of the Respondent's employment contract. This interpretation is the prime reason the Delegate concluded that SD #59 had contravened the *Act* and that the Respondent was entitled to a remedy.

Therefore, as the Appellant has met the onus of burden of proof to show errors fatal to the Determination, the appeal is granted.

Due to the foregoing, it is not necessary to deal with either the Section 80 issue or the issue of improper calculations.

ORDER

Pursuant to Section 115 of the *Act,* I order that the Determination dated April 26, 2001 be cancelled.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal