Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Patrick O'Reilly
("O'Reilly")

- 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: Carol Roberts
Fern Jeffries
Ib Petersen

FILE No.: 2001/895

DATE OF DECISION: May 2, 2002

DECISION

OVERVIEW

This is a request to reconsider a Decision pursuant to Section 116 of the *Employment Standards Act* (the "*Act*") that provides:

> (1) On application under subsection (2) or on its own motion, the Tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) cancel or vary the order or decision or refer the matter back to the original panel.

Patrick O'Reilly complained to the Employment Standards Branch that he had not been paid the full amount of vacation pay owing when he retired from his employment with School District #59 (the "District"). The Determination awarded Mr. O'Reilly wages for 204.75 days. The District appealed this Determination, claiming that it was not given an opportunity to respond to the complaint, that the Delegate erred in awarding compensation for vacation days earned more than 24 months prior to retirement, and that there were errors in calculating the number of days in the vacation bank.

At the appeal hearing, the Adjudicator agreed with the District that it was not given a reasonable opportunity to respond pursuant to Section 77 of the *Act* and cancelled the Determination. Mr. O'Reilly's request for reconsideration is based on allegations that there was a failure to adhere to a number of principles of natural justice at the appeal hearing. While we find no basis for many of these allegations, we conclude that the appeal decision contains serious errors. The panel cancels Tribunal Decision BC EST # D596/01, reconsiders this case, and confirms the Determination.

FACTS

Mr. O'Reilly began working for the District in 1965. When he retired in June 2000 he was the Director of Instruction. At the end of his employment, he was paid vacation pay representing 53.3 days. Mr. O'Reilly contended that he had not been fully compensated for vacation pay.

The terms of Mr. O'Reilly's employment were governed by a series of contracts prepared by the District. According to the agreement, Mr. O'Reilly was entitled to bank vacation time. Appendix 1 to the contract set out the following vacation provisions:

1. The vacation year shall be September 1st to August 31st
2. Up to 50% of the annual vacation entitlement may be carried forward to a subsequent year
3. O'Reilly is entitled to EIGHT (8) weeks vacation annually. Extensive vacation periods (more than five consecutive days) must be mutually agreed to by the Superintendent of Schools and O'Reilly

As found by the Adjudicator, this excerpt is from the employment contract dated May 9, 1996. The language was consistent with all previous and subsequent contracts.

Up to and including February 1999, the District regularly advised Mr. O'Reilly of the number of vacation days in his vacation bank. In a letter dated March 4, 1998, the District acknowledged the cumulative bank balance to be 269.75 days as of February 1998. Pay stubs for January 1999 indicated that 272.9 days were in the vacation bank. On February 12, 1999, the District advised Mr. O'Reilly that his vacation

bank had been adjusted and his new balance was 92 days. The copy of the pay stub for March 1999 indicates that there were 89 days in the vacation bank.

The issue before the Delegate was whether the District retroactively changed Mr. O'Reilly's vacation entitlement. The Delegate found that "The employer ran a cumulative time bank with the knowledge of the employee for several years up until February 1999 without any loss of vacation time/pay". The Delegate found that on February 12, 1999 the District "changed its interpretation or procedure and reduced the outstanding time/pay by a substantial amount." The Delegate further found that the vacation pay was payable within the 24 month period set by section 80 of the *Act*. The Delegate calculated the amount owing based on information supplied by the employer:

> "The employer has supplied signed leave requests as well as signed monthly summaries. It appears that the reconciliation's (sic) supplied to Mr. O'Reilly on March 4, 1998 and February 12, 1999 along with the one supplied on November 27, 2000 are based on those documents. The reconciliation's (sic) of March 9, 2001 and March 20, 2001 appear to take into consideration Mr. O'Reilly's day timer for days which he recorded activity or recorded nothing…Given the leave requests that were signed along with the monthly summaries that were signed at those times, I do not accept copies of day timers as being retroactively classified as vacation days.
>
> I have completed and attached a reconciliation of vacation time, primarily using the reconciliation completed by the employer in March 1998 then considering the signed leave requests and leave summaries from the earliest possible point."

The Delegate concluded that Mr. O'Reilly was entitled to $71,508.93 in vacation pay and interest of $4,346.66.

The District appealed on three grounds:

1. That it was not given an opportunity to respond to the complaint;
2. That the Delegate had contravened section 80 of the *Act* in awarding vacation pay not accrued with 24 months of the complaint; and
3. That the Delegate grossly erred in calculating the amount payable

The District sought to have the Determination cancelled and requested a hearing to allow an adjudicator to assess the credibility of the complainant and of various members of the School District's senior staff.

The appeal hearing was held October 12, 2001. Although the Delegate did not attend the hearing, he made comprehensive written submissions in support of the Determination. The submissions maintained that the contract language did not support the District's assertion that cumulative carry over of vacation time was prohibited by the contract. The Delegate supported his view that the employee's interpretation fo the contract was appropriate by reference to the principle of "*contra proferentum*" as confirmed by Mr. Justice Leggatt in *Kenpo Greenhouses Ltd. vs. Director of Employment Standards* (February 1997) unreported (B.C.S.C.), at para. 27.

At the appeal hearing the District's Secretary Treasurer testified that during her employment with the School District, which commenced in 1993, the interpretation of the operation of the vacation bank was that only 50% of the vacation allotment could be carried over to the next year. The Tribunal set out her evidence as follows:

> "Essenlink (sic) testified that this is how she applied the contracts since her arrival at SD#59. Essenlink (sic) reiterated that the reconciliation letter issued to the Respondent on March 4, 1998 was in error as the system erred in carrying forward and accumulating the bank on an ongoing

> basis. The vacation reconciliation dated February 12, 1999 more accurately reflected the vacation owed at that time including the current year".

The Adjudicator found that the evidence was that this interpretation of the contract was "uncontradicted". He then concluded that the District "was not afforded a reasonable opportunity to respond to the actual substance of the Respondent's complaint" and that the Delegate failed to comply with Section 77 of the *Act*.

The Adjudicator concluded that the Delegate had reached an "absurd conclusion" in his interpretation of O'Reilly's contract, allowed the appeal, cancelled the Determination, and found that it was not necessary to deal with either the Section 80 issue or the issue of improper calculations.

Counsel for Mr. O'Reilly filed for reconsideration of this Decision on December 21, 2001.

ARGUMENT

We do not intend to set out the arguments in detail. The following, in our view, encapsulates the positions and arguments of the parties on this application.

Mr. O'Reilly argues that the appeal was conducted in a manner inconsistent with the principles of natural justice. He disputes that the District was not provided with full opportunity to respond during the investigation stage. Mr. O'Reilly also argues that the Delegate was correct in examining the contract and in resolving any ambiguity in his favour. Finally, he submits that the Decision leaves him without remedy because the Adjudicator simply cancelled the Determination because of an allegation of misconduct by the Delegate prior to the issuance of the Determination. Mr. O'Reilly submits that either the Decision should be cancelled or the whole matter referred back for investigation.

The Director supports the request for reconsideration. The Director argues that the Adjudicator overlooked evidence that contradicted the *viva voce* evidence provided by the District's witnesses. The Director submits that the Adjudicator failed to take into account evidence that showed that the employer was fully aware of the details of the complaint against it and had every opportunity to respond and refers to various meetings and correspondence between the Delegate and the District. Finally, the Director submits that the Adjudicator ignored the implications of section 4 of the *Act* on the District's interpretation of the contract language. Section 57 of the *Act* places the onus on the employer to ensure that the employee takes annual vacation. The Director submits that the Adjudicator erred when he indicated that the main issue was the contract language rather than application of the *Act*. The Director submits that the Decision should be reconsidered and decided on its merits.

The District argues that the Tribunal ought not to consider the Director's submissions because these submissions improperly advocate on behalf of the employee and go beyond the limited role allowed the Director. Moreover, and in any event, these submissions "should have been made before the Adjudicator at the appeal hearing and are not properly brought in reconsideration proceedings". The District also argues that the Director has failed to establish any error in law.

The District submits that details of the claim were not provided prior to the issuance of the Determination, and that the Adjudicator did not err in finding a breach of natural justice. The District also submits that there was no breach of natural justice in the conduct of the hearing or in the appeal process and that the application for reconsideration is simply an attempt to re-argue the case. The Employer argues that one of

the remedies requested by the employee – a referral back to the Director – is not within the scope of the Tribunal's powers. The District wants the application dismissed.

On February 20, five days after the time limit for submissions, the District filed a further reply submission. The panel has not considered this late submission.

ISSUE

There are two issues on reconsideration: Does this request meet the threshold established by the Tribunal for reconsidering a decision? If so, should the Decision be cancelled or varied or sent back to the Adjudicator?

ANALYSIS

Role of the Director

The Delegate made substantial written submissions on appeal. While it may have been preferable for the Delegate to be at the oral hearing, particularly in light of arguments that the District was denied a right to respond to the complaint, the fact that he did not attend in person does not mean that he did not participate in the appeal process. Appeal information that is available in Tribunal publications and on the Tribunal's web site states:

> "Please note that the Director's Delegate does not normally attend the hearing. Please notify the Tribunal in advance if you believe that the Delegate's attendance at the hearing is crucial for your case to proceed."

At no point did the District indicate that the Delegate's attendance was critical. We find that the submissions made by the Delegate support the Determination. This is entirely in keeping with the established role of the Director.

Further, on appeal, the District alleged that the Delegate did not comply with Section 77 of the *Act* by providing a "reasonable opportunity" to respond. Given that the appeal succeeded on this ground, it would be unfair to exclude the Delegate's submissions as they are now even more critical to understanding the nature and extent of the investigation.

The District relies on *BWI Business World Incorporated* (BC EST # D050/96) in support of its argument that the Director's submissions should not be considered. In our view, this Decision does not aid the employer. The Decision states, in part, as follows:

> "On the other hand, I conceive the Director's role on an appeal hearing to be somewhat wider than is suggested by BWI (i.e., the Director is restricted to "explaining its decision and its jurisdiction to make its decision"). The role of the Director on an appeal hearing must be considered in the context of the overall investigative and adjudicative framework established by the Act."

BWI establishes the following principles for determining an appropriate role for the Director:

1. The Director is not the statutory agent for the employee(s) named in the Determination.
2. The Director is entitled to attend, give evidence, cross-examine witnesses and make submissions at the appeal hearing.

3. The Director's attendance and participation at the appeal hearing must be confined, however, to giving evidence and calling and cross-examining witnesses with a view to explaining the underlying basis for the Determination and to show that the Determination was arrived at after a full and fair consideration of the evidence and submissions of both the employer and the employee(s).
4. The Director must appreciate that there is a fine line between explaining the basis for the Determination and advocating in favour of a party, particularly when one party seeks to uphold the Determination.
5. It will fall to the Employment Standards Tribunal adjudicator in each case, given the particular issues at hand, to ensure that the line between explaining the Determination and advocating on behalf of one or other of the parties is not crossed.
6. It will also fall to the adjudicator to ensure that all relevant evidence is placed before the Tribunal for consideration.

In our view, the Director's submissions are appropriate to the nature of the issues before the Tribunal.

We now turn to the request for reconsideration to determine whether it meets the threshold established by the Tribunal.

1. The Threshold Test

The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*."

In *Milan Holdings* (BCEST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

(*Zoltan Kiss* BC EST # D122/96)

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Was There a Breach of the Principles of Natural Justice?

We find that there is no basis to many of the particulars supporting the allegation that there has been a denial of natural justice. Tribunal publications inform parties that legal counsel is not required for proceedings before the Tribunal. This information was conveyed to the employee by Tribunal staff. However there is no evidence to suggest that staff advised Mr. O'Reilly not to seek legal counsel. We can appreciate that counsel for Mr. O'Reilly may feel that his participation was required to ensure a fair hearing. However we should point out that over 70% of the proceedings before this Tribunal are conducted by parties who are not represented by legal counsel. This is consistent with the report of the Commission on Employment Standards, Rights and Responsibilities in a Changing Workplace that recommended the establishment of the Employment Standards Tribunal:

> "The advice the Commission received from members of the community familiar with the appeals system, the staff of the Ministry and the Attorney General was almost unanimous. An appeals system should be relatively informal, with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry."

There is no evidence to suggest that Mr. O'Reilly requested and was denied an opportunity to retain counsel at any time. Further, we infer that Mr. O'Reilly is well educated and capable of representing himself at the hearing.

Mr. O'Reilly also contended that he was denied an opportunity to call evidence to show that other senior district staff with similar contracts had taken long periods of vacation just prior to retirement, and to subpoena relevant documentation from the district. Mr. O'Reilly also claimed that the Adjudicator failed to exclude some of the District's witnesses from the hearing leading to a possibility that their evidence would be tailored.

While we agree that the hearing process could have been conducted differently, we are not persuaded that there was a clear breach of natural justice that would in and of itself warrant a reconsideration. However, it is one factor that weighs in favour or reconsideration. We do conclude that the Decision deprived Mr. O'Reilly of a ruling on the merits of his claim and this too is a significant factor weighing in favour of exercising the discretion to reconsider the decision.

Was there a mistake in stating the facts or some significant issue misunderstood or overlooked?

There is nothing on the face of the Decision to suggest that the Adjudicator considered the correspondence between the District and the Delegate in arriving at his conclusion that the Delegate failed to allow the District an opportunity to respond. This correspondence forms part of the record.

With respect to his conclusion on the merits of the Determination – that Mr. O'Reilly's contract of employment did not provide for the cumulative banking of vacation time – there is nothing to suggest that the Adjudicator considered the evidence in support of that claim, including the language of the employment contract and correspondence that, if believed, could be considered supportive of such a claim, in particular, the March 4, 1998 letter and payroll documents.

In our view, the facts as outlined in the Decision support the Director's submission that key evidence was overlooked.

Material submitted at appeal includes correspondence between the District and the Delegate. However none of the evidence is recited in the Decision and none seemed to play a role in the analysis and

subsequent decision that the Delegate had not provided "reasonable opportunity" for the employer to respond to the complaint. In our view, this is a significant factor weighing in favour of exercising the discretion to reconsider the Decision. In our view, this request does meet the threshold test in that it raises significant questions of policy, procedure and law likely to have serious implications for future cases.

The issue in the Decision was whether or not the vacation provisions in the contract were interpreted as argued by the employee or the employer. The Adjudicator reasoned that because *viva voce* evidence tendered at the hearing differed from the analysis in the Determination the employer was not given an opportunity to respond. We assume this means that if the District were given an opportunity, the Delegate would not have analyzed the contract in the way he did. However, this reasoning fails to take into account that there was considerable evidence to support the employee's interpretation of the contract provisions. Further, the Delegate provided a fully reasoned explanation for preferring the employee's position.

Mistake in Applying the Law

The issue before the Adjudicator was whether the District had been given an opportunity to respond to the complaint. While Section 77 exists to ensure that there is a fair investigation process, the dispute resolution scheme envisioned in the *Act* provides that the Tribunal's appeal function 'cures' any deficiency in the investigation.

We find that the Adjudicator erred in interpreting the *Act*'s dispute resolution scheme and the curutive effect of the appeal process.

In addition, we find a second fatal error. The Adjudicator preferred the *viva voce* evidence provided at the hearing to the Delegate's interpretation of the employment contract The contract states in part: "This agreement constitutes and expresses the whole agreement of the parties hereto". In our view the Adjudicator should not have allowed *viva voce* evidence on the intent of the parties to the contract in light of the absence of any ambiguity in its terms.

In our view, this request does meet the threshold test in that it raises significant questions of policy, procedure and law likely to have serious implications for future cases. We now turn to the merits of this case.

2. Reconsideration of the Appeal Decision

The original appeal was submitted on three grounds:

1. That the School District was not given an adequate opportunity to respond to the complaint;.

2. That the Delegate contravened Section 80 of the *Act* in awarding vacation pay not accrued within 24 months of the complaint; and.

3 That the Delegate grossly erred in calculating the amount payable.

Opportunity to Respond

As noted above, the Adjudicator appears to have found that there was evidence that the Delegate did not give the District a reasonable opportunity to respond to the complaint. There was, however, key evidence on file. As mentioned earlier, it would have been preferable for the Delegate to have attended the hearing. His failure to attend the oral hearing left the Employee to defend a position that was not his to defend.

From our review of the file, it is apparent that there was information provided to the Adjudicator that in most cases would be persuasive. The correspondence and documentation include:

1. The complaint regarding "vacation pay" was filed on November 1, 2000.

2. On December 12, Downey disputed the basis for the claim in a letter to the Delegate.

3. On February 16, 2001, the Delegate wrote to the District's counsel regarding the complaint.

4. On March 1, 2001, the Delegate wrote to the District's counsel advising that an investigation, including a review of documents supplied by the District and Mr. O'Reilly, was going to take place. The letter noted:

> "Mr. Downey was supplied with copies of letters dated February 12/99 and March 4/98 from Ms. Esselink to Mr. O'Reilly, which Mr. O'Reiley supplied. (Copies attached). Mr. O'Reilly does not agree that the payout calculation of his vacation pay was done correctly and feels he is entitled to the cumulative total of vacation days. It appears that the Employer was running a time bank for vacation time and then at some point changed to allowing a maximum of 75 to 100 days."

5. On March 12, 2001, the District forwarded a binder with information regarding Mr. O'Reilly's entitlement.

6. On March 9, 2001, counsel for the District wrote the Delegate:

> "We enclose additional documents which shows applications for annual vacation leave .... from all the information provided to you, we feel Mr. O'Reilly has been given or paid out vacation consistent with his entitlement, or in fact in excess of his entitlement...
>
> We feel there is no further documentation you need to make a determination under the Employment Standards Act. We remind you of our letter dated February 15, 2001 and our comments about Section 80 of the Act which clearly limits such claims for the 24 months period prior to the cessation of Mr. O'Reilly's employment.
>
> We are concerned that Mr. O'Reilly appears to be providing you selective and/or incomplete information which has caused you some confusion about the claim. Further by providing you all of this additional information, we hope that you now have complete information on which to make a determination."

7. On April 26, 2001, the Delegate issued his Determination.

The District maintains that it should have been provided with the Delegate's position before the issuance of the Determination. This expectation however is not in keeping with the practice envisioned in the *Act*. As detailed in *Tina Argenti* BC EST #D332/00:

> "I start with the proposition that Section 77 does not, nor was it intended to, create a "discovery" obligation such as that found in the B.C. Supreme Court Rules whereby documents are

> presumptively inadmissible-and therefore cannot be relied on by a party–in the absence of prior disclosure. As well, it is acknowledged that under the *Act*, there is no specific legislative requirement that the Director disclose all information received by the Director to all parties involved. As noted in the decision of the Tribunal *BWI Business World Incorporated* BC EST #D050/96:
>
> > When conducting an investigation, the Director will typically gather evidence from each of the parties but will rarely, if ever, convene a hearing at which both parties are present. Accordingly, neither the employer nor the employee will necessarily know precisely what the other has alleged or what particular documentation has been provided to the Director. "

In summary, because of the appeal process itself, because of the documentation of meetings and correspondence between the District and the Delegate, and because of the expectations for 'response' detailed in previous Tribunal decisions, we believe that the Adjudicator erred when he decided that the employer was not provided with a "reasonable opportunity to respond".

We are of the view that the parties had ample knowledge of the case they were to meet, and ample opportunity to respond.

REMEDY

Section 116 gives the Tribunal the power to vary an order or decision. The panel believes that the information currently before us is sufficient to determine the final outcome of the complaint.

At issue is the amount of vacation pay Mr. O'Reilly was entitled to. In the panel's view, the Delegate did not err in finding that he was entitled to wages for 204.75 days.

Mr. O'Reilly's terms of employment were government by a series of contracts drafted by the School District, to which Appendix 1 was attached. In March 1998, the District advised Mr. O"Reilly in writing that he had 269.75 vacation days accumulated in his time bank. The memo states, in part, as follows:

> Re: Unused Vacation Time
>
> We will need to budget to the (sic) pay money owing to you and bring this down to current levels of accural (sic) allowed in your contract. The maximum allowed to accrue is 60 days. The Board's liability needs to be addressed.

In February 12, 1999, the District sent another letter to Mr.O'Reilly stating as follows:

> I have reviewed the vacation entitlement in light of the limiting clause in your contract and have prepared the attached reconciliation of the appropriate entitlement.
>
> Over the years, the vacation bank maintained by the payroll software has not been adjusted to the correct accumulation of earned and carried forward vacation time. I have worked out the appropriate level of adjustment over the past number of years. This changes the vacation bank from which you draw vacation to 92 days….

It is clear that, at some time between 1998 and 1999, the District changed its interpretation of the contract, or its policy of calculating banked vacation time. At issue is whether Mr. O'Reilly should be able to rely on the District's letter of March 4, 1998, setting out his vacation entitlement.

In the view of the panel, the contents of the terms contained in Appendix 1 are basic to Mr. O'Reilly's contractual rights, and the District's contractual obligations and effect must be given to the express terms contained in that Appendix. No policy or change in the District's interpretation can alter those terms.

The Delegate concluded that a plain reading of the employment contract indicated that 50% of Mr. O'Reilly's annual vacation entitlement could be carried forward to "a" subsequent year, and that Mr. O'Reilly was not restricted to carrying over the unused portion to any particular year. The panel agrees with this interpretation based on principles of contract law.

The District argues that the correct interpretation is that if more than 50% of the vacation entitlement is unused in the year, only 50% of it may be carried over to the next year. Mr. O'Reilly contended that he was entitled to the banked vacation time that had accumulated up to 1998, prior to a new program of vacation days.

In the view of the Panel, the language of Appendix 1 used by the District clearly established Mr. O'Reilly's entitlement to banked vacation time. In our view, it is clear and unambiguous. The vacation clause does not say that the annual vacation entitlement must be carried over to "the" subsequent year, as the Delegate has noted. It states that the vacation entitlement may be carried over to "a" subsequent year. There is no limitation on the time the entitlement may be carried over.

However, even if the language is ambiguous, it must be construed against the party who drafted it, in this case, the District. Applying this principle, in our view, Mr. O'Reilly is entitled to the vacation bank as determined by the Delegate.

Our view of the interpretation of this clause is fortified by the subsequent conduct of the parties.

There is no evidence the parties interpreted the clause to "use or lose" that way. As noted by the Delegate, had Mr. O'Reilly understood that he had to "use or lose" his vacation entitlement each year, he would have used most, if not all, of it:

> "The employee worked for the School District for 35 years. It would be logical to say that had the banking option not been available, that the employee would have used most if not all vacation time each year."

In our view, this is a reasonable assumption. It is certainly preferable to an alternative interpretation that the employer deliberately misled the employee so that he would not take vacation owed but instead devote his vacation to work for the employer. In our view, the conduct of Mr. O'Reilly and the District demonstrates that they both understood that a significant vacation bank had accrued.

The District advised Mr. O'Reilly as late as 1998 that he had 269.75 days in his vacation bank, well in excess of the maximum carry over contended by the District. Paystubs issued by the District set out his vacation bank.

Both parties relied on this interpretation until February 1999. At that time, the District unilaterally attempted to alter the terms of the employment contract, and eliminated the portion of the time bank n excess of 92 days. At best, this is many years after the District claims it knew that the information being provided to employees was incorrect. At worst, it is a unilateral amendment to the employment contract. As Mr. O'Reilly argues, he did not agree to forfeit or waive any portion of his vacation entitlement. In the panel's view, the District cannot amend an employment contract unilaterally and Mr. O'Reilly is entitled to his outstanding vacation pay.

The 24 month time limit – Section 80

There is considerable evidence to the effect that prior to 1999, the District led Mr. O'Reilly to believe that he had a significant vacation bank. This evidences includes the pay stub dated January 29, 1999 and the letter from the District to Mr. O'Reilly, dated March 4, 1998 indicating that the "use or lose it " policy is "not legal" and requesting that the employee reconcile the entitlement of 269.75 with the employee's records. The letter, of February 12,1999 then indicated that there were 92 days in the employee's vacation bank.

Section 58 of the *Act* states that:

> "Any vacation pay an employee is entitled to when the employment terminates must be paid to an employee in the time set by section 18 for paying wages"

Section 80 of the *Act* states that:

> "(1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that become payable in the period beginning
>
> (a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and
>
> (b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination, plus interest on those wages."

If vacation pay was owed, it was payable at the time of retirement. The employee retired on June 30, 2000, well within the 24 month time limit. The employer cannot use Section 80 to avoid liability.

Did the Delegate "grossly inflate" the amount payable?

In the Determination, the Delegate considered all the submissions from the District including the leave forms, employee's day timer, and calculated that 204.75 days of vacation pay were owed to the employee. In its appeal, the District claimed that there were errors in calculation. However, this assertion was based primarily on the fact that the Delegate does not limit the 'carry over' to 50% of the annual entitlement.

The interpretation of the contract cannot result in an employee falling below the minimum entitlements in the *Act*. The *Act* ensures that an employee receives at least a basic entitlement.

The *Act* places the responsibility for ensuring that vacations are taken with the employer, not the employee.

Ms. Esselink testified that her understanding of the Distrct's vacation policy is that there was a maximum of 50% carry over of vacation to the subsequent year from her commencement of employment in 1993. Notwithstanding this evidence, some 5 years later, in March 1998, Mr. O'Reilly received a letter that calculated his vacation bank Six years later in January of 1999, Mr. O'Reilly received pay stubs from the employer that approximated his estimate of the amount owing. That amount was greater than the amount that the employer now claims is "grossly inflated".

Responsibility for maintaining accurate records rests with the employer.

The Delegate bases his calculation of vacation pay "primarily using the reconciliation completed by the employer in March 1998 then considering the signed leave requests and leave summaries from the earliest possible point." This seems a reasonable approach in light of the deficiencies of the employer's record keeping. We are unable to find that the Delegate grossly inflated the amount of vacation owed.

SUMMARY

The panel grants the request to reconsider the Tribunal Decision BC EST # D596/01 as there is no basis to the allegation that the employer was not provided with a reasonable opportunity to respond to the case against it. In reconsidering this case, the panel has fully considered all the evidence and argument submitted for the original complaint on appeal, and all the submissions made for this reconsideration request and concludes that Decision BC EST # D596/01 contained serious mistakes in applying the law to the facts of this case. In its analysis of all the evidence and argument submitted for the original appeal, the majority of the reconsideration panel is unable to find any error in the Determination.

ORDER

The Decision BC EST # D596/01 is cancelled and the Determination dated April 26, 2001 is confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal

Fern Jeffries
Chair
Employment Standards Tribunal

DISSENTING OPINION

I agree with the majority that this case is appropriate for reconsideration. In my view, the resolution of the merits of this appeal largely turn on two issues:

1. Whether the Adjudicator in his conclusion that the Delegate failed to allow the Employer an opportunity to respond?
2. Whether the Adjudicator erred in his conclusion on the merits of the Determination that O'Reilly was not entitled to the vacation bank accrued since 1988?

I agree with the majority of this panel with respect to first issue. There is nothing on the face of the Decision to suggest that the Adjudicator considered key evidence, namely the correspondence, forming part of the record, between the District and the Delegate with respect to his investigation. In my view, there is no merit to the argument that the Delegate failed to allow the Employer a reasonable opportunity to respond.

I part ways with the majority on the second issue and on the appropriate remedy. I do agree, however, that there is nothing on the face of the Decision to suggest that the Adjudicator considered the evidence in support of O'Reilly's claim, including the language of the employment contract and certain correspondence.

Under the *Act*, an employee is entitled to an annual vacation of "at least" two or three weeks, depending on consecutive months or years of service (Section 57). The *Act* also provides an obligation to pay vacation pay (Section 58). It is clear from the Tribunal's jurisprudence, that the Director may enforce the terms of an employment contract even if it provides for a vacation entitlement that is greater than that provided for in the *Act* (see, for example, *Barter Carabetta Braun*, BC EST # D499/98, and Cariboo Resorts, BC EST # D128/01). Also relevant is Section 80 which limits an amount of wages an employer may be required by a determination to pay to the "amount that became payable," in the case of a complaint, "24 months before the earlier of the date of the complaint or the termination of employment."

As I understand it, O'Reilly's position on the original appeal was that he was entitled to the accumulated vacation bank. The Delegate concluded that O'Reilly was entitled to vacation time accrued since 1988. This position flows fundamentally from his--and the Delegate's--view of his contract of employment with the District and was--arguably, at least--supported by certain documentary evidence that formed part of the record before the Adjudicator. There was also evidence before the Delegate as to amount of vacation time taken by O'Reilly. In the Delegate's view, the District changed its "interpretation" of the entitlement to bank vacation time in February 1999 and that the District had, in effect, unilaterally and retroactively, amended O'Reilly's contract.

The District's position, as I understand it, was that O'Reilly's ability to carry forward was limited to 50% to the subsequent year. Its position was that it had not changed its "interpretation." This position was buttressed by *viva voce* evidence at the hearing of a "consistent application."

There is no dispute that the terms of O'Reilly's employment with the District was governed by a series of contracts prepared by the District. Under the terms of the agreements, O'Reilly was entitled to bank vacation time. Relevant portions of the contract are as follows:

"O'Reilly is entitled to the following vacation and time off provisions:

3. VACATION

1. The vacation year shall be September 1st to August 31st.

2. Up to 50% of the annual vacation entitlement may be carried forward to a subsequent year.

3. O'Reilly is entitled to:

EIGHT (8) weeks' vacation annually

Extensive vacation periods (more than five consecutive days) must be agreed to by the Superintendent of Schools and O'Reilly."

Risking, perhaps, an oversimplification, the majority of this panel is of the view that the material terms of this agreement are unambiguous and that *viva voce* (extrinsic) evidence as to the application ought not to have been admitted into evidence at the hearing. As well, even if the terms are ambiguous, the majority would uphold the Delegate's Determination on the basis of the principle of *contra proferentum*. With respect, I am unable to agree with these propositions.

In my view the following legal principles apply. In *Fleckenstein v. Deutche Bank Securities Ltd*., [2002] B.C.J. No. 190, the B.C Court of Appeal stated (at p. 4-5):

"[41] The principles which govern interpretation of contracts have been usefully summarized by the B.C. Court of Appeal in *Gilchrist v. Western Star Trucks Inc*. (2000), 73 B.C.L.R. (3d) 102 at pp. 108-9:

"The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: *Delisle v. Bulman Group Ltd*. (1991), 54 B.C.L.R. (2d) 343 (S.C.), approved by Chief Justice McEachern in *Bramalea Ltd. v. Vancouver School Board No. 39* (1992), 65 B.C.L.R. (2d) 334 (C.A.); *Prenn v. Simmonds,* [1971] 3 All E.R. 237 (H.L.); *Eli Lilly and Co. v. Novopharm Ltd*. (1998), 161 D.L.R. (4th) 1, (S.C.C.).

The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 72 B.C.L.R. (2d) 273 (C.A.); *Melanesian Mission Trust Board v. Australian Mutual Provident Society,* [1997] 1 N.Z.L.R. 391 (P.C.)."

In *Sullivan v. Graydon*, [2000] B.C.J. No. 1281, Mr. Justice Neilson made the following useful summary (at p. 3):

"...I will summarize the principles briefly, as set out in G.H.L. Fridman, The Law of Contract in Canada, 4th Edition (Scarborough: Carswell, 1999), at p. 477-498. The object of the rules of contractual interpretation is to objectively discern the meaning which the parties intended. One should look first at the

> contract as a whole, and give effect to the plain, literal and ordinary meaning of its words unless this leads to an absurdity. However, if the parties' intent is not clear from the words of the contract, extrinsic evidence is admissible to resolve any ambiguity, to assist in ascertaining the parties' intention and to resolve apparent inconsistencies between different parts of the contract. There are three potential sources of extrinsic evidence: the conduct of the parties prior to entering the written agreement, the conduct of the parties contemporaneous with making the agreement and their conduct after the agreement has been put into writing. Finally, where ambiguity remains, the document should be construed against its author. ...."

The object is to ascertain the intentions of the parties, not--as the Delegate seems to have done--to consider the merits of "competing interpretations." While I agree with the majority that there is merit to the Delegate's analysis and conclusions, set out in the Determination, I am of the view that his analysis flowed from fundamentally flawed legal principles:

> "A plain reading of the this clause indicates that 50% of the annual vacation time may be carried forward to "a" subsequent year. There is no mention of any forfeiture of time, nor that the carried forward time is restricted to the next year. Having said that I do not believe that a third parties (sic.) interpretation is relevant or in this case binding. We must look at what the interpretation was of the employer and the employee. The employer ran a cumulative time bank with the knowledge of the employee for several years up until February 1999 without any loss of vacation time/pay." (Emphasis added)

The object is, as noted above, to ascertain the parties contractual intentions at the material time, not their subjective post-facto interpretations, in light of the available evidence. The parties' conduct may provide useful evidence. I emphasize that I do not dismiss out of hand, the Delegate's conclusions of the contractual language. He did consider relevant documents and other conduct (vacation taken by O'Reilly). I am, however, concerned about how he got there, i.e., his analysis. Ultimately, his conclusions might be bourne out by all of the evidence.

The first step in the analysis is an analysis of the contract. Turning to the material provisions of O'Reilly's employment contract, I am of the view that the language is ambiguous. I base that on the use of the indefinite article "a" which can mean "one, some or any" (The Canadian Oxford Dictionary, Toronto: Oxford University Press, 1998). The use of "a" or "an" imply a lack of specificity. From the District's reading, "a" means "the." In the context of this reconsideration application, I make no finding as to the proper interpretation. While the Adjudicator found that the Delegate's interpretation was "absurd," largely based on his conclusion that he had failed to allow the Employer a reasonable opportunity to respond, he failed to properly – or at all – consider the language of the employment contract. The Adjudicator also failed to consider whether, in all of the circumstances, the District unilaterally and retroactively, and if so when, amended its bargain with O'Reilly. If there was a change, the timing is significant because of the limitations contained in Section 80. Briefly, I am unable to accept the Adjudicator's leap from the alleged failure to allow the District to respond to an "absurd" interpretation.

Having concluded that the contractual language is ambiguous, I move on to the next step. Can the ambiguity be resolved in light of the extrinsic evidence? I am of the view that, in the circumstances, it is proper to admit and consider evidence of the parties' conduct to properly interpret the contractual language which is at the heart of this dispute. Boiled down to its bare essentials, the evidence before us is not unequivocally in support of either position. Somewhat simplistically put, there is documentary evidence and, presumably, of conduct (vacation time taken over the years) in support of O'Reilly's position. There was *viva voce* evidence from the District of, as I described it above, "consistent

application." In my view, the Adjudicator failed to address and resolve this apparent conflict in the evidence and arrive at a reasoned conclusion on the dispute before him. While I find much merits to the analysis conclusions of the majority in this case, I am of the view that we, as a reconsideration panel, are ill-equipped to assess and resolve conflicts in the evidence. We did not hear the evidence. We did not observe the witnesses. I am of the view that it would require us to, in effect, "re-weigh" the evidence, and accept the documentary evidence over the District's *viva voce* evidence.

What is clear, in my view, is that the Adjudicator failed to consider key evidence which, arguably at least, was supportive of O'Reilly's claim to the accumulated vacation bank. In a letter to O'Reilly, dated March 4, 1998, the District indicated the cumulative bank balance to be 269.75 days as of February 1998. A copy of the Pay stubs for January 1999 indicated that there were 272.9 days were in the vacation bank. On February 12, 1999 the District advised O'Reilly by letter that the adjusted balance was 92 days. The copy of the pay stub for March 1999 indicated that there were only 89 days in the vacation bank.

There is clearly evidence that prior to 1999, the District, at the very least, indicated to Mr. O'Reilly that he had a significant vacation bank. The March 4th, 1998 letter stated:

> March 4, 1998
>
> To: Pat O'Reilly
> Director of Instruction
>
> From: Cathy Esselink
> Re: Unused Vacation Time
>
> The "use it or lose it" policy relating to vacation time and the letter that Georgina distributed for signature are not legal.
>
> Attached is a summary of the vacation time you have accrued with the reduction of time as submitted on leave forms and notices on file. Please review the reconciliation and advise if some leaves were missed.
>
> We will need to budget to pay the money owing to you and bring this down to current levels of accrual (sic) allowed in your contract. The maximum allowed to accrue is 60 days. The Board's liability needs to be addressed."

Attached to this letter is a chart entitled "Pat O'Reilly's Vacation Reconciliation". The last number printed indicates that 269.75 days are owing. One reading of the letter is that 269.75 have been accrued unless the employer lacks information that the employee can provide, i.e. "if some leaves were missed". The Adjudicator did not address this evidence. I note, as well, that there is a reference in this 1998 letter to a limitation on the accrual of vacation time.

The next letter received from Ms. Esselink, dated February 12, 1999 begins:

> "I have reviewed the vacation entitlement in light of the limiting clause in your contract"

The Adjudicator based his decision on *viva voce* evidence presented at the hearing. There, the District's secretary-treasurer testified that, during the term of her employment with the School District that began in 1993, the interpretation of the operation of the vacation bank was that only 50% of the vacation allotment could be carried over to the next year:

> "....Essenlink (sic) testified that this is how she applied the contracts since her arrival at SD #59. Essenlink (sic) reiterated that the reconciliation letter issued to the Respondent on March 4, 1998 was in error as the system erred in carrying forward and accumulating the bank on an ongoing

> basis. The vacation reconciliation dated February 12, 1999 more accurately reflected the vacation owed at that time including the current year".

Other witnesses at the hearing, M. Downey, the superintendent, who testified on behalf of the District, and John Kendrew and Dave Nybakken, who testified on behalf of O'Reilly, also testified that this was their understanding or interpretation of the application of the language in the employment contracts. The witnesses all held, or had held, senior positions with the District, including Director of Instruction. In the Adjudicator's view this evidence was "uncontradicted." In the circumstances, I find that difficult to accept. Importantly, there is no reference to – or reasoned analysis – of key evidence such as the District's letters to O'Reilly and payroll stubs. In my view, the Adjudicator's failure to consider key evidence was a fundamental error. Ultimately, the Adjudicator might have reached the conclusion that the Delegate erred in the Determination. He cannot, in the circumstances of this case, do so without considering the language of the contract and the parties' conduct and resolving the apparent conflicts in the evidence. The latter task may well involve assessment of the credibility of the witnesses. It is only if the ambiguity in the language remains, that the principle of *contra preferentum* comes into play.

Given the Adjudicator's conclusion that the Delegate's interpretation of the employment contract was "absurd," I would not refer the matter back to him and, in the circumstances, it would have been my decision to cancel Tribunal Decision BC EST # D596/01 and order a new hearing with respect to the issue of O'Reilly's vacation bank, the Section 80 issue and the issue of improper calculations. The latter two issues were not considered by the Adjudicator.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal