

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.: 2002/16

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*”) for reconsideration of an adjudicator’s decision issued on November 20th, 2001 (B.C.E.S.T. Decision No. D623/01). This application also addresses, at least by implication, a supplementary decision of the Tribunal, B.C.E.S.T. Decision No. 013/02, issued on January 10th, 2002.

PREVIOUS PROCEEDINGS

Ms. Valene Kahn (“Kahn”) was employed by Kitchen Plus as a retail sales clerk from October 15th, 1998 until her termination on May 26th, 2000. Ms. Kahn 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. Kahn the sum of \$1,573.34 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 set aside the delegate’s finding that Kitchen Plus did not have just cause for termination and thus cancelled the \$551.42 award made in favour of Kahn under section 63 of the *Act*. In all other respects the Determination was confirmed. The adjudicator’s order is reproduced below:

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated August 17th, 2001 related to compensation for length of service is canceled. I otherwise confirm the Determination related to vacation pay, and other pay, and refer this matter to the Delegate for a re-calculation of the entitlement of Valene Kahn, including an entitlement to interest pursuant to s. 88 of the *Act*.

In accordance with the above order, the delegate filed a recalculation report dated November 23rd, 2001 with the Tribunal. The delegate calculated Kahn’s entitlement, including accrued interest to November 23rd, 2001, to be \$983.10.

By way of a letter dated November 27th, 2001, the Tribunal’s vice-chair forwarded the delegate’s November 23rd report to the parties for their submissions. Ms. Kahn filed a submission indicating her agreement with the delegate’s calculations; the Employer’s legal counsel indicated that he did not “seriously dispute” the delegate’s calculations. In light of the parties’ submissions, on January 10th, 2002 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. 013/02) varying the original August 17th, 2000 Determination to reflect an amount due from Kitchen Plus to Kahn of \$983.10 plus accrued section 88 interest as and from November 23rd, 2001.

THE RECONSIDERATION APPLICATION

The present reconsideration application concerns only the award made in favour of Ms. Kahn for vacation pay.

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 with respect to the matter of Ms. Kahn's vacation pay entitlement.

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*.

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

58. (2) Vacation pay must be paid to an employee
- (a) at least 7 days before the beginning of the employee's annual vacation, or
 - (b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.

In addition, 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. Kahn was entitled to 4% vacation pay. Nor does the Employer assert that it paid Ms. Kahn her vacation pay before she went on vacation. The Employer's assertion is that there was an agreement between the parties that Ms. Kahn would be paid her vacation pay in each pay period and that her vacation pay was paid, by consent, in the form of an increased (by 4%) hourly wage.

The delegate awarded Ms. Kahn the sum of \$110.88 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. Kahn's tenure:

“[Ms. Kahn] 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?"

(Determination at page 6)

The delegate, at page 6 of the Determination, noted that: "An employer cannot pay vacation pay on each payday, unless the employee has consented to it" and noted that Ms. Kahn denied any such agreement. The delegate, as I read the Determination, accepted Ms. Kahn's assertion that she never consented to having her vacation pay paid to her in each pay period. The delegate also noted that the Employer failed to fully comply with section 27 of the *Act*. Accordingly, the delegate awarded Ms. Kahn 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. Kahn 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. Kahn on the point of whether Ms. Kahn was told, upon being hired, that her wage rate included vacation pay:

"I note that the delegate was not satisfied on the information she had that [Ms. Kahn] had consented to payment of the vacation pay on the scheduled pay days of this Employee. I have no hesitation in preferring the evidence of Mr. Huang over Ms. Kahn, that Mr. Huang discussed this with Ms. Kahn at the time of her hiring and she agreed that she would accept vacation pay with every cheque. I do not find Ms. Kahn 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. Kahn 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..."

During 2000, the Employer changed its practices and issued a pay stub which set out the amount of vacation pay and the amount of regular wages for each pay period."

(Adjudicator's Reasons at page 8)

As noted above, initially, Ms. Kahn's pay cheques indicated that her pay included vacation pay, however, sometime in the spring of 2000, the Employer changed this practice and separately recorded vacation pay on Ms. Kahn's wage statements.

So far as I can determine, the Director did not issue a monetary penalty (see section 98 of the *Act*) against the Employer in consequence of its failure to provide a proper wage statements to Ms. Kahn during the period of her employment prior to the April 1st, 2000 pay period.

Despite the adjudicator's finding that an express agreement was reached between the parties with respect to the payment of vacation pay in each pay period (by way of a 4% supplement or increase to her regular hourly wage), 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 [Ms. Kahn] 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.”

(Adjudicator's Reasons at page 11)

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, consistently provide to Ms. Kahn a wage statement that separately itemized Ms. Kahn'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* nor would a wage statement that contained a similar notation.

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, as previously noted, the Director apparently did not issue such a penalty.

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 commenced issuing proper wage statements (*i.e.*, for the period from April 1st, 2000 to the end of her employment in late May that same year).

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. Kahn was paid all of the vacation pay to which she was entitled. There was no misrepresentation about Ms. Kahn's wage rate. The parties agreed that Ms. Kahn'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 \$110.88 representing vacation pay for the period October 15th, 1998 to March 31st, 2000.

ORDER

Pursuant to section 116(1)(b) of the *Act*, I order that B.C.E.S.T. Decision Nos. D623/01 and D013/02 be varied by cancelling the award in the amount of \$110.88 (and any section 88 interest awarded thereon) made in favour of Ms. Kahn on account of vacation pay. In all other respects, the adjudicators' decisions are confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal