

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an application for reconsideration
pursuant to Section 116 of the
Employment Standards Act S.B.C. 1995, C. 38

-by-

Michael LaPorte
("LaPorte")

and

Douglas Niemi
("Niemi")

and

InterCity Appraisals Ltd.
("InterCity")

of a Decision issued by

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Mark Thompson

FILE No.: 96/424 (97/316)

DATE OF DECISION: April 9, 1997

DECISION

OVERVIEW

This was an application in the first instance by Mr. Michael LaPorte and Mr. Douglas Niemi ("LaPorte" and "Niemi") under Section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Decision No. D245/96 issued by the Tribunal on October 22, 1996. LaPorte and Niemi initiated their application for reconsideration of one element of the Decision on November 15, 1996. Counsel for InterCity Appraisal Ltd. ("InterCity") initially argued that on December 4, 1996 that the application for reconsideration should be denied. On January 6, 1997, a new counsel for InterCity requested that the Tribunal reconsider the entire Decision.

The facts surrounding the application of LaPorte and Niemi are not in dispute. Both were employed as real estate appraisers by InterCity. They gave two weeks' notice of resignation on September 6, 1995. InterCity terminated their employment on September 13, 1995. LaPorte and Niemi filed a complaint under the *Act* for repayment of unauthorized deductions from their wages, statutory holiday pay, annual vacation pay and compensation for length of service. Mr. LaPorte started employment for InterCity in November 1989 and Mr. Niemi started his employment in January 1990.

Ultimately, the complaint came to the Tribunal. During the hearing, counsel for InterCity conceded that his client was required to repay unauthorized deductions from the wages of LaPorte and Niemi. The adjudicator then decided the remaining issues in dispute, including the status of the complaints under the *Act* and the previous employment standards legislation. The request for reconsideration turns on the adjudicator's calculation of the vacation pay owed to LaPorte and Niemi. At p. 5 of the Decision, the adjudicator stated:

Section 58 of the Act provides that vacation pay is to be paid at a rate of 4% of wages for the first five years of employment and at a rate of 6% of wages thereafter .

LaPorte and Niemi argued that they should have received six per cent of their wages as vacation pay for the period beginning on their fourth anniversaries of their employment with InterCity, i.e., the fifth year of their employment. The effect of the decision was that LaPorte and Niemi received four per cent of their wages as vacation pay for that period.

ISSUE TO BE DECIDED

What is the entitlement of LaPorte and Niemi to vacation pay after the fifth anniversary of their employment?

ANALYSIS

Sections 57 and 58 of the *Act* treat entitlement to vacation and payment of vacation pay as follows:

Entitlement to annual vacation

57. (1) *An employer must give an employee an annual vacation of*
- (a) at least 2 weeks, after 12 consecutive months of employment, or*
 - (a) at least 3 weeks, after 5 consecutive years of employment.*
- (2) *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.*
- (3) *An employer must allow an employee who is entitled to an a vacation to take it in periods of one or more weeks .*
- (4) *An annual vacation is exclusive of statutory holidays that an employee is entitled to.*

Vacation pay

58. (1) *An employer must pay an employee the following amount of vacation pay:*
- (a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;*
 - (b) after 5 consecutive years of employment, at least 6% of the employee 's total wages during the year of employment entitling the employee to the vacation pay.*

- (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.*
- (3) *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.*

Briefly stated, the Decision as quoted above held that LaPorte and Niemi were entitled to six per cent vacation pay based on compensation after the completion of five years , employment. InterCity supported this position in its submission to the Tribunal in support of its appeal. The delegate's Determination, supported by a submission from the Ministry of Attorney General in response to the request for reconsideration, was that an employee who completes five consecutive years of employment is entitled to six per cent vacation pay based on pay for the previous year .

Section 116 of the *Act* does not set out the grounds on which a reconsideration should vary decision. This Tribunal has stated that the authority to reconsider a decision should be exercised with great caution. In *Zoltan T Kiss*, BC EST #122/96, the Tribunal set out the criteria for reconsideration of a decision as follows:

- a failure by the Adjudicator to comply with the principles of natural justice;
- there is some mistake in stating the facts;
- a failure to be consistent with other decisions which are not distinguishable on the facts;
- some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- some serious mistake in applying the law
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- some clerical error exists in the decision.

Counsel for InterCity relied on *Kiss* to argue that the request for reconsideration should be denied.

While the argument for restraint in reconsidering decisions of the Tribunal is strong, I am persuaded that the Adjudicator in this case made an error in the law, and thus one of the conditions in *Kiss* is satisfied. As the adjudicator in *Kiss* noted, one of the objectives of a Tribunal is to ensure that all persons covered by the *Act* are treated consistently and fairly. In this case, I have concluded that the law was not applied correctly, so that LaPorte and Niemi, and potentially other employees in the same position, are denied their rights under the statute. With respect to the adjudicator in the decision, it does not appear that this issue was argued before him.

While there elements of ambiguity in the law, the most logical interpretation of Sections 57 and 58 of the *Act* leads to a conclusion that vacation pay is based on the previous year's earnings. The law entitles an employee to three weeks of vacation after the completion of the fifth year of employment, i.e. after the employee's fifth anniversary of employment. Section 58(1)(b) states that the six per cent payment is based on the employee's wages "during the year of employment entitling the employee to the vacation pay ." In other words, the basis for calculating entitlement to vacation pay is the previous year of employment. Sections 57 and 58 establish reliance on the previous year's wages to calculate vacation pay consistently. An employee who completes one year of employment is entitled to four per cent vacation pay based on earnings during the first year of employment, for instance. In subsequent years, the four per cent is based on earnings the year before. At the fifth anniversary , the entitlement becomes six per cent of the earnings the previous, i.e., the fifth year. Mr. Niemi began work in January 1990.

His fifth anniversary was January 1995, and he was entitled to six per cent vacation pay for his 1994 earnings and earnings thereafter until his termination. Mr .LaPorte completed his fifth anniversary in November 1994, so he is entitled to vacation pay at the rate of six per cent for his earnings in the November 1993-November 1994 year and earnings thereafter. The result of the alternate interpretation of the statute would be that an employee would be entitled to three weeks of vacation after five years of employment, but would not have the right to the equivalent six per cent vacation pay until after the sixth year .That would be an illogical result.

Counsel for InterCity asked that all aspects of the Determination be reconsidered. She did not offer any of the grounds listed in *Kiss* or other Tribunal decisions on reconsideration in support of her request. In effect, she sought to re-argue the case that the original adjudicator heard, without providing any new evidence or other compelling reason for varying first decision.

ORDER

For these reasons, I order that Decision 245/96 be varied to provide that Mr. LaPorte receive six per cent vacation pay from November 1993 through the date of his termination and Mr. Niemi receive six per cent vacation pay from January 1994 through the date of his termination.

Mark Thompson
Adjudicator
Employment Standards Tribunal