Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Alkon Trading Ltd. operating as Kitchen Plus
("Kitchen Plus" or the "Employer")

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/886

DATE OF DECISION: March 28, 2002

DECISION

OVERVIEW

This is an application filed by Alkon Trading Ltd. operating as "Kitchen Plus" ("Kitchen Plus" or the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*"). Kitchen Plus applies for reconsideration of an adjudicator's decision issued on November 20th, 2001 (B.C.E.S.T. Decision No. D622/01). Further, this application also addresses, at least by implication, a supplementary decision of the Tribunal, B.C.E.S.T. Decision No. 692/01, issued on December 20th, 2001.

PREVIOUS PROCEEDINGS

Ms. Bonnie Michael ("Michael") was employed by Kitchen Plus as a retail salesperson from January 1999 until her termination in late May 2000. Ms. Michael filed an unpaid wage complaint with the Employment Standards Branch. Following an investigation, a delegate of the Director of Employment Standards (the "delegate) issued a Determination, dated August 17th, 2001, ordering Kitchen Plus to pay Ms. Michael the sum of $1,681.55 on account of unpaid wages (vacation pay, overtime, statutory holiday pay and minimum daily pay) and two weeks' wages as compensation for length of service (the "Determination").

Kitchen Plus appealed the Determination to the Tribunal. An oral hearing was held on November 7th, 2001 and the adjudicator's written reasons for decision were subsequently issued on November 20th, 2001. The adjudicator confirmed the delegate's finding that Kitchen Plus did not have just cause for termination and also confirmed all other findings save that the adjudicator held that Michael was terminated on May 25th, rather than on May 28th, 2000 as determined by the delegate. Accordingly, the adjudicator made the following order:

> **ORDER**
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> Pursuant to s. 115 of the *Act* I order that the Determination dated August 8th [*sic*, 17th], 2001 is confirmed, except that the issue of wages, vacation pay and interest are referred to the delegate, to adjust the Determination to reflect a finding that Ms. Michael was terminated on May 25, 2000.

In accordance with the above order, the delegate filed a recalculation report dated November 22nd, 2001 with the Tribunal. The delegate calculated Michael's entitlement, including accrued interest to November 23rd, 2001, to be $1,681.20. By way of a letter dated November 27th, 2001, the Tribunal's vice-chair forwarded the delegate's November 22nd report to the parties for their submissions, however, neither party responded. Thus, on December 20th, 2001 the Tribunal's vice-chair, having satisfied herself about the correctness of the revised calculations, issued a decision (B.C.E.S.T. Decision No. 692/01) varying the original August 17th, 2000

Determination to reflect an amount due from Kitchen Plus to Michael of $1,681.20 plus accrued section 88 interest as and from November 24th, 2001.

THE RECONSIDERATION APPLICATION

The present reconsideration application concerns only the awards made in favour of Ms. Michael for vacation pay and compensation for length of service.

The application for reconsideration is contained in a letter dated and filed December 18th, 2001 from legal counsel for Kitchen Plus. Counsel says that the adjudicator's November 20th, 2001 decision is in error in two broad respects. First, the adjudicator erred with respect to the matter of Ms. Michael's entitlement to vacation pay and, second, he erred in finding that Kitchen Plus did not have just cause to terminate Ms. Michael's employment.

ANALYSIS

This application for reconsideration is timely (*Unisource Canada Inc.,* B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel,* B.C.E.S.T. Decision No. D279/00). The application also raises a serious question (see *Milan Holdings Ltd.*, B.C.E.S.T. Decision No. D313/98) with respect to the interpretation and application of section 58(2)(b) (vacation pay) of the *Act.*

As will be seen, I am not satisfied that the application raises a serious question with respect to section 63(3)(c) (just cause) of the *Act.* I shall address each issue in turn.

Vacation pay

Section 58(2) of the *Act* states:

> 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 pay days, if agreed by the employer and the employee or by collective agreement.

Payment of vacation pay must also be properly documented. Section 27 of the *Act* states that an employer must provide each employee with a wage statement each pay period itemizing, *inter alia*, the employee's hourly rate (if applicable) and any vacation pay being paid in the pay period.

There is no dispute that Ms. Michael was entitled to 4% vacation pay. Nor does the Employer assert that it paid Ms. Michael her vacation pay before she went on vacation. The Employer's assertion is that there was an agreement between the parties that Ms. Michael would be paid her vacation pay in each pay period.

The delegate awarded Ms. Michael the sum of $134.56 on account of unpaid vacation pay. The delegate noted that the Employer had met its vacation pay obligation for some, but not all, of Ms. Michael's tenure:

> "[Ms. Michael] is clearly entitled to 4% vacation pay on her gross wages for work performed prior to February 1, 1999, before she found out that vacation pay was to be included in her wages. She also received 4% vacation pay on her wages from April 1 to May 28, 2000, i.e., an amount separate from regular wages, so she is not entitled to extra vacation pay for this period. However, is she entitled to vacation pay for the period February 1, 1999 to March 31, 2000?"
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> (Determination at page 7)

The delegate, at page 8 of the Determination, noted that: "An employer cannot pay vacation pay on each payday, unless the employee has consented to it" and concluded that there was not sufficient evidence of such consent in this case. The delegate also noted that the Employer failed to fully comply with section 27 of the *Act.* Accordingly, the delegate awarded Ms. Michael vacation pay spanning the period from the commencement of her employment up to March 31st, 2000.

There was conflicting evidence before the adjudicator at the appeal hearing about whether Ms. Michael consented to be paid vacation pay on each pay day. The adjudicator preferred the testimony of the Employer's principal, Mr. Huang, over that of Ms. Michael on the point of whether Ms. Michael was told, upon being hired, that her wage rate included vacation pay:

> "I have no hesitation in preferring the evidence of Mr. Huang over Ms. Michael, that Mr. Huang discussed this with Ms. Michael at the time of her hiring and she agreed that she would accept vacation pay with every cheque. I do not find Ms. Michael to be a credible witness...I accept the Employer's evidence that she was told her wage rate included vacation pay at the time of hiring. The Employer sought to document the oral agreement by stamping on each cheque that the cheque included vacation pay. The Employer also had Ms. Michael and other employees sign a letter, on or about April 10, 2000, indicating that they had been paid for vacation pay. Again, I accept the evidence of the Employer that there was no coercion. The Employee freely and voluntarily signed the letter. I do not accept the testimony of Ms. Michael, when she alleges that the Employer was 'angry' and 'stood over her' while she signed the letter."
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> (Adjudicator's Reasons at page 5)

As noted above, initially, Ms. Michael's pay cheques indicated that her pay included vacation pay; sometime in 2000, the Employer changed this practice and separately recorded vacation pay on Ms. Michael's wage statements. Despite the adjudicator's finding that an agreement was reached between the parties with respect to the payment of vacation pay in each pay period, the

adjudicator nonetheless concluded that the agreement was void as being contrary to the *Act* since the vacation pay was included in her hourly wage:

> "I have found that [Michael] did agree with the Employer to receive vacation pay on the scheduled pay days. The problem for the Employer is that an hourly rate which consists of regular wages and vacation pay, does not comply with the *Act.* While an employer can pay the vacation pay, if agreed by the Employee, on the scheduled pay days, a pay rate which is blended, consisting or a regular wage and vacation pay, does not comply with the *Act.* The Delegate did not err in the matter in which she dealt with vacation pay in the Determination."
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> (Adjudicator's Reasons at page 8)

I agree with the adjudicator that the Employer's arrangement did not comply in all respects with the *Act.* It would appear that the Employer did not, as is required by section 27, always provide to Ms. Michael a wage statement that separately itemized Ms. Michael's regular wages and her vacation pay for the particular pay period in question. In my view, a simple stamp on a pay cheque that the amount therein "includes vacation pay" does not comply with the requirements of section 27 of the *Act.* Similarly, in my view, a wage statement that simply indicates that the hourly wages paid "includes vacation pay" does not comply with section 27.

It may be that the Employer contravened section 27 in which case the Director could have levied a $500 monetary penalty pursuant to section 98 of the *Act* and section 28(a) of the *Regulation*---in this case, the Director expressly refused to issue such a penalty because "the employer had changed his method of paying vacation pay even before the complaint had been filed".

However, the Employer's failure to consistently and properly *document* the payment of vacation pay is, in my view, a separate issue from whether or not vacation pay was actually *paid.* I do not consider it to be a fair result [see section 2(b) of the *Act*] if an employee is paid vacation pay twice over simply because the employer has been guilty of sloppy bookkeeping. It should be recalled that the delegate did not award any vacation pay for the period after the Employer apparently commenced issuing proper wage statements (*i.e.*, for the period from April 1st, 2000 to the end of her employment).

Clearly, where the employer maintains that it has paid vacation pay but is unable to document such payment, one must carefully scrutinize the evidence. In my view, the burden properly falls on an employer to show that it has met its statutory obligation with respect to the payment of vacation pay. Further, if an employer misrepresents the employee's hourly wage (see section 8 of the *Act*), say, by indicating the hourly rate is $10 and then, only after employment commences, advises the employee that the rate includes vacation pay, I do not doubt that the employee is entitled to be paid vacation pay over and above the originally quoted hourly rate regardless of whether the employee's wage statements separately identify regular wages and vacation pay.

Nevertheless, given the adjudicator's above-quoted findings of fact, it seems clear that Ms. Michael was paid all of the vacation pay to which she was entitled. There was no misrepresentation about Ms. Michael's wage rate. The parties agreed that Michael's vacation pay would be paid in each pay period. This is not a case like, say, *Sunner* (B.C.E.S.T. Decision No. D569/01), where the employer unilaterally allocated a portion of the employee's regular wage to vacation pay without the employee's consent.

Accordingly, I am of the view that the adjudicator erred in confirming the Determination with respect to the award of $134.56 representing vacation pay for the period January 1999 to March 31st, 2000.

Compensation for length of service

The delegate did not accept Michael's assertion that her termination was in retaliation for having filed a complaint under the *Act* (see section 83) but did find that her termination was without cause.

Kitchen Plus has consistently maintained that it had just cause to terminate Michael's employment. In a termination letter dated May 25th, 2000, Kitchen Plus set out various grounds justifying Michael's termination including dishonesty, conflict of interest, chronic absenteeism and willful misconduct. The delegate concluded that if there had been any failings on the part of Michael, the Employer did not take adequate steps to advise Michael that her work performance was jeopardizing her continued employment. Accordingly, the delegate awarded Michael the sum of $474.24 representing two weeks' wages as compensation for length of service.

The adjudicator, while accepting that Michael was "an unsatisfactory employee who was difficult to manage", nonetheless held that the Employer did not have just cause for termination:

> "The difficulty for the Employer, however, is that there is no proof that it warned Ms. Michael about her work related conduct...It is clear that both Mr. Huang and [the Employer's manager], brought to the attention of Ms. Michael problems related to her non-professional attitude, her tardy attendance, mistakes that she made, and failure to follow the Employer's policy concerning discounts, and personal sales. There was evidence that the Employer counseled the employee with regard to the above matters. *There was no evidence that the Employer told the Employee that her job was in jeopardy if she did not improve her conduct. There were admissions both from Mr. Huang and [the manager] in their oral testimony, that the Employee had not been told her job was in jeopardy. Had there been evidence that Ms. Michael's conduct persisted after such a warning, I would have upheld this termination on the basis of cause...*
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> The law in this area, requires that the Employer set the standard, clearly communicate to the Employee that her job was in jeopardy if she failed to meet the standard, provide an opportunity to the Employee to meet the standard, and

> terminate when it is clear that the Employee is unable or unwilling to meet the standard despite being given an opportunity (including direction and training) to do so. It is not a particularly high standard for an Employer to meet, but this standard was not followed by [the Employer]. I must confirm the Determination on this point as the Delegate did not err in the Determination."
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> (my *italics*; Adjudicator's Reasons at page 7)

The Employer's argument, essentially, is that the adjudicator erred in finding that the Employer failed to adequately warn Ms. Michael that her continued poor performance would result in her termination. In other words, the Employer is simply endeavouring to overturn, via a reconsideration application, findings of fact made by the adjudicator. On the basis of the material before me, it is far from clear that the adjudicator erred as alleged--for example, the delegate who appeared at the appeal hearing has a quite different recollection of the evidence.

The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator unless those findings can be properly characterized as perverse. That high threshold has not been met in this case. Thus, I would not disturb the award on account of compensation for length of service.

ORDER

Pursuant to section 116(1)(b) of the *Act*, I order that B.C.E.S.T. Decision Nos. D622/01 and D692/01 be varied by cancelling the award in the amount of $134.56 (and any section 88 interest awarded thereon) made in favour of Ms. Michael on account of vacation pay. In all other respects, the adjudicators' decisions are confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal