Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

501546 B.C. Ltd. carrying on business as Labour Unlimited Temporary Services
("Labour Unlimited")

- 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.: 2013A/80

DATE OF DECISION: December 17, 2013

DECISION

SUBMISSIONS

Peter Huber — on behalf of 501546 B.C. Ltd. carrying on business as Labour Unlimited Temporary Services

INTRODUCTION

1. These reasons for decision are being issued as supplementary reasons to BC EST # RD097/13 issued on December 11, 2013, and should be read in conjunction with that decision. By way of brief background, 501546 B.C. Ltd. carrying on business as Labour Unlimited Temporary Services ("Labour Unlimited") filed an application under section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of appeal decision BC EST # D083/13 issued on October 29, 2013. By way of the appeal decision, Tribunal Member Stevenson confirmed a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on July 19, 2013, pursuant to which Labour Unlimited was ordered to pay $6,325.40 on account of unpaid vacation pay (section 58), compensation for length of service (section 63) and interest (section 88) owed to its former employee, Devin Crowder ("Crowder"), and two separate $500 monetary penalties (section 98).

2. In my earlier decision, I only addressed Labour Unlimited's reconsideration application as it related to Mr. Crowder's section 63 award. Unfortunately, when I was drafting my reasons, I did not have before me the last page of a 4-page memorandum attached to Labour Unlimited's Reconsideration Application Form (Form 2). So far as I was aware when I was drafting my earlier reasons, the 2½-page memorandum that was before me constituted Labour Unlimited's complete reconsideration submission. It was only on the last (4th) page of its submission that Labour Unlimited addressed the vacation pay (section 58) award made in Mr. Crowder's favour. I wish to stress that this omission on my part to address the section 58 issue was solely my fault and not attributable in any way to Labour Unlimited. Accordingly, in these Supplementary Reasons for Decision, I will now deal with the other issue Labour Unlimited raised in its application, namely, Mr. Crowder's vacation pay award.

THE VACATION PAY ISSUE

3. Labour Unlimited's position before the delegate was that Mr. Crowder did not work on several days in November 2012 and that "the wages paid for those particular dates was vacation pay [and] their designation of what were noted as regular wages on his wage statements as paid to him for these periods was a mistake" (delegate's reasons, page R11). After summarizing her reasons why she was unable to accept Labour Unlimited's position on this score, the delegate concluded (at page R11):

> Accordingly, I am not convinced by Labour Unlimited that, with the exception of the $96.74 in vacation pay noted on the final wage statement, the wages paid to Mr. Crowder for the periods between October 28 to November 24 were vacation pay and I find instead that they were regular wages as earned and owed. Accordingly, I find no regular wages are owed to Mr. Crowder as he was paid his regular salary up until November 16, 2012.

4. I should further note that, in any event, the delegate rejected, based on the evidence before her, Labour Unlimited's position that Mr. Crowder was not actually working during the days in question in November 2012 (page R12):

> …Labour Unlimited has not satisfied me that he would not have been entitled to his regular wages during November. Finally, even if Mr. Crowder was not entitled to regular wages through this period, an assertion Labour Unlimited has failed to prove, section 21 of the Act precludes an employer from recovering an overpayment of such wages without the employee's written consent. No such consent was provided and I find Labour Unlimited cannot simply recoup those wages overpaid by unilaterally and ex post factor redefining those wages paid as vacation pay in order to circumvent these requirements under the Act.

5. The delegate awarded Mr. Crowder a total of $3,737.46 (not including section 88 interest) on account of vacation pay and this award had two components. First, and as noted above, the delegate rejected Labour Unlimited's position that a portion of Mr. Crowder's earned vacation pay was mistakenly characterized and paid as regular wages for the period October 28 to November 24, 2012. Labour Unlimited, despite its own payroll records, took the position before the delegate that the amount in question, $1,984.12, was properly credited as vacation pay since, in Labour Unlimited's view, Mr. Crowder was not entitled to his regular pay since he did not work on the days in question. As noted above, the delegate found that the amount was, as it had been denoted on Mr. Crowder's wage statements, regular wages paid for work he had undertaken during the disputed period. Thus, in the delegate's view, Labour Unlimited was attempting to unilaterally reconfigure the fundamental nature of this portion of his compensation. The delegate concluded that Labour Unlimited was not entitled to treat this amount as vacation pay because, on the evidence before her, it was simply an amount reflecting earned wages for work undertaken during November 2012. Accordingly, this particular component of Mr. Crowder's overall vacation pay entitlement was never paid to him and thus constituted a portion of his total outstanding vacation pay entitlement. Second, the delegate concluded, based on a careful review of Labour Unlimited's payroll records, that it improperly accounted for vacation pay actually paid to Mr. Crowder when he was on vacation leave. In essence, while it continued his base salary while he was on vacation leave, Labour Unlimited credited any commission income paid while he was on leave as vacation pay rather than as earned wages (pages R16 – R17):

> I find the method by which Labour Unlimited calculated the value of vacation pay for the time off taken by Mr. Crowder does not accurately reflect the actual amount received by Mr. Crowder for the days spent on vacation. When Mr. Crowder took a vacation day, despite Labour Unlimited's calculation of the value of the vacation for that pay period, in actuality he received no more than base salary for that day. Therefore, Mr. Crowder did not receive vacation pay payable on his commissions during those pay periods where he took vacation despite Labour Unlimited's record to the contrary. … In sum, Labour Unlimited's system of including and prorating commissions paid in determining the value of a vacation day inflated [the] value of the amount of vacation pay ***deemed*** paid. The real value and actual amount received by Mr. Crowder for any one vacation day off was the prorated amount of his salary. Therefore, I find the amount ***credited*** as paid on the year end summary sheets is greater than what was actually paid… (***emphasis*** in original text)

6. The delegate prepared a table (found at page R17) where she set out for the relevant wage recovery pay periods, the amount of vacation pay credited, and Mr. Crowder's actual entitlement. The total amount found owing to Mr. Crowder was $1,664.32 which, together with the previously noted $1,984.12 amount and a further $89.02 representing vacation pay payable on the section 63 compensation for length of service award, constituted the total $3,737.46 vacation pay award.

7. Labour Unlimited challenged the vacation pay award on appeal arguing that the delegate erred in failing to credit the $1,984.12 as vacation pay rather than, as its own payroll records indicated, regular wages. Labour Unlimited also argued that the delegate's calculations regarding the $1,664.32 component were "flawed". Tribunal Member Stevenson rejected the appeal on both counts (see paras. 32 to 35 of his reasons for decision).

8. The reconsideration application, as it relates to the matter of vacation pay, is largely, if not entirely, a reiteration of the arguments made on appeal. Labour Unlimited says "DC received his total entitlement amount of vacation pay under Section 58 and as per the Director submission noted above, during his employment with LU" and further says that the "capture period…was flawed". I should note that this first submission misstates the delegate's finding. The delegate accepted Labour Unlimited's *calculation* – as did Mr. Crowder – regarding Mr. Crowder's total *vacation pay entitlement*; however, the delegate ultimately determined that Mr. Crowder *was not actually paid* all of the vacation pay to which he was entitled (see delegate's reasons, page R16, 2nd para.).

9. In my view, the reconsideration application as it relates to the vacation pay award is simply an undisguised attempt to reargue matters that were rejected (and rightfully so) on appeal. To a large degree, Labour Unlimited's application simply asserts that the delegate erred in making certain findings of fact. However, the delegate's analysis of the vacation pay issue was thorough and supported by evidence – much of it provided by Labour Unlimited itself – and her analysis clearly showed that Mr. Crowder was not paid all of the vacation pay to which he was entitled. Further, with respect to the vacation pay recovery period, I am of the view that the delegate correctly determined this issue (see delegate's reasons, pages R15 – R16). Labour Unlimited has not provided any argument even purporting to demonstrate that the delegate's interpretation of the appropriate "vacation pay capture period" was "flawed". So far as I can determine, the delegate's analysis of the issue was entirely correct.

10. I am not satisfied that this application, as it relates to the vacation pay award, passes the first stage of the *Milan Holdings* test. Accordingly, I propose to confirm the order I issued in my original decision in this matter.

ORDER

11. Labour Unlimited's section 116 application to vary or cancel BC EST # D083/13 is refused and, pursuant to subsection 116(1)(b) of the *Act*, this decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal