An Application for Reconsideration

- by -

Pioneer Distributors Ltd.
("Pioneer Distributors")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2012A/118

DATE OF DECISION: January 25, 2013

DECISION

SUBMISSIONS

Gwendoline Allison	legal counsel for Pioneer Distributors Ltd.
Alexander D. Mitchell	legal counsel for Sean Orr
Michelle J. Alman	legal counsel for the Director of Employment Standards

INTRODUCTION

1. Pioneer Distributors Ltd. ("Pioneer Distributors") applies under section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal decision issued on September 19th, 2012, (BC EST # D095; the "Appeal Decision"). By way of the Appeal Decision, the Tribunal varied a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on March 27th, 2012, (the "Determination") and made a "referral back" order for the purposes of calculating the unpaid vacation owed to the complainant, Mr. Sean Orr ("Orr"), a former Pioneer Distributors employee.

2. The Determination required Pioneer Distributors to pay Mr. Orr a total sum of $16,059.56 including section 88 interest. The bulk of Mr. Orr's entitlement concerned unpaid vacation pay (section 58) with the balance representing unpaid overtime pay. In addition, and also by way of the Determination, the delegate levied two separate $500 monetary penalties (see section 98) against Pioneer Distributors. Thus, the total amount payable under the Determination was $17,059.56.

3. Mr. Orr appealed the Determination on the ground that the delegate erred with respect to his total unpaid vacation pay entitlement. The Tribunal allowed the appeal and referred Mr. Orr's vacation pay entitlement back to the Director to be recalculated on the basis that his claim should have been calculated as and from 2003 rather than, as the delegate determined, from November 1st, 2008.

4. Pioneer Distributors says that the Appeal Decision is wrong in law and that the Tribunal should cancel its "referral back" order and confirm the Determination. The essence of Pioneer Distributors' position is captured in paragraphs 9 and 10 of its October 19th, 2012 reconsideration submission:

> …the Tribunal increased the amount it deemed to be owed by Pioneer well beyond the limits of section 80 of the Act and has permitted Mr. Orr to reach back over seven years of his employment with Pioneer.
>
> In doing so, Pioneer submits that the Tribunal committed multiple errors of law and exceeded its jurisdiction.

5. I have before me written submissions filed by legal counsel for each of the applicant, Pioneer Distributors, Mr. Orr and the Director of Employment Standards. I have reviewed these submissions as well as the material that was before the Tribunal when the Appeal Decision was issued.

6. Prior to addressing the substantive grounds underlying the application, I wish to address two preliminary matters raised by Pioneer Distributors' counsel, namely, whether: i) this application should be the subject of a supplementary oral hearing; and ii) I should issue a "stay of proceedings" pending a decision from the B.C. Supreme Court with respect to certain litigation also arising out of the employment relationship between Pioneer Distributors and Mr. Orr.

THE APPLICATION FOR AN ORAL HEARING

7. Pioneer Distributors' legal counsel submits that "an oral hearing is necessary to permit a thorough canvassing of the issues raised in the application, and the findings of the Tribunal". This assertion, so far as I can determine from my review of Pioneer Distributors' principal reconsideration submission, constitutes the entire argument advanced in favour of an oral hearing. In her reply submission, Pioneer Distributors' counsel says "brief oral submissions…would permit counsel to summarize [their] arguments in a concise, oral form". Mr. Orr's counsel opposes the application for an oral hearing. Counsel for the Director of Employment Standards has not taken a position regarding whether an oral hearing should be held but does say that, at this stage, the Tribunal should refrain from entertaining the reconsideration application on its merits until the referral back process (regarding Mr. Orr's vacation pay entitlement) has been completed.

8. In my view, there is no need for a supplementary oral hearing and, indeed, to order such a hearing would be inconsistent with the section 2(d) purpose "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". In November and December 2011, the delegate conducted a 3-day complaint hearing at which both parties were represented by legal counsel. On March 27th, 2012, the delegate issued extensive reasons (25 single-spaced pages including two appendices) setting out the evidence, his findings of fact (and there was not much disagreement between the parties concerning the relevant facts), analysis and conclusions. Mr. Orr's appeal was predicated solely on alleged errors of law and thus was readily addressed solely by way of a written submission hearing. The present application calls into question the correctness of the Appeal Decision and as there is no new evidence to be presented the issues can be readily addressed by written submissions.

9. Pioneer Distributors' counsel says an oral hearing would allow counsel to "concisely" summarize the arguments that have already been advanced in written form. Although oral argument that supplements previously filed written submissions can be helpful (this process is almost always followed by appeal courts), counsel have clearly articulated their positions in their respective submissions and I am confident that I can deal with this application without hearing further from counsel. In my view, holding an oral hearing so that counsel can simply summarize their previously articulated positions would serve no useful purpose but would further delay adjudication (recall, the original complaint hearing was held over 1 year ago) and increase the parties' costs.

THE APPLICATION FOR A STAY OF PROCEEDINGS

10. The second preliminary matter relates to Pioneer Distributors' application for a "stay of proceedings" until such time as the B.C. Supreme Court has issued a decision in other litigation between Pioneer Distributors and Mr. Orr. The Tribunal's authority to issue a stay of proceedings, or simply adjourn or postpone a matter, is found in Rule 5(4)(g) and (h) of the Tribunal's *Rules of Practice and Procedure* (adopted as of September 1st, 2012).

11. On September 14th, 2012, Mr. Orr filed an Amended Notice of Civil Claim ("Civil Claim") in the B.C. Supreme Court (Vancouver Registry No. S108262). Pioneer Distributors is the defendant in that action which concerns several matters relating to Mr. Orr's dismissal. The same legal counsel represents the parties in both the *Act* proceedings and the Civil Claim. Fundamentally, the Civil Claim is an action for damages for failure to provide "reasonable notice" of termination, but there are other claims including claims for what are sometimes referred to as "Wallace" damages, aggravated damages, punitive damages and damages relating to an alleged breach of an agreement that would have allowed Mr. Orr to purchase shares in Pioneer Distributors. The Civil Claim also includes a claim relating to unpaid vacation pay and a "debt" claim relating

to a breach of an alleged settlement agreement. This latter claim is at the heart of Pioneer Distributors' request for a stay of this reconsideration application.

12. In its "Response" to the original Civil Claim, Pioneer Distributors pleaded, *inter alia*, that the "vacation pay" claim was within the exclusive jurisdiction of the Director of Employment Standards. In light of that pleading, Mr. Orr filed his *Act* complaint which was limited to claims for overtime pay and vacation pay. The delegate was aware of the Civil Claim and referred to it at page R2 of his reasons.

13. On December 9th, 2011 Pioneer's legal counsel wrote to Mr. Orr's counsel with an offer to settle the Civil Claim. I wish to highlight three paragraphs in this letter. First, counsel advised that she considered Mr. Orr's overtime and vacation pay claims to be "duplicative of the matters under reserve at the Employment Standards Branch" and would be applying to have them struck out. Second, the letter contained an offer to pay Mr. Orr $90,000, "less all required statutory and other deductions in settlement of Mr. Orr's claims in the action". Later that same day, counsel forwarded an e-mail indicating that the suggested sum was incorrect and should be increased to $100,000. Third, the letter contained the following paragraph: "In exchange, Mr. Orr will execute a release in the form approved by Pioneer; and will consent to a dismissal of the action".

14. On its face, it is not clear whether the settlement offer was intended to extend to Mr. Orr's overtime and vacation pay claims. On the one hand, a release was to be executed and a consent dismissal order issued (and recall that the Civil Claim included claims for overtime and vacation pay). On the other hand, Pioneer's legal counsel was taking the position that the B.C. Supreme Court had no jurisdiction over these latter claims and as of December 9th, 2011, the *Act* complaint hearing had been completed (the hearing dates were November 30th, December 1st and 5th, 2011) and the delegate's decision was on reserve (the delegate's decision was issued on March 27th, 2012). The December 9th, 2011, settlement offer did not specifically address how the *Act* proceedings would be dealt with as part of the proposed settlement.

15. In any event, on April 19th, 2012, – about 3 weeks after the Determination was issued – a lawyer at Mr. Orr's counsel's firm (not Mr. Orr's counsel in these proceedings) wrote to Pioneer Distributors' counsel purporting to accept the settlement proposal but adding this specific caveat: "The release will exempt the Determination issued by the Delegate of the Director of Employment Standards dated March 27, 2012, including the Order that Pioneer pay to the Director of Employment Standards $17,059.56 (the "Determination"); Mr. Orr's intended appeal of the Determination to the Employment Standards Tribunal; and any proceedings taken by the parties therefrom…".

16. On June 8, 2012, Mr. Orr's counsel filed an application to enforce the alleged settlement agreement and, on September 14th, 2012, he filed an Amended Notice of Civil Claim asserting that Pioneer Distributors was in breach of a concluded settlement agreement. Pioneer Distributors' position is that no settlement was ever reached on the terms asserted by Mr. Orr's counsel. The parties appeared in the B.C. Supreme Court on June 25th, 2012, regarding this matter, but it was adjourned to January 25th, 2013.

17. Pioneer Distributors' counsel says that this reconsideration application should be stayed "to avoid uncertainty, duplication and inconsistent rulings". Mr. Orr's counsel opposes the application for a stay. The position of counsel for the Director of Employment Standards at paragraph 10 of her submission is "that the Tribunal ought not to grant Pioneer's request for a stay of proceedings, as to do so would not serve the section 2(d) purpose of the *Act* and would not assist in the 'just and timely' resolution of this dispute". However, at para. 23, counsel for the Director of Employment Standards also says that the Tribunal should "exercise its discretion to decline to reconsider the [Appeal Decision] until after the completion of the referral back process."

18. I do not think it appropriate to order that this application be stayed pending a decision from the B.C. Supreme Court regarding the "settlement" issue.

19. As I understand Pioneer Distributors' position, it is advancing three alternative arguments regarding the settlement. First, it says that there was no settlement since its original offer encompassed a global settlement of all of Mr. Orr's employment-related claims whereas Mr. Orr's acceptance purported to exclude his overtime and vacation pay claims and reserved his right to have those adjudicated under the *Act's* dispute resolution procedure. In effect, and although it does not use these terms, Pioneer Distributors says that the acceptance was conditional, not unconditional (since Mr. Orr added a new term to the original offer), and thus, in law, amounted to a counteroffer that was never accepted. Second, it says that its original settlement offer lapsed prior to acceptance and thus there was no concluded contract. Third, it says that if there was a settlement, it encompassed Mr. Orr's overtime and vacation pay claims. Thus, on the basis of its first two arguments, the present proceeding before the Tribunal would be wholly unaffected. It is only Pioneer Distributors' third argument, if accepted, that would presumably render the Tribunal proceedings moot.

20. I note that the stay application was not filed until after the Appeal Decision was issued and an application for reconsideration was filed, even though the dispute between the parties has been simmering since at least June 8th, 2012, when Mr. Orr applied to the B.C. Supreme Court to enforce the alleged settlement agreement. Mr. Orr's appeal of the Determination was filed on May 3rd, 2012, and Pioneer Distributors did not ask the Tribunal to hold the appeal in abeyance pending the outcome of the B.C. Supreme Court proceedings. The B.C. Supreme Court has not issued an order directing the Tribunal to refrain from adjudicating the reconsideration application, nor to my knowledge, has any such order ever been sought. The Tribunal is subject to a statutory mandate to adjudicate disputes that come before it in a fair and efficient manner (subsection 2(d)) and I do not see how delaying the adjudication of this reconsideration application would be consistent with that stated purpose. Although the application to deal with the settlement agreement is scheduled to be heard in the B.C. Supreme Court on January 25th, 2013, there is no guarantee that the matter will in fact be fully heard on that day and, further, even if it is heard on the 25th, there could still be further delay if the judge does not issue a "bench decision", let alone any additional delay that might ensue if the court's decision were to be appealed to the Court of Appeal.

21. In my view, the most efficient way to proceed is for this application to be adjudicated without any further delay. I reject Pioneer Distributors' position that if the Tribunal were to adjudicate the reconsideration application there is a possibility of "uncertainty, duplication and inconsistent rulings". Although the Civil Action includes a claim for unpaid overtime and vacation pay, those issues have now been determined (save for a final accounting as to amount) as a result of *Act* proceedings to date. Even if the B.C. Supreme Court does have the jurisdiction to adjudicate Mr. Orr's overtime and vacation pay claims arising under the *Act* (and the court seemingly does *not* have that jurisdiction – see *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, leave to appeal to the Supreme Court of Canada refused: 2008 CanLII 53790) – since the overtime and vacation pay claims are being adjudicated under the *Act* dispute resolution process (without, I might add, any objection as to the Director's or Tribunal's jurisdiction having been raised by either party), these issues would not be re-litigated in the B.C. Supreme Court by reason of the doctrine of issue estoppel. If the B.C. Supreme Court were to conclude that there is a binding settlement agreement in place, then, on one view of the matter, the *Act* proceedings would be outside that settlement agreement. On another view of the matter, if the settlement represents a "global" settlement including Mr. Orr's *Act* entitlements, that is simply an accounting issue in the sense that the total settlement figure includes all *Act* entitlements as may be ultimately determined as a result of the *Act* proceedings.

22. Counsel for the Director says that Pioneer Distributors and Mr. Orr have apparently been unable to agree on the actual amount of Mr. Orr's vacation pay entitlement on the assumption that his claim dates from 2003

(although this assertion is disputed by Pioneer Distributors' counsel who says she has not been privy to any such discussions), and thus there could be further proceedings before the Tribunal relating to the quantum of Mr. Orr's claim if the "referral back" order is ultimately confirmed. The Director's counsel suggests that the Appeal Decision "should be considered to be preliminary, as no final figure has yet been confirmed crystallizing the variation to the Determination" and that it would "not [be] efficient for the Tribunal to proceed with this reconsideration request until after the Director's and the Tribunal's completion of the referral back process" (para. 20).

23. While there may be some value in holding the reconsideration application in abeyance pending a determination regarding Mr. Orr's vacation pay entitlement, it should also be remembered that Pioneer Distributors is seeking an order cancelling the Appeal Decision and confirming the original Determination. If that were to occur, then the Director (and the Tribunal) would have engaged in an entirely unnecessary adjudicative process regarding the quantum of Mr. Orr's claim. By proceeding with the reconsideration application at this juncture, it will be clear whether or not the quantum issue need even be addressed. If I ultimately confirm the Appeal Decision, the only issue that might come back before the Tribunal would be whether or not the delegate correctly calculated Mr. Orr's vacation pay claim. If that transpired, this would be a relatively straight-forward matter that could be adjudicated without any undue delay. On the other hand, if I were to cancel the Appeal Decision, the referral back order would fall and there would be no need for any further proceedings either before the Director or this Tribunal.

24. All told, I am of the view that the most efficient approach is for me to issue a final ruling on the reconsideration application at this point in time. Accordingly, Pioneer Distributors' application for a stay of proceedings is denied, as is the Director's application that I hold the reconsideration application in abeyance until the Director has determined Mr. Orr's vacation pay entitlement under the "referral back" order. I shall now address the reconsideration application.

PRIOR *ACT* PROCEEDINGS

25. Pioneer Distributors sells materials, such as particleboard and hinges, to kitchen cabinet and millwork manufacturers. Mr. Orr worked as a sales representative (although he also had various other duties not involving sales) with the company from November 1st, 1999, until his dismissal on September 10th, 2010. At the time of his dismissal, Mr. Orr's compensation was based on an annual salary and a further commission based on his sales performance. As noted above, Mr. Orr originally filed a "wrongful dismissal" claim against Pioneer Distributors in the B.C. Supreme Court in which he sought, among other claims, overtime pay and vacation pay. Pioneer Distributors filed a Response asserting that these latter claims were outside the jurisdiction of the B.C. Supreme Court (and within the exclusive jurisdiction of the Director of Employment Standards); Mr. Orr then filed a complaint under the *Act* concerning both unpaid vacation pay and overtime pay.

The Determination

26. The delegate conducted a complaint hearing over 3 days in late 2011 and issued the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") on March 27th, 2012. With respect to Mr. Orr's overtime pay claim, the delegate found that he was not a "manager" as defined in section 1 of the *Employment Standards Regulation* ("*Regulation*") and thus he was not exempted from the overtime provisions of the *Act* under subsection 34(f) of the *Regulation*. However, the delegate also concluded that subsection 37.14(1) of the *Regulation* governed his overtime claim: "A salesperson paid entirely or partly by commission is excluded from sections 35 and 40 and Part 5 of the Act on the condition that all wages earned by the employee in a pay period exceed the wages that would be payable under those provisions when

calculated at the greater of the employee's base rate or the minimum wage under the Act." The delegate, after applying this provision and the "backpay" recovery limitation set out in section 80 of the *Act*, determined that Mr. Orr was entitled to $1,475.38 in overtime pay.

27. The delegate's findings regarding Mr. Orr's vacation pay entitlement may be summarized as follows. First, at the time of his dismissal, his annual vacation pay entitlement under the *Act* was 6% of the previous year's earnings. Second, although Mr. Orr took some vacation leave during his tenure, he did not take his entire 3-week entitlement during each the last several years of his employment. Third, although his regular salary was continued during those periods when he took vacation leave, he did not receive any vacation pay on his commission earnings. Fourth, his vacation pay claim was limited by subsection 80(1) of the *Act*. Since this latter finding is critical to the reconsideration application that is now before me, I have reproduced this provision, below:

> 80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
>
> (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment, and
>
> (b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination,
>
> plus interest on those wages.

28. Regarding Mr. Orr's vacation pay "recovery period", the delegate found(at page R18):

> Mr. Orr commenced his employment November 1, 1999 so for the purpose of calculating his statutory entitlement to vacation pay November 1 is his anniversary date. The vacation pay Mr. Orr earned from November 1, 2008 to October 31, 2009 was payable by Pioneer within the period November 1, 2009 to October 31, 2010. As Mr. Orr's employment was terminated on September 10, 2010, the vacation pay earned from November 1, 2008 until the end of his employment is recoverable under the Act as it became payable within the period stipulated in section 80 of the Act.

29. The delegate rejected Mr. Orr's position, which was predicated on the Tribunal's decision in *O'Reilly* (BC EST # RD165/02), that he should be awarded vacation pay dating from 2003. This matter is central to the present application. During the relevant time frame, Pioneer Distributors had a very small workforce (typically, fewer than 5 employees) and Mr. Orr was described as the "second in command" after the firm's principal, Mr. George Klukas ("Klukas"). The firm's accountant during most of the relevant time frame was Ms. Helena Ng ("Ng"). Ms. Ng was employed from 2002 until her resignation in March 2010. Ms. Ng's testimony was the lynchpin to Mr. Orr's vacation pay claim.

30. Briefly, the evidence before the delegate was that Ms. Ng began tracking employees' vacation entitlements in 2003 on an Excel spreadsheet. "She designed the spreadsheets and tracked vacation pay in accordance with her understanding of the employer's statutory obligations" and "carried over any [vacation leave] balance to the following year" but did this of her own accord since "Mr. Klukas did not instruct her to do this" (delegate's reasons, page R7). She also acknowledged "she did not have any authority to enter into contracts on Pioneer's behalf" and "did not seek Mr. Klukas' advice regarding the vacation accrual method she used" (delegate's reasons, page R7). Mr. Orr's position regarding his vacation pay claim was simply that he was entitled to the full amount of his vacation pay as recorded in the spreadsheet that, in turn, reflected accrued vacation pay dating from 2003. The delegate rejected Mr. Orr's position.

31. The delegate's key findings regarding the scope of Mr. Orr's vacation pay claim are set out at pages R20 to R22 of the delegate's reasons. The following excerpts, at page R20, suggest that Pioneer Distributors was carrying forward Mr. Orr's vacation pay accrual from year to year and that its principal, Mr. Klukas, was aware of that situation at least as of March 29th, 2010 (over five months prior to Mr. Orr's dismissal):

- "Ms. Ng agreed she did not have the authority to bind Pioneer to terms and conditions of employment…and was not instructed by Mr. Klukas to accrue vacation pay in the manner that she did, and at no point did she inform Mr. Klukas of Mr. Orr's outstanding vacation pay accrual."
- "Mr. Orr…did not discuss…his vacation pay accrual with Mr. Klukas until the end of his employment, at which point Mr. Klukas disagreed with Mr. Orr's claim to the outstanding vacation pay."
- "…Mr. Klukas was informed of Mr. Orr's outstanding entitlement on March 29, 2010 by email. It is also clear Mr. Orr's accrual continued to be tracked in the same manner as it had been during the majority of his employment from 2003 onwards…Although there is no evidence Mr. Klukas knew about the manner in which Mr. Orr's vacation was being accrued prior to March 29, 2010, the email…establishes he learned of it when that email was sent."
- "Rather than dispute this entitlement with Mr. Orr he was silent, and the vacation entitlement continued to be recorded as accruing as it had since Mr. [*sic*] Ng began the process in 2003. Although Mr. Klukas claims he would have disputed this method of accrual had he known about it earlier it weighs against Pioneer that he did not dispute it at this time. This is especially so given Mr. Klukas promptly raised a commission overpayment with Mr. Orr that occurred around the time the employment relationship was terminated. Mr. Klukas did not explain why he remained silent on the matter of Mr. Orr's outstanding vacation accrual."
- "These facts establish that on March 29, 2010, which is within the 6 month recovery period, Mr. Orr believed he was entitled to $68,246.73. This understanding had also been expressed to Mr. Klukas by email, and Mr. Klukas did not take any steps to inform Mr. Orr that he was not entitled to this amount. Then, Pioneer's replacement accountants continued to record Mr. Orr's vacation entitlement as accruing in the same manner as Ms. Ng had done."
- "As of this time [*i.e.*, March 2010] both Mr. Orr and Mr. Klukas were aware Mr. Orr was carrying forward unpaid vacation pay, and both were aware of Pioneer's records showing the entitlement."

32. Notwithstanding these findings of fact, the delegate ultimately concluded that only the portion of Mr. Orr's unpaid vacation pay that was earned during the period from November 1st, 2008 to the end of his employment (September 10th, 2010) was recoverable under the *Act* (a total sum of $13,875.71 not including section 88 interest; I note the delegate calculated this amount at $13,787.19 at page R23 of his reasons and I am not quite sure why there is a discrepancy in the two figures). The delegate determined that "Mr. Orr operated under the assumption of a contractual term to which Mr. Klukas had never explicitly assented" and that "Ms. Ng was not an agent of Pioneer through whom conditions of employment were created" (page R21). The delegate held: "If Mr. Orr believed he had an ongoing entitlement to these funds then his belief was a mistake". Although the delegate determined that Pioneer Distributor's payroll records indicated that unpaid vacation pay for at least four other employees was carried forward and, for three of these employees, paid out on termination, the delegate nonetheless concluded that this evidence did not unequivocally establish a contractual agreement that unpaid vacation pay would be carried forward "indefinitely". The delegate concluded, at page R22:

> "…I find the records do not establish that Mr. Klukas was, on a balance of probabilities, of the understanding all employees were entitled to indefinitely carry forward unpaid vacation pay and have it paid out on request or upon termination of employment. Ms. Ng's testimony firmly establishes Mr. Klukas' approach to Pioneer's payroll accounting was 'hands off' and I cannot find Mr. Klukas had any

> knowledge of Pioneer's payroll functions independent of what Ms. Ng or the other accountants specifically told him."

The Appeal Decision

33. On May 3rd, 2012, Mr. Orr appealed the Determination on the sole ground that the delegate erred in law (subsection 112(1)(a)). More specifically, Mr. Orr asserted that Pioneer Distributors was bound by decisions and representations made by Ms. Ng regarding Mr. Orr's vacation pay entitlement as she had, at the very least, the ostensible authority to bind Pioneer regarding its vacation pay obligations to its employees. Mr. Orr did not appeal the Determination as it related to his overtime pay claim.

34. On September 19th, 2012, Tribunal Member Groves issued the Appeal Decision which included the following order:

> …I order that the Determination be varied to provide as follows:
>
> (a) the Employer pay to Orr the balance of vacation pay accumulated by him and carried forward annually since 2003;
>
> (b) the matter of the calculation of the amount owing to Orr for accumulated vacation pay carried forward annually since 2003 be referred back to the Director to be determined in accordance with the reasons in this decision.

35. In the Appeal Decision, Tribunal Member Groves acknowledged the uncontroverted fact that Ms. Ng did not have the express (or actual) authority to bind Pioneer Distributors to particular terms and conditions of employment including terms relating to the accrual of vacation pay from one year to the next on an ongoing basis (Appeal Decision, para. 72). However, under the law of agency, a principal is bound by the actions of its agent if the agent is acting within its *express* authority but also actions of its agent acting within their *implied* authority. This latter authority is also known as the agent's apparent or ostensible authority. Tribunal Member Groves' decision regarding Ms. Ng's implied authority to bind Pioneer Distributors to pay Mr. Orr vacation pay accrued and carried forward since 2003 is principally set out in the following excerpts from the Appeal Decision (paras. 76 – 81):

> While Ms. [Ng] and the Employer's other accountants may not have been hired with the actual authority to determine the terms and conditions of the employment of the employees of the Employer, there is no dispute that they were authorized to administer the payroll accounting functions of the firm…the delegate states [in his reasons] that Mr. [Klukas'] approach to the Employer's payroll accounting was 'hands off'. The only plausible inference to be drawn from this finding is that Mr. [Klukas] relied on Ms. [Ng] and her counterparts to accurately represent the interests of the Employer within the limits of their function.
>
> One of the principal duties within the Employer's payroll accounting function was to ensure that the payroll records of the Employer were accurate. Indeed, the obligation to keep accurate records is specifically mandated in section 28 of the *Act*, including, in section 28(1)(f), "the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing."
>
> It is important to remember that the statutory obligation to keep accurate payroll records is an obligation of the employer, and not the employee. It was, therefore, an obligation of the Employer to ensure that its records were accurate. It was not Orr's obligation. Therefore, if there was a mistake in the Employer's payroll records, it was not Orr's mistake, but the Employer's at least, as here, where there is no evidence that Orr knew the records were inaccurate, or misleading.
>
> As regards the Employer's description in its payroll records relating to the vacation pay it was documenting it owed to Orr, the Employer failed to keep accurate records. In so doing, it misrepresented to Orr what the Employer's position was regarding Orr's vacation pay entitlement. This is so because there could be no rational explanation for the Employer's continuing to record vacation pay carried

> forward annually in an accumulated amount that far exceeded the amount recoverable by Orr on a strict application of sections 58 and 80(1)(a) of the *Act* unless the Employer was representing in its records that vacation pay accumulated in this fashion was a benefit to which Orr was entitled pursuant to the terms of his employment contract.
>
> …I do not believe it was unreasonable for Orr to expect that the Employer's payroll records, and in particular the records relating to accumulated vacation pay, would accurately reflect the position of the Employer. Nor do I believe there should have been anything suspicious about the notation of accumulated vacation pay on Orr's payroll records kept by Ms. [Ng] and the other accountants employed by the firm. Orr was entitled to vacation pay, and he had not been paid what his entitlement provided, as he should have been. The reason was that he had not taken enough vacation. But again, section 57(2) of the *Act* makes it clear that it was the Employer's obligation to ensure that Orr took proper vacations, and was paid his vacation pay accordingly.
>
> Given the history of the employment relationship, the Employer's statutory obligations to ensure that employees took vacations, and the information that was appearing on his payroll records, it was, I believe, reasonable for Orr to infer that his unpaid vacation pay was being accumulated, and would be paid to him at some point in the future. The fact that Mr. [Klukas] was unaware that the representations contained in the Employer's payroll records were not in accordance with the true intentions of the Employer, and that Ms. [Ng] and the firm's other accountants were communicating information that amounted to a misrepresentation of the Employer's intentions, is beside the point. In my view, the Employer must be taken to have held them out as persons on whom Orr would rely for information representing the Employer's position regarding the terms and conditions of his contract of employment. That being so, the representations by their conduct they made to him regarding his vacation pay entitlement are binding on the Employer.

36. In addition, Tribunal Member Groves also considered the vacation pay issue in light of the doctrine known as estoppel. Tribunal Member Groves noted: "Orr was led to believe that he would enjoy as an employment benefit the accumulation of unpaid vacation pay carried forward on an annual basis" (para. 82). This reliance – based on representations made by Ms. Ng in her capacity as Pioneer Distributor's accountant and further confirmed by the payroll statements that were issued to him – caused Mr. Orr, firstly, to refrain "from taking vacation days that he might otherwise have enjoyed if he had been made aware that he would have to use his vacation days in order to receive vacation pay" or otherwise forfeit his accumulated vacation pay benefits and, secondly, influenced him to continue "to work for the Employer under the misapprehension that his vacation pay was being carried forward, at least in part because he viewed it as an asset, generally, but also one that might be employed to assist him in purchasing an ownership interest in the Employer" (para. 84).

37. Tribunal Member Groves ultimately concluded: "…the Delegate should have decided, as a matter of law, that the conduct of the parties implied a term and condition of Orr's contract of employment with the Employer that he would be entitled to payment of all his vacation pay accumulated since 2003 when his employment was terminated" (para. 84).

THE APPLICATION FOR RECONSIDERATION

38. Pioneer Distributors applies for reconsideration of the Appeal Decision on the basis that it contains "multiple errors of law" and that the Tribunal "exceeded its jurisdiction". Pioneer Distributors says that "the Tribunal increased the amount it deemed to be owed by Pioneer well beyond the limits of section 80 of the [*ESA*] and has permitted Mr. Orr to reach back over seven years of his employment with Pioneer." Pioneer Distributors seeks an order cancelling the Appeal Decision and confirming the original Determination.

FINDINGS AND ANALYSIS

39. I propose to first address the threshold question of whether I should summarily dismiss the application. As will be seen, I am of the view this application should not be summarily dismissed. Accordingly, following the discussion relating to summary dismissal, I set out my reasons with respect to the merits of the application.

Should the Tribunal Reconsider the Appeal Decision?

40. Section 116 of the *Act* gives the Tribunal a *discretionary* authority to reconsider an appeal decision. In *Director of Employment Standards Milan Holdings Inc. et al.*, BC EST # D313/98, the Tribunal established a two-stage process for addressing reconsideration applications. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal re-weigh issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.

41. In my view, this application passes the first *Milan Holdings* test. The application is timely and raises a serious question regarding the scope of section 80 of the *Act* and the application of previous Tribunal decisions and, in particular, *O'Reilly*, *supra*. In addition, Pioneer Distributors has raised a serious question with respect to the interpretation and application of the evidence relating to the parties' agreement concerning vacation pay. Pioneer Distributors says that the Appeal Decision is incorrect as it relates to the application of the law of agency – a critical point since Ms. Ng was found to be an agent with implied, but not express, authority to bind Pioneer Distributors regarding Mr. Orr's vacation pay entitlements and particularly his right to "carry forward" earned, but unpaid, vacation pay from one year to the next on an ongoing basis. Finally, the application raises the question of whether the Tribunal, as a statutory body, has any jurisdiction to apply equitable legal doctrines (such as promissory estoppel).

42. Although I am satisfied that this application raises serious issues such that it passes the first stage of the *Milan Holdings* test, it does not follow that the application is bound to succeed. The first stage simply filters out those applications that are clearly untimely or otherwise obviously lack merit. Thus, I shall now turn to the merits of the reconsideration application.

The Parties' Positions

43. Counsel for Pioneer Distributors notes that subsection 80(1)(a) limits an employer's "backpay" liability to wages "that became payable…6 months before the earlier of the date of the complaint or the termination of the employment". Counsel also notes that while parties are free to negotiate contractual terms that provide for greater benefits than those set out in the *Act*, such an agreement must be clearly established on the evidence. In this instance, counsel says: "Mr. Orr was required to establish that there was an agreement between himself and Pioneer that permitted him to waive payment of vacation pay, to carry forward and accumulate vacation pay, and be entitled to payment in the future, on an indefinite basis." However, since the delegate determined "that there was no agreement between the parties that from 2003 to 2010, Mr. Orr was entitled [to] waive payment and to accrue and carry forward vacation pay on an indefinite basis", Mr. Orr's claim for vacation pay earned prior to November 1st, 2008, failed. Pioneer Distributors says that this latter finding was a factual finding and thus should not have been overturned on appeal given that there was ample evidence to support the delegate's conclusion that there was no "vacation carry forward" agreement.

Pioneer Distributors says that neither the payroll records prepared by Ms. Ng, nor anything else that might have been represented by Ms. Ng to Mr. Orr, constituted legally sufficient evidence supporting Mr. Orr's position that there was a vacation pay "carry forward" agreement between himself and Pioneer Distributors. Finally, Pioneer Distributors says that the Tribunal, as a statutory body, does not have the jurisdiction to give Mr. Orr a remedy based on equitable doctrines.

44. Mr. Orr's counsel, not surprisingly, says that the Appeal Decision is correct and that the reconsideration application should be refused. Counsel notes that the uncontested evidence before the delegate was that Pioneer Distributors' principal, Mr. Klukas, took a "hands off" approach to the firm's payroll administration (see delegate's reasons, page R22) and that he delegated actual authority regarding "the fulfillment of Pioneer's statutory and contractual obligations to its employees…to Pioneer's Accountants". Counsel further says that the firm's accountants had the actual authority or, at very least, the implied authority to establish a payroll practice whereby unused vacation would be accrued, carried forward and paid out on an employee's termination. Mr. Orr's counsel says that this practice constituted an implied term of Mr. Orr's employment contract that he relied on for some ten years. With respect to Pioneer Distributors' position that Mr. Klukas never expressly authorized and was, for most of the relevant time frame, unaware of its existence, Mr. Orr's counsel poses the following question: "If the Accountants' practice of administering vacation pay ran counter to Mr. Klukas's subjective intentions, who ought to bear the consequence? Should it be Pioneer, the employer whose owner and president neglected to supervise the Accountants' exercise of that authority? Or should it be Mr. Orr, a third party to these agency relationships who relied in good faith for almost a decade, upon the actual or ostensible authority of the Accountants to administer payroll, including his vacation pay in the manner in which they did for all those years?"

45. In her submission, counsel for the Director of Employment Standards only very briefly touched on the merits of the application. Counsel simply asserts, without any further analysis or argument, "the Director disagrees that there were serious errors of law in the Determination" but, at the same time, rejects Pioneer Distributors' position "that the interpretation of employment contracts is outside the power of the Director".

The Merits of the Application – Analysis and Conclusions

46. Under the *Act*, a newly hired employee is entitled to 2 weeks' vacation leave that the employer *must* ensure is taken within 12 months after the employee completes their first year of service (section 57); accordingly, there is no statutory entitlement to vacation leave during the employee's first year of employment but there is an entitlement to earn vacation pay during that first year of employment. Although the vacation leave is an unpaid leave, the employer *must* pay at least 4% of the employee's prior year's total wages, as vacation pay, at least 7 days prior to the commencement of the vacation leave (section 58). Alternatively, if there is a written agreement between the parties, or if provided in a collective bargaining agreement, vacation pay may be paid, more or less as earned, on the employee's scheduled paydays. In the instant case, Pioneer Distributors failed to comply with its statutory obligations under both sections 57 and 58.

47. The combined effect of subsections 58(3) and 18(1) of the *Act* is that all vacation pay earned, but not yet paid, must be paid to the employee within 48 hours after the employer terminates the employee. However, subsection 80(1), reproduced above, places a limit on the employer's total unpaid wage liability (including any liability it may have in relation to unpaid vacation pay). The Director of Employment Standards cannot require an employer to pay, by way of a determination, unpaid wages "that became payable" more than "6 months before the earlier of the date of the complaint or the termination of the employment". Applying these provisions, the delegate determined (at page R18): "As Mr. Orr's employment was terminated on September 10, 2010, the vacation pay earned from November 1, 2008, [Note: this was his employment

anniversary date] until the end of his employment is recoverable under the Act as it became payable within the period stipulated in section 80 of the Act."

48. Given the statutory framework, I am in complete agreement with the delegate's conclusion but for one complication, namely, whether there was an agreement between the parties whereby Mr. Orr could "carry forward" the cash value of his unused vacation leave from one year to the next. In *O'Reilly*, *supra*, the Tribunal addressed a similar situation. Mr. O'Reilly worked for many years for a school district and was, at the time of his retirement, a "Director of Instruction". His employment had been governed by a series of term contracts that included a provision stating: "Up to 50% of annual vacation entitlement may be carried forward to a subsequent year". In March 1998, the District advised Mr. O'Reilly, in writing, that he had accumulated 269.75 vacation days in his time bank (his total banked vacation days was also regularly recorded on his various wage statements) but in February 1999, purporting to rely on a changed interpretation of his entitlement, the District sent him another letter indicating that his bank had been "recalculated" to only 92 days. The principal issue in the dispute was whether, on a correct interpretation of his contract, Mr. O'Reilly was entitled to carry forward his unused vacation pay on an indefinite basis – the Director originally determined that Mr. O'Reilly could claim his banked days and the Tribunal ultimately confirmed that decision.

49. I reproduced the relevant portions of the delegate's reasons regarding the "vacation carry forward" issue, above, but for the sake of convenience will briefly summarize them once again. Ms. Ng, the accountant, agreed that Mr. Klukas never instructed her to carry forward employees' unused vacation pay from one year to the next but, at the same time, she also testified that Mr. Klukas never became personally involved in payroll administration matters. However, in late March 2010 Mr. Klukas learned, by way of an e-mail to him from Mr. Forster (Ms. Ng's successor), that Mr. Orr's vacation pay was being carried forward (and that there was a balance in excess of $68,000 at that point) and he took no steps to advise Mr. Orr that he, in fact, did not have any such accumulated vacation pay balance. The delegate determined that since Mr. Klukas never expressly told Mr. Orr that he could bank and carry forward his unused vacation time, and because Ms. Ng's actions in tracking and recording this time did not bind Pioneer Distributors since she was not an agent of the firm for that purpose, Mr. Orr's claim for accumulated vacation pay failed.

50. The delegate's decision regarding the vacation pay "carry forward" issue was overturned in the Appeal Decision. The Tribunal Member, while acknowledging the correctness of the delegate's finding that Ms. Ng did not have the express authority to bind Pioneer Distributors regarding the terms and conditions of its employees' contracts (including terms relating to the accumulation of vacation pay from one year to the next), nonetheless concluded that the evidence before the delegate supported a finding that Ms. Ng (and other accountants employed at the firm), were held out by Pioneer Distributors as having authority to administer the payroll system (including calculating and reporting with respect to vacation pay) on behalf of the firm and thus had implied authority to bind the firm.

51. Counsel for Pioneer Distributors says that the delegate made a finding of fact that there was no agreement between the parties regarding the accumulation of vacation pay. As such, that finding of fact was not appealable. I do not accept either assertion. Firstly, findings of fact may be appealable if the factual finding is not based on a proper evidentiary foundation – a finding of "fact" made without proper evidence constitutes an error of law. Secondly, and more fundamentally, in my view, counsel's assertion overstates the nature of the delegate's finding. The delegate found – and the Tribunal Member on appeal accepted this finding – that Mr. Orr and Mr. Klukas never expressly discussed how Mr. Orr's unpaid vacation pay would be addressed. Clearly, Mr. Orr was entitled to a certain amount of vacation leave (and vacation pay) following his first year of employment and, equally clearly, Pioneer Distributors did not ensure (despite its statutory obligation) that

Mr. Orr actually took his leave and was paid his earned vacation pay each year. This failing is at the heart of the dispute between the parties.

52. Mr. Klukas took a "hands off" approach to payroll administration matters; he simply did not involve himself in payroll administration and, in effect, delegated that authority to the firm's accountants. Ms. Ng and the other firm accountants had the delegated authority to administer the firm's payroll and, in that capacity, implemented a system whereby unused vacation pay would be recorded and carried forward rather than paid out each year. There is no suggestion in the evidence that if Mr. Klukas has been advised the latter course of action was being adopted, Mr. Klukas would have objected (and recall that when he *was* advised, in March 2010, about the practice he never objected); even if he might have objected, employees are entitled under the *Act* to have their earned vacation pay, based on their previous year's wages, paid out each year. The problem here, of course, is that rather than paying out vacation pay on a regular basis, Pioneer Distributors simply carried it forward as an ongoing liability to the firm and an accumulating benefit for the employee. This was recorded in the firm's *own payroll records* and was reported to the employees in the form of a spreadsheet. No one at Pioneer Distributors, and least of all Mr. Klukas, ever told Mr. Orr that he could not carry forward his earned, but unpaid, vacation pay. Had Mr. Orr been told, he likely would not have forfeited his extant leave and pay, but undoubtedly would simply have demanded, as was his right under the *Act*, to take his full vacation leave each year and, at the very least, be paid all of his earned vacation pay.

53. Pioneer Distributors' counsel says that "Mr. Orr was required by law to establish an implied term that he could waive payment of vacation pay and carry forward the unpaid portion indefinitely" and that the "Delegate found that as a matter of fact, Mr. Orr had not established such a term, whether express or implied". Once again, in my view, this latter assertion misstates the nature of the delegate's finding and seemingly misses the fundamental point of the Appeal Decision. As I read the delegate's reasons, he merely found that there was no express understanding between Mr. Orr and Mr. Klukas regarding the "banking" of Mr. Orr's earned vacation pay and that was simply because Mr. Klukas did not involve himself in payroll administration. The delegate found, in effect, that Mr. Klukas delegated responsibility for payroll administration to Ms. Ng and the firm's other accountants. It was these individuals, carrying out the responsibilities that Mr. Klukas reposed in them, who decided that, rather than paying Mr. Orr his vacation pay in accordance with the provisions of the *Act*, they would accrue his earned but unpaid vacation pay and carry it forward on an ongoing basis until it was paid out. They also reported his current unpaid vacation pay entitlement to him, in writing, so he would always have a current record of this accumulating pecuniary asset. While Mr. Orr could have rejected this approach and demanded the timely payment of his accrued vacation pay as mandated by the *Act*, he was content to allow this account to accrue over time apparently because he looked upon this fund as, potentially, at least partially funding his intended investment in the firm.

54. Counsel for Pioneer Distributors says that Mr. Orr could only prevail if he established an express or implied term in his employment contract regarding the "banking" of his earned, but unpaid, overtime. Further, counsel says that the Tribunal Member erred in law by "implying" such a term into Mr. Orr's employment contract. While the *Act* does contain, in section 42, a provision regarding the establishment of an overtime pay "bank", there is no equivalent provision relating to vacation pay. Nevertheless, Ms. Ng essentially unilaterally established a vacation pay "bank" for Mr. Orr (and the firm's other employees as well) outside the parameters of the *Act*. As I indicated earlier, Mr. Orr was not obliged to accept this "banking", rather than the direct payment, of his earned vacation pay but was apparently content to do so. Pioneer Distributors, through its expressly delegated agents, namely, Ms. Ng and the other firm accountants, represented to Mr. Orr that his unpaid vacation pay was accruing from year to year and represented a fund that he could draw on during his employment or that he would receive in full upon the termination of his employment. The Appeal Decision merely reflects a view that having given Mr. Orr to understand that was situation, and given that he was reasonably entitled to rely on that state of affairs, Pioneer Distributors was not entitle to *ex post facto*

disavow its long-standing representations regarding the year to year accumulation of Mr. Orr's unpaid vacation pay.

55. I wish to briefly comment on *Zia v. TELUS Corporation*, 2007 BCSC 1426, a decision that Pioneer Distributors says wholly undercuts Mr. Orr's claim. Relying on this decision, Pioneer Distributors "submits that in general payroll administrators may not bind employees" [sic?; employers?] and that "the BC Supreme Court has found in at least one other case that mistakes made by a payroll department in overpaying an employee did not serve to create a contract or alter the terms of employment".

56. I do not see how the *Zia* decision is relevant to the case at hand. In *Zia*, the employee was temporarily reassigned from Vancouver to Thailand to work on a particular project and he negotiated some supplementary compensation that was tied to his time in Thailand. However, after returning from Thailand he continued to receive this supplement for several more years. The court held that Mr. Zia could not lawfully claim the "overpayments" on either a promissory estoppel (since "he did not rely on any promise or assurance made by Telus", para. 45) or a contractual waiver (since the overpayment was a clear mistake that should have been obvious to Mr. Zia) basis. I think it important to note the following findings in Zia (at paras. 119 and 120):

> Although it is correct to say that Telus made a mistake in continuing the payments after Mr. Zia returned from Thailand, the fact that he knew he was being overpaid and did nothing about it cannot be ignored. He was content to take advantage of this mistake for as long as possible. When it was discovered, he persisted in asserting a claim he knew to be baseless.
>
> The action taken by Telus to recover the overpayment was authorized by s. 254.1(2)(d) of the *Canada Labour Code*…

57. In this case, Mr. Orr *actually earned* the vacation pay in question but it was not paid to him in accordance with the provisions of the *Act*. Far from taking advantage of a payroll clerk's error, this case is about an employer failing to meet its statutory obligations regarding the payment of vacation pay, representing to an employee that those unpaid wages would nonetheless accrue to his benefit and would be paid out in the future, and then attempting to resile from that representation.

58. Pioneer Distributors submits "the Tribunal implicitly found that Pioneer should be vicariously liable for Ms. Ng's records" and that this finding is "entirely wrong". Counsel's argument continues: "The Complaint is premised upon the failure of Ms. Ng to comply with the Act. If Ms. Ng had complied with the Act, Mr. Orr would have been forced to take vacation and would have been paid out his vacation pay in accordance with the Act." I have three comments with respect to this submission. First, the notion that it was "Ms. Ng", and not Pioneer Distributors itself, that failed to comply with the *Act* is not tenable. Mr. Klukas, Pioneer Distributor's principal, expressly delegated the authority to administer the firm's payroll functions to Ms. Ng and the other accountants later employed by the firm (recall the delegate's finding that he preferred to take a "hands off" approach to payroll administration). Ms. Ng may well have misunderstood the firm's *Act* obligations but this misunderstanding was one made *during the course of her employment duties on behalf of Pioneer Distributors* and thus, in this case, her error is Pioneer Distributors' error. Second, and by the same logic, the payroll records in question were not "Ms. Ng's records" but, rather, Pioneer Distributors' records – records, I might add, it was obliged to keep under section 28 of the *Act*. Third, having acknowledged that if it had complied with the *Act*, Mr. Orr would have been paid in full, it now says that because its employee, Ms. Ng, caused the company to default in its *Act* obligations, Mr. Orr should now have to suffer the adverse economic consequences of that default. I reject that approach as being inconsistent with the section 2(d) purpose relating to "fair treatment of employees and employers". There is nothing unfair about requiring an employer to pay the wages (including vacation pay) that an employee has earned, but it is very unfair to deny

employees wages they have earned especially when the firm represented that these accrued wages would ultimately be paid out in full.

59. A significant portion of Pioneer Distributors' argument relates to whether the Tribunal erred in finding a "contract" in regard to the continuing accrual of Mr. Orr's earned, but unpaid, vacation pay. In my view, there could not have been a valid contact between the parties to the effect that earned vacation pay would *not* be paid out as dictated by the *Act* but, rather, would accrue on an ongoing basis to be paid out at some indefinite future point (for example, when demanded or on termination of employment). Had the parties specifically agreed to such an arrangement it would appear that sort of agreement would have been unlawful. Employers are obliged to ensure that employees take their annual vacation (subsection 57(2)) and must, in addition, pay all earned vacation pay prior to the employee taking that leave (subsection 58(2)). An agreement whereby the employee forfeited their vacation entitlement, or their right to be paid accrued vacation pay in the manner mandated by the *Act*, offends section 4 of the *Act* and thus would be void.

60. I read the Appeal Decision, particularly para. 81, as finding that Pioneer Distributors was bound by the *representations* it made (through Ms. Ng and through the wage statements) regarding Mr. Orr's accruing vacation pay entitlement and his right to full payment of the entire accrued sum. In effect, these representations were section 8(c) representations regarding his "wages" and, as such, Pioneer Distributors was bound to honour them. These representations were to the effect that Mr. Orr could draw down some or all of his earned, but unpaid, vacation pay when requested and that any balance due him when his employment terminated would be paid out. Since Mr. Orr never actually demanded payment of the entire amount of his accrued vacation pay during his employment, the outstanding vacation pay balance in his account "became payable" on termination (and thus was within the section 80(1) limitation period).

61. The final argument advanced by Pioneer Distributor's counsel concerns the Tribunal's jurisdiction. Specifically, counsel says "the Tribunal, as a statutory body has no jurisdiction to apply principles of equity". This argument relates to the discussion in the Appeal Decision (at paras. 82 – 84) regarding estoppel and, I believe, is the source of some confusion between the *agency* doctrine of *agency by estoppel* and the equitable doctrine of *promissory estoppel*. The former relates to the issue of whether, as a matter of law, an agency relationship exits and is sometimes referred to as ostensible agency, implied agency, or a "holding out" of agency. Promissory estoppel a quasi-contractual doctrine that concerns whether a promisor is bound by a gratuitous (*i.e.*, made without consideration) promise not to enforce an existing contractual right (see *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50).

62. The Appeal Decision refers to estoppel in the context of whether an agency relationship existed. One of the issues before both the delegate and the Tribunal related to Ms. Ng's (and the other firm accountants') authority to bind Pioneer to an obligation regarding the accrual of vacation pay and the employees' right to be paid out the full accrued balance upon the termination of their employment. The delegate stated, at page R21 of his reasons: "Although Ms. Ng tracked Mr. Orr's vacation entitlement, and Mr. Orr was aware of this, *Ms. Ng was not an agent of Pioneer through whom conditions of employment were created.* If Mr. Orr believed he had an ongoing entitlement to these funds then his belief was a mistake. And Mr. Klukas' discovery of this accrual, and his subsequent silence, is not the same as acknowledging for the first time that this entitlement existed." (my *italics*).

63. An agency relationship may be established in a variety of ways; typically, the parties enter into an express agency contract. However, an agency relationship may arise, as a matter of law, in other circumstances including the situation where the principal "holds out" a person as their agent despite the absence of a formal agency agreement (*i.e.*, an agency by estoppel). Even though a person is not an express agent, any actions within the apparent authority of the ostensible agent are binding on the principal. At para. 82 of the Appeal

Decision, the member referred to Fridman's *Canadian Agency Law* regarding the creation of this form of agency relationship and, at para. 83, he concluded that the evidence clearly supported a finding that Ms. Ng was Pioneer Distributors' agent for purposes of ensuring legal compliance with the *Act* and otherwise administering the firm's payroll function. Finally, at para. 84 of the Appeal Decision, the member concluded that Mr. Orr reasonably relied on, potentially to his detriment, Ms. Ng's apparent agency authority in regard to payroll matters. Counsel for Pioneer Distributors submits:

> The Tribunal's desire to provide a remedy to Mr. Orr by applying equitable principles constitutes an error of law. In the present case, in the absence of offer and acceptance regarding the monetary term of carrying forward vacation pay on an indefinite basis, the Tribunal has no ability to create a contract for Mr. Orr.
>
> Further, at paragraphs 83 and 84 of the Decision, the Tribunal found that Pioneer through its conduct had made "representations" to Mr. Orr upon which he relied.

64. I think it quite unfair to assert that the Tribunal member who issued the Appeal Decision had some sort of "desire" to provide Mr. Orr with a remedy. In essence, it is an allegation that the Tribunal member was predisposed in favour of Mr. Orr and, for my part, I do not see a scintilla of evidence to support that notion. The Tribunal member *did* find that the delegate erred in determining that Ms. Ng was not an agent of Pioneer Distributors for purposes of administering the firm's payroll obligations. The uncontested evidence before the delegate was that Mr. Klukas delegated the firm's responsibility regarding its payroll obligations to firm's accountants and, principally, to Ms. Ng. In that sense, Ms. Ng was expressly authorized by the firm to deal with payroll matters. At the very least, she had implied authority to communicate to employees regarding their wage entitlements. As an agent, Ms. Ng's representations became the firm's representations and thus binding on Pioneer Distributors. It should also be noted that in March 2010, when Mr. Klukas had the opportunity to advise Mr. Orr that Pioneer Distributors did not accept Ms. Ng's calculations regarding his accrued vacation pay, Mr. Klukas chose to say nothing and "Pioneer's replacement accountants continued to record Mr. Orr's vacation entitlement as accruing in the same manner as Ms. Ng had done" (delegate's reasons, page R20).

65. Even though a person is an agent by estoppel, the agent's representations may not bind the principal if the third party's (in this case, the third party is Mr. Orr) reliance on the agent's representations is unreasonable. The Tribunal member concluded, at paras. 83 and 84 of the Appeal Decision, that Mr. Orr, through the actions of Pioneer's agents, was induced to believe that his accrued vacation pay would be carried forward on an annual basis and that he relied on this representation by, firstly, not taking vacation that he otherwise might have, and, secondly, by allowing his unpaid vacation pay to continue to accrue, rather than demanding immediate payment (as would have been his right), so that he might use this fund as a "capital asset" to partly finance his anticipated investment in the firm. The Tribunal member concluded that Mr. Orr acted reasonably in relying on the representations made to him regarding his vacation pay account. In my view, the Tribunal member's conclusions regarding these issues were amply supported by the evidentiary record before him.

ORDER

66. Pioneer Distributors' application, made pursuant to section 116 of the *Act*, to cancel the Appeal Decision (BC EST # D095/12) is refused. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal