An Application for Reconsideration

- by -

Metropolitan Fine Printers Inc.
("Metropolitan")

- 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/142

DATE OF DECISION: February 19, 2013

DECISION

SUBMISSIONS

Ib S. Petersen — counsel for Metropolitan Fine Printers Inc.

INTRODUCTION

1. This is a timely application made pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an appeal decision issued by Tribunal Member Stevenson on October 24, 2012 (BC EST # D113/12) – the "Appeal Decision". The Appeal Decision confirmed a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on July 4, 2012, ordering the current applicant, Metropolitan Fine Printers Inc. ("Metropolitan"), to pay its former employee, Henry Ducluzeau ("Ducluzeau"), the total sum of $5,506.54 representing unpaid vacation pay and section 88 interest (the "Determination"). Further, and also by way of the Determination, the delegate levied a $500 monetary penalty (see section 98) against Metropolitan for having contravened section 58 of the *Act* (employers' obligations regarding vacation pay). Thus, the total amount payable under the Determination was $6,006.54.

2. Metropolitan says that both the Appeal Decision and the Determination should be cancelled since they are both predicated on an error of law concerning the interpretation and application of the *Act's* vacation pay provisions as they relate to the somewhat unique circumstances of Mr. Ducluzeau. In addition, and although this does not appear to be Metropolitan's principal avenue of attack, it says that the appeal process was unfair since, in rendering his decision, the Tribunal Member referenced section 21 of the *Act* (employers must not withhold, or deduct from, an employee's earned wages) even though this particular provision was not referenced in any of the parties' submissions.

3. Section 116 of the *Act* gives the Tribunal a *discretionary* authority to reconsider an appeal decision. In *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98, the Tribunal established a two-stage process for adjudicating 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 revisit factual matters that have already been appropriately 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 fact, law or principle, or suggests that the Tribunal's decision should be reviewed because of its fundamental importance or because of its possible 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.

4. At this juncture, I am only addressing the first stage of the *Milan Holdings* test. If I am satisfied that this application passes the first stage, the Tribunal will advise the respondents and seek their submissions regarding the issues raised by Metropolitan's application. On the other hand, if this application does not pass the first stage, it will be dismissed. I am adjudicating this application based on the submissions filed by Metropolitan's legal counsel and, in addition, I have reviewed the record that was before the Tribunal when the Appeal Decision was issued.

5. In the following sections of these reasons, I briefly summarize the adjudicative history of this matter and then assess whether this application passes the first stage of the *Milan Holdings* test.

PRIOR PROCEEDINGS

6. Metropolitan employed Mr. Ducluzeau in a sales capacity from June 25, 2008, until his termination on March 31, 2011. Following his termination, Mr. Ducluzeau filed somewhat overlapping claims in both the B.C. Provincial Court and the Employment Standards Branch. Eventually, he abandoned his "vacation pay" claims in the B.C. Provincial Court and the delegate proceeded to investigate only that aspect of his various claims against Metropolitan. As noted above, the delegate issued a Determination in favour of Mr. Ducluzeau, along with his "Reasons for the Determination" (the "delegate's reasons", on July 4, 2012).

7. Mr. Ducluzeau's original employment contract provided for greater vacation leave and vacation pay than minimally mandated by the *Act*. Of course, there is nothing inappropriate about that – parties are free to negotiate greater benefits than mandated by the *Act*. But if a non-union employment agreement provides lesser benefits than mandated by the *Act*, the offending provision is void and the minimum provision of the *Act* governs (see section 4).

8. In any event, an employment handbook that was purportedly incorporated by reference into Mr. Ducluzeau's employment contract stated that "vacation shall be scheduled in the calendar year in which it is earned" and that "the full vacation entitlement must normally be taken during the applicable vacation year". The handbook also provided for a limited right (and subject to Metropolitan's written approval) to "carry forward" 5 unused vacation days from the current calendar year to the next. The seminal problem in this case is that Mr. Ducluzeau did not take his entire vacation allotment despite the fact that section 57(2) of the *Act* obliges employers to ensure that employees actually take their earned vacation leave. The further complication is that, under the *Act*, vacation leave is taken – and vacation pay is paid – in "arrears" in the sense that vacation leave is to be taken (and vacation pay must be paid) in the year *following* the year in which the leave entitlement was earned. In other words, the combined effect of sections 57 and 58 of the *Act* is that a newly hired employee is entitled to *at least* 2 weeks' unpaid leave, to be taken in their second year of employment. In addition, at the start of the vacation leave, *at least* 4% of their *prior year's earnings* must be paid to the employee as vacation pay. These entitlements increase to 3 weeks' leave and 6% vacation pay after 5 consecutive years of employment. There was no dispute between the parties that under the parties' employment agreement, Mr. Ducluzeau was entitled to unpaid vacation leave and, in this case, 8% vacation pay, based on his earnings *during* the year entitling him to his vacation leave.

9. Metropolitan's position before the delegate was that given its policy regarding vacation leave, coupled with the fact that Mr. Ducluzeau never obtained written authority to carry forward his unused vacation leave, he forfeited any claim to unpaid vacation pay. The delegate concluded that Metropolitan's policy requiring an employee to either take their vacation during the current year or otherwise forfeit it (subject to the conditional right to carry forward a maximum of 5 days), was inconsistent with the *Act* provisions that, first, require employers to ensure that vacation leave is taken (subsection 57(2)) and, second, permit employees to take their earned vacation and be paid their accrued vacation pay (subsection 58(2)) in the year following (rather than the current year) the year in which the vacation leave and vacation pay is earned. The delegate, after applying the subsection 80(1) "wage recovery limitation", determined that Mr. Ducluzeau's vacation pay earned as and from January 1, 2009, was recoverable.

10. Metropolitan appealed the Determination on the ground that the delegate erred in law in interpreting section 57(2) of the *Act*: "An employer must ensure an employee takes an annual vacation within 12 months after completing the year of employment entitling the employee to the vacation." Metropolitan also sought a suspension of the Determination pending the adjudication of the appeal and the Tribunal issued a suspension order on the condition that Metropolitan deposit the entire amount of the Determination (including the penalty) by October 12, 2012 (see BC EST # D104/12 issued October 4, 2012).

11. The appeal was unsuccessful. Tribunal Member Stevenson held that the appeal was, in some sense, misconceived since Metropolitan's liability was predicated on its contravention of section 58, not 57, of the *Act* (see Appeal Decision, para. 17). He noted that while section 57 deals with vacation *leave*, it is section 58 that deals with vacation *pay* and that this latter provision was the foundation for the delegate's award. I also note that Metropolitan was penalized for having contravened section 58 rather than section 57. Tribunal Member Stevenson observed that vacation pay is defined as "wages" under the *Act* and that subsection 58(3) states: "Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages". This latter obligation, of course, is subject to the limit imposed by section 80. Finally, Tribunal Member Stevenson noted that even if an employee's *vacation leave* entitlement is lost, that employee does not lose their earned *vacation pay* since subsection 21(1) of the *Act* prohibits, save for some inapplicable exceptions, employers from withholding, or taking deductions from, an employee's wages.

THE APPLICATION FOR RECONSIDERATION

12. As I noted above, although Metropolitan primarily asserts that the Appeal Decision is wrong in law, it also says that Tribunal Member Stevenson "denied the employer a fair hearing" because he referred to section 21 in the absence of any party referring to this provision in their submissions. I wish to briefly deal with this submission.

13. First, I note that Metropolitan does not say how or why it was prejudiced by Tribunal Member Stevenson's reference to section 21 except to point out that this provision was not raised by any party in their submissions. Second, it agrees with the Member Stevenson's proposition that vacation pay falls within the section 1 definition of "wages". Third, it does not dispute Member Stevenson's observation that, subject to some exceptions that do not apply here, an employer cannot withhold, or take deductions from, an employee's wages. Fourth, although the Appeal Decision does include a brief discussion regarding section 21, I do not read the Member's reasons as having been predicated on section 21. Rather, the reference to section 21 was more in the nature of an additional, rather than a principal, rationale for dismissing the appeal. Finally, Metropolitan does not say in its submission (although it clearly had the opportunity to do so) that the Member's discussion regarding section 21 is incorrect as a matter of law and, for my part, I find the Member's discussion about section 21 to be entirely correct. In my view, the Member's reference to section 21, in the context of this case, does not provide a proper foundation for reconsideration.

14. Metropolitan's main argument flows from its assertion that the Determination "was based on Section 57 of the Act". Although Metropolitan concedes that section 57 vacation leave is distinct from section 58 vacation pay, it says that its employment policy provided benefits that *exceeded* both the *Act* vacation leave and vacation pay provisions. Accordingly, it says Mr. Ducluzeau was bound by the restrictions inherent in the policy (*i.e.*, if he did not take his vacation entitlement, or arrange for a limited permissible "carry forward", he lost *both* his accrued vacation leave and pay).

15. In my view, Metropolitan's position is simply not tenable. First, although the delegate did reference section 57 in his reasons, it is clear that the *vacation pay* award was based on a contravention of section 58. As noted above, Metropolitan was penalized for contravening section 58, not section 57. Second, I am not satisfied, based on the record before me, that Metropolitan's policy actually exceeded the minimum standards of either section 57 or 58. With respect to the former, clearly the leave provided to Mr. Ducluzeau exceeded the *minimum* leave (note: there is no statutory *maximum* since an employer must provide "at least" a certain amount of leave) set out in section 57. However, Metropolitan's vacation leave policy did not ensure compliance with section 57(2) since, quite obviously, Mr. Ducluzeau "forfeited", at least in the employer's view of the matter, some of his vacation leave in accordance with the terms of the policy. But section 57

does not permit vacation leave to be forfeited simply because it was not taken. Indeed, it is the employer's statutory obligation to ensure that all earned vacation leave *is* taken. I might add that under section 58, the vacation leave is to be taken in the year *following* that in which the leave was earned rather than, as with Metropolitan's policy, during the current year. Metropolitan's policy conflicts with section 57 in the sense that vacation leave not taken in the current year (subject to the 5-day "carry forward") is forfeited whereas under section 57, the employee's leave entitlement does not even crystallize until the year following that in which it was earned.

16. As for section 58, I have already noted that this was the basis for the monetary award in Mr. Ducluzeau's favour rather than section 57. I agree with Member Stevenson that Mr. Ducluzeau 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. For another example: an unpaid wage liability in the form of "compensation for length of service" is "deemed to be discharged" if proper advance written notice of termination is given (see section 63).

17. In this case, subsection 58(3) crystallized Metropolitan's liability to pay Mr. Ducluzeau his earned, but unpaid, vacation pay (subject to the section 80 limiting provision). I agree with Member Stevenson that nothing in the *Act* authorized Metropolitan to withhold, or to take a deduction from, the wages (*i.e.*, vacation pay) it owed to Mr. Ducluzeau when it terminated his employment. Section 21 simply reinforces that latter conclusion.

18. In my view, this application does not pass the first stage of the *Milan Holdings* test as it does not raise even a *prima facie* argument that the Appeal Decision was wrongly decided. That being the case, I am exercising my discretion to refuse this application. Accordingly, there is no need to seek submissions from the respondents regarding the issues raised by this application.

ORDER

19. Metropolitan's application under subsection 116(2) of the *Act* to cancel the Appeal Decision (BC EST # D113/12) is refused. Pursuant to subsection 116(1)(b), the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal