An Application for Reconsideration

- by -

IBM Canada Limited - IBM Canada Limitee
("IBM")

- 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.: 2014A/166

DATE OF DECISION: January 23, 2015

DECISION

SUBMISSIONS

Lorene A. Novakowski — counsel for IBM Canada Limited - IBM Canada Limitee

INTRODUCTION

1. IBM Canada Limited - IBM Canada Limitee ("IBM") has applied, pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of BC EST # D104/14 (the "Appeal Decision"). The Tribunal reviews reconsideration applications in light of the two-stage test set out in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98 ("*Milan Holdings*") which directs the Tribunal to, first, consider whether the application raises a sufficiently cogent case to justify the Tribunal exercising its discretion to reconsider the appeal decision in question. At this stage, the Tribunal will consider whether the application raises a serious and compelling issue of law, fact or procedure. If the application does not pass the first stage of the *Milan Holdings* test, it will be summarily dismissed. If, on the other hand, the application does raise an important matter justifying reconsideration, the Tribunal will receive full submissions from all affected parties and then address the merits of the application more fully.

2. At this stage, and based solely on the submissions filed by IBM, I am considering whether this application passes the first stage of the *Milan Holdi*ngs test. I have reviewed IBM's reconsideration application and supporting materials as well as the complete record that was before the Tribunal on appeal.

FACATUAL BACKGROUND & PRIOR PROCEEDINS

3. This is a dispute about vacation pay and the interplay between the relevant provisions of the *Act* (found in Part 7) and an employee's contractual provisions as they relate to vacation pay.

4. Brett R. Barlow ("Barlow") was a senior employee with IBM who submitted four weeks' notice of resignation on June 17, 2013. Since Mr. Barlow was resigning to take up employment with a competitor, IBM decided to summarily terminate his employment and pay him out for the balance of the tendered notice period. Mr. Barlow's employment was terminated as of June 21, 2013. It is conceded that when he was terminated, Mr. Barlow was entitled, by contract, to five weeks' annual vacation (25 working days equivalent to 10% of his annual salary) and that each vacation day was valued at $716.00.

5. IBM paid Mr. Barlow the sum of $3,938 on account of 5.5 vacation days it considered was payable to him but Mr. Barlow believed he was entitled to significantly more vacation pay. When the parties could not resolve the dispute between them, Mr. Barlow filed an unpaid wage complaint that was the subject of a complaint hearing before a delegate of the Director of Employment Standards (the "delegate") on March 26, 2014. On July 18, 2014, the delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") upholding the complaint and awarding Mr. Barlow $12,194.59 on account of unpaid vacation pay and section 88 interest. The vacation pay award represented 15 accrued vacation days (15 x $716 = 10,740) plus vacation pay on his final severance payment ($1,073.10) plus $381.59 interest (Note: the Determination contains a $0.10 arithmetic error and should total $12,194.69).

6. In addition, and also by way of the Determination, the delegate levied two separate $500 monetary penalties against IBM based on its contraventions of sections 57 and 58 of the *Act*. Thus, the total amount payable under the Determination is $13,194.69 (adjusting for the arithmetic error).

7. Prior to his employment with IBM, Mr. Barlow was employed with a firm known as "PricewaterhouseCoopers LLP". On November 26, 2001, Mr. Barlow received a letter indicating that his employment would be "transferred", effective January 1, 2002, "to PwC Company, the employer entity for our new organization, *PwC Consulting*". Later, during the fall of that same year, IBM acquired the operations of *PwC Consulting* and on October 2, 2002, Mr. Barlow received a letter from IBM welcoming him "to the IBM family of companies". Although his base compensation apparently continued unchanged, there were some changes to what had been Mr. Barlow's vacation entitlements the most significant of which might have been IBM's policy that unused annual vacation could not be carried forward and taken in a subsequent year (although IBM could, at its discretion but only for "exceptional business/personal reasons", allow employees to utilize some unused vacation in the first quarter of the following year). The basic policy, however, was that employees could not receive more than 52 weeks' pay (including paid vacation) in any calendar year. Vacation entitlement was calculated using a common January 1 date for all employees.

8. IBM's "senior human resource partner" testified at the complaint hearing before the delegate that in calendar year 2012, Mr. Barlow took 20 paid vacation days and in 2013 he took 7 paid vacation days prior to his termination. This witness testified that Mr. Barlow's 2013 vacation entitlement was 12.5 days given that he worked approximately half the calendar year (delegate's reasons, page R8). Accordingly, Mr. Barlow was paid 5.5 vacation days on termination (12.5 days' entitlement – 7 vacation days taken).

9. The delegate determined, and this finding is not contested, that Mr. Barlow's annual vacation entitlement was 25 working days and that he actually took 15 paid vacation days in 2011, 20 days in 2012, 7 days in 2013 and, in addition, he was paid for 5.5 days in 2013 along with his final severance payment (delegate's reasons, page R13). The delegate noted that "it is the Employer's responsibility to ensure vacation time is taken and that vacation is paid in accordance with section 58(2) and section 58(3)" (page R12). The delegate further observed that "a [vacation] policy in which vacation time is forfeited contravenes section 57 and "it is disingenuous to give an employee five weeks of vacation while assigning projects which make it difficult or impossible to take five weeks off and then require the forfeiture of that entitlement" (page R11).

10. Pursuant to subsection 80(1) of the *Act*, the delegate fixed the "wage recovery period" as being from December 22, 2012, to June 21, 2013, but also noted that "vacation pay earned in a calendar year is payable up to December 31 of the following year [and] consequently, [Mr. Barlow's] annual vacation pay earned between January 1, 2011, and June 21, 2013, is recoverable" (page R13).

11. Since there was a total of 62.5 vacation days payable to Mr. Barlow during the wage recovery period, but only 47.5 vacation days paid (including the 5.5 vacation days paid on termination) during the same period, there was a balance of 15 vacation days owing (15 x $716/day = $10,740) as well as a further $1,073.10 owed as vacation pay on his final severance payment. The delegate awarded Mr. Barlow these latter amount plus section 88 interest ($381.59) for a total award of $12,194.69.

12. IBM appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b) of the *Act*). With respect to its first ground of appeal, IBM argued that the delegate erred in making a certain finding of fact relating to Mr. Barlow's vacation pay entitlement and that the delegate misinterpreted and/or misapplied sections 57, 58 and 80 of the *Act*. IBM asserted that the delegate failed to observe the principles of natural justice when, without prior notice to the parties and in the absence of a claim by Mr. Barlow, she awarded Mr. Barlow an additional 10% vacation pay on the final severance payment ($10,731 x 10% = $1,073.10) IBM issued to Mr. Barlow when it summarily terminated him after he submitted 4 weeks' notice of resignation.

13. Tribunal Member Stevenson summarily dismissed IBM's appeal under subsection 114(1)(f) of the *Act* on the basis that it had no reasonable prospect of succeeding. IBM now seeks to have that decision reconsidered.

THE APPLICATION FOR RECONSIDERATION

14. As noted in the 10-page memorandum that is attached to IBM's reconsideration application form, IBM's application "is confined to the aspect of the [appeal] decision as follows: (a) the interpretation of Section 57(1)…(b) the interpretation of Section 58(2)…and (c) the interpretation of Section 80 of the *Act*". Although the application refers to section 80 of the *Act*, it only addresses the interpretation and application of subsection 80(1). I have reproduced these provisions, below:

> 57 (1) An employer must give an employee an annual vacation of
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> (a) at least 2 weeks, after 12 consecutive months of employment, or
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> (b) at least 3 weeks, after 5 consecutive years of employment.
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> 58 (2) Vacation pay must be paid to an employee
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> (a) at least 7 days before the beginning of the employee's annual vacation, or
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> (b) on the employee's scheduled paydays, if
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> (i) agreed in writing by the employer and the employee, or
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> (ii) provided by the collective agreement.
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> 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
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> (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
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> (b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination,
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> plus interest on those wages.

FINDINGS AND ANALYSIS

15. Subsection 57(1) of the *Act* states that an employer must give an employee "at least" 2 or 3 weeks of annual vacation leave depending on the employee's tenure. It is common ground that Mr. Barlow was entitled, under his contract, to 5 weeks' paid vacation leave annually (although he did not actually take that full entitlement in calendar years 2011 and 2012). IBM says that its vacation policy complies with the *Act* in Mr. Barlow's case since it provided "at least" 3 weeks paid vacation to him. IBM says that the delegate and Tribunal Member Stevenson both erred in finding that the effect of section 57 was to prohibit the forfeiture of "vacation that the employer grants employees over and above the statutory minimum". IBM says that the effect of the Appeal Decision is to "create an unlimited statutory maximum". IBM's submission continues:

> [IBM's] position is that it is this minimum standard [*i.e.*, 3 weeks' paid vacation after 5 consecutive years of employment], the minimum floor to which the no forfeiting of vacation provision applies. Should employers choose to exercise discretion and provide employees with an entitlement greater than the minimum entitlement, such employer is entitled to create rules about how that non-statutory entitlement can be used.

16. IBM says that it is an error of law to "interpret *at least* as giving the [Employment Standards] Branch the right to enforce more than the statutory entitlement" and further submits that even if the Director can enforce a vacation pay entitlement that exceeds the statutory minimum, "such right includes the contractual terms that an employer imposes on the vacation entitlement, as long as they meet or exceed statutory minimums" and that, in the instant case, IBM had "the right to forfeit vacation that the employee had chosen not to take". Finally, and with reference to section 57, IBM says that Mr. Barlow "did not lose any vacation pay as a result of the application of the IBM vacation plan [and that] if he lost anything by not taking his vacation entitlement, he would lose the right to take time off with pay".

17. Vacation pay is a form of "wages" earned and payable to an employee under the *Act* (*Traderef Software Corporation*, BC EST # D269/97; *Creative Screen Arts Ltd.*, BC EST # D024/98). Employers are not entitled to take deductions from an employee's earned wages except in the limited circumstances set out in section 21. IBM's vacation policy complies with the *Act* to the extent that it provided Mr. Barlow with at least the statutory minimum vacation entitlement. However, the Director has the authority under the *Act* to enforce a contractual agreement that provides for a vacation leave/pay entitlement that is greater than the minimum standard (see *Director of Employment Standards (Evinger)*, BC EST # D331/97 (at paras 11-15); *QI Systems Inc.*, BC EST # D340/02; *Unity Wireless Systems Corporation*, BC EST # RD041/05). This latter authority is analogous to the Director's power to issue a wage payment order that exceeds the statutory minimum wage provided the higher wage rate was agreed to by contract. Subsection 16(1) states that an employer must pay an employee "at least" the minimum wage but where there is a higher wage agreed to by contract, the employee is entitled to be paid that higher wage. An employer cannot lawfully defend a claim for unpaid wages, where there is a contract providing for a wage greater than the minimum wage, on the basis that it paid the employee "at least" the minimum wage.

18. It should also be noted that, under the *Act*, *vacation leave* (section 57) and *vacation pay* (section 58) are separate entitlements. Subsection 57(2) places an obligation on the employer to ensure that an employee takes their annual vacation leave. In this case, of course, the employer failed to ensure that Mr. Barlow took all of the vacation leave to which he was entitled. However, even if it could be said that Mr. Barlow forfeited a portion of his vacation leave, it does not follow that he forfeited his right to vacation pay (*Metropolitan Fine Printers Inc.*, BC EST # RD022/13). As previously noted, vacation pay is a form of wages and any earned but unpaid vacation pay must be paid to an employee whose employment has ended in accordance with the time frames set out in section 18 of the *Act*.

19. An interpretation of section 57 that permits the Director to enforce the parties' agreement with respect to vacation leave is consistent with both the explicit language of section 57 and with the purposes of the *Act*. Such an interpretation does not create an "unlimited maximum" since there will always be a ceiling fixed by the parties' employment contract (and, in the absence of a contractual agreement, the minimum statutory standard applies). It must be remembered that, in this case, the only reason why Mr. Barlow "forfeited" (if, indeed, he did so) his full vacation leave for the years in question was because IBM failed to live up to its statutory obligation under subsection 57(2) to ensure that he took his allotted vacation leave.

20. IBM says that it "exercise[d] discretion" when it provided Mr. Barlow with vacation leave beyond the statutory minimum and that since Mr. Barlow "chose" not to take his full vacation leave, the unpaid leave is forfeited. First, Mr. Barlow's vacation leave entitlement was a matter of contractual agreement, not a gratuitous discretionary benefit conferred on him by IBM – his vacation leave and his correlative right to vacation pay was a contractual benefit that formed part of his overall compensation package. Second, there is no evidence in the record that Mr. Barlow, by failing to take his full vacation leave (and recall IBM's statutory obligation was to ensure that he took his full vacation leave allotment), affirmatively forfeited or otherwise

waived his right to his separate statutory entitlement to the vacation pay referable to the vacation leave not taken.

21. It must be remembered that this is a case about vacation pay (*i.e.*, a claim for unpaid wages), not vacation leave. With respect to vacation pay – as distinct from vacation leave – the statutory minimum entitlement is fixed by section 58 and, tracking the language of section 57, the employer must pay "at least" 4% or 6% (depending on the employee's tenure) "of the employee's total wages during the year of employment entitling the employee to the vacation pay". Thus, the Director is entitled to enforce the parties' agreement with respect to vacation pay where it exceeds the statutory minimum (see cases cited above).

22. In this case, the parties' employment agreement effectively provided that Mr. Barlow's vacation pay entitlement was equivalent to 10% of his regular salary. IBM argues that if Mr. Barlow forfeited some of his vacation leave, by not taking his full allotment (*i.e.*, 25 days), he also forfeited his statutory right to concomitant vacation pay relating to the vacation leave not taken. In many respects, this case is similar to *Metropolitan Fine Printer*, *supra*, where I observed in refusing to grant reconsideration (paras. 16-17):

> …I agree with Member Stevenson that [the employee] did not lawfully forfeit his vacation leave simply because the employer failed to ensure, contrary to its statutory obligation, that he actually took his entire leave. Nevertheless, even if he did forfeit his leave (and I advance this proposition simply for the sake of argument), vacation pay, being a form of "wages", is an entirely separate matter. An employee does not *forfeit* earned wages under the *Act* although that employee may not be able to fully recover all wages earned and payable because, for example, section 80 limits recovery…
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> In this case, subsection 58(3) crystallized [the employer's] liability to pay [the employee] his earned, but unpaid, vacation pay (subject to the section 80 limiting provision). I agree with Member Stevenson that nothing in the *Act* authorized [the employer] to withhold, or to take a deduction from, the wages (*i.e.*, vacation pay) it owed to [the employee] when it terminated his employment. Section 21 simply reinforces that latter conclusion.

23. IBM also argues that it regularly paid Mr. Barlow his vacation pay "on the employee's scheduled paydays" and that there was an agreement "in writing" (marked as "Exhibit 7" at the complaint hearing) between the employer and the employee authorizing that payment (see subsection 58(2)(b)(i) of the *Act*). The delegate made a finding of fact that there was no such agreement (see pages R12-R13). IBM unsuccessfully challenged this finding of fact on appeal. It now seeks to challenge the finding yet again by way of this reconsideration application.

24. I agree with Tribunal Member Stevenson's conclusion that Exhibit 7 does not constitute an agreement within the parameters of subsection 58(2)(b)(i) of the *Act* – I find nothing in this document, which is a general information document seemingly made available to all employees regarding IBM's vacation and statutory holiday leave policies, that states Mr. Barlow's vacation pay will be paid, as accrued, on each scheduled payday. Further, the uncontroverted fact is that "[IBM's] payroll records do not show payments made on each pay cheque of actual vacation pay over and above [Mr. Barlow's] regular salary" (delegate's reasons, page R13). Finally, IBM's own actions post-termination belie its position – if Mr. Barlow's vacation pay was paid to him as it accrued (which is the effect of a subsection 58(2)(b)(i) agreement) why did IBM issue him a further cheque for 5.5 unpaid vacation days approximately 10 weeks after his termination (August 30, 2013)?

25. Finally, IBM says that the delegate erred in her interpretation of subsection 80(1) of the *Act* (the "wage recovery period" provision), and did not provide a reasoned analysis for her conclusions about the scope of the wage recovery provision as it applied to Mr. Barlow's vacation pay claim. IBM says that Tribunal Member Stevenson erred in upholding the delegate's interpretation and application of the wage recovery provision and that the delegate's interpretation gives Mr. Barlow an undeserved "windfall".

26. I have already noted that there was no subsection 58(2)(b)(i) agreement in this case. When Mr. Barlow actually took vacation leave, his regular salary simply continued and, effectively, he received his vacation pay relating to all the vacation leave that he actually took. However, and this is the problem in this case, he did not take all of the leave to which he was contractually entitled and he did not receive any vacation pay relating to the earned vacation days that he did not actually take (save for the 5.5 vacation days that were paid to him following his dismissal). Thus, at the point of dismissal, he had an accrued entitlement to vacation pay relating to the vacation leave he had not yet taken. Under subsection 58(2)(a), this latter vacation pay would have to be paid 7 days before the beginning of the applicable vacation leave but since he never took his full leave, this vacation pay was earned but not payable. It became payable under subsection 18(1) within 48 hours after IBM terminated Mr. Barlow's employment and, as such, fell within the subsection 80(1)(a) wage recovery period. This is, in fact, what the delegate determined (see page R13). The delegate's decision did not give Mr. Barlow a "windfall"; to the contrary, it merely provided for payment of the vacation pay to which he was entitled under the *Act*.

27. In my view, the delegate did not err in her interpretation of any of sections 57, 58 or 80 of the *Act* and IBM's appeal was properly dismissed as having no reasonable prospect of success. It follows that am not persuaded that this application passes the first stage of the *Milan Holdings* test and, accordingly, it is not necessary to notify the respondent parties and seek their submissions on the issues raised by IBM in this application.

ORDER

28. IBM's application for reconsideration of the Appeal Decision is refused. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal