

BC EST #D331/97
Reconsideration of BC EST #D027/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 116 of the
Employment Standards Act S.B.C. 1996, C. 113

- by -

The Director of Employment Standards
(“Director”)

- of a Decision issued by -

The Employment Standards Tribunal
(the “Tribunal”)

ADJUDICATOR: Mark Thompson

FILE NO.: 97/423

DATE OF DECISION: July 27, 1997

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DECISION

OVERVIEW

This is an application by the Director of Employment Standards (the “Director”) under Section 116(2) of the *Employment Standards Act* (the “Act”) for reconsideration of Decision D027/97 issued by the Tribunal on January 24, 1997.

The Decision found that an employee whose contract of employment provided for annual vacation in excess of the provisions of the *Act* was entitled to be compensated only to the amount provided by law. The Director maintains that she has the authority to recover annual vacation in excess of the minimum standard.

ISSUES TO BE DECIDED

The issues to be decided are three: should the Tribunal reconsider Decision D027/97 and if so, does the Director have the authority to recover entitlement in excess of the minimum standard, and if so, what is the former employee’s entitlement.

FACTS

The Director’s Delegate issued Determination No. 003902 on September 10, 1996. The Employer in the case was the Danish Trade Office. Ms. Siv Evinger (“Evinger”) was employed by the Danish Trade Office as a secretary/receptionist. All parties accept that the Employer issued a written three month notice of termination to Evinger on December 22, 1995 to the effect that her contract of employment expired on March 31, 1996. On the morning of March 25, 1996, Evinger was told that she was free to leave the office and would not be required to work through the end of the month. She was paid in full through March 31. Evinger and the Employer signed a written employment contract dated March 16, 1992. The contract provided for three weeks of annual vacation. At the time of her termination, Evinger had taken thirteen days of vacation in the previous year, leaving her with a balance of two days of annual vacation. The Employer did not pay her for the two days. Evinger filed a complaint claiming two days’ vacation pay.

The Determination found that the Employer had violated the *Act* by not ensuring that Evinger took her annual vacation within the time period specified in the *Act*. The Determination further found that the Employer had not violated Sections 58(2) or (3) of the *Act* by failing to pay Evinger for the two days of annual vacation that she had not taken as time off. The Determination did not explain the rationale for the conclusion regarding the unpaid vacation. However, the Employer pointed out that Evinger controlled her own

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vacation time and had the opportunity to schedule vacation between December 22 and March 25. Evinger appealed the Determination.

In BC EST #D027/97, an adjudicator of the Tribunal upheld the Determination. In his decision, the adjudicator noted that the *Act* entitled Evinger to two weeks of annual vacation despite her contract of employment providing for three weeks. The decision concluded:

In light of the foregoing, Ms. Evinger does not have any entitlement under the *Act* for the two additional paid vacation days she now claims; indeed, it would appear that the employer provided more paid vacation time than it was legally obliged to do, at least insofar as the *Employment Standards Act* is concerned.

The Director appealed the decision on the grounds that the Adjudicator made a serious error in applying the law by taking the position that the Director can only enforce the minimum employment standards pertaining to annual vacation contained in Section 57(1) of the *Act*. The Director pointed out that Section 57(1) requires the employer to pay “at least” 4% of the employee’s total wages as vacation pay. The phrase “at least” implies that the Director can recover wages or other entitlement due to an employee that exceed the minimum requirements of the *Act*.

ANALYSIS

Section 116(1) of the *Act* provides for reconsideration of Tribunal decisions as follows:

- (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.

In a series of decisions, the Tribunal has exercised its authority under this provision of the *Act* with great caution. Stated briefly, cases on this point hold that appeals of Tribunal decisions should succeed only where there has been a demonstrable breach of the rules of natural justice, a fundamental error in law, or there is compelling new evidence. The statutory purpose of providing “fair and efficient procedures for resolving disputes over the *Act*” has led adjudicators to use their power to reconsider decisions sparingly. See *World Project Management Inc. Et al.*, BC EST #D325/96.

Despite the general reluctance of adjudicators to upset previous decisions, they have emphasized the importance of avoiding a fundamental error in law in the administration of

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the *Act*. See *Zoltan T. Kiss*, BC EST #D122/96; *Michael LaPorte, et al.*, BC EST #D141/97.

In this case, I am persuaded that the Decision under appeal contains a fundamental error of law that should be rectified. With respect to the Adjudicator, I conclude that the Decision overlooks the dual functions of the *Act*. The *Act* first contains minimum standards for terms conditions of employment, include minimum wages, annual vacation, bereavement leave, statutory holidays and the like. Secondly, it provides a mechanism the Director of Employment Standards to assist employees or former employees in recovering wages or certain other benefits to which they are entitled. These wages or benefits may exceed the statutory minima, depending on the employee's contract of employment and the specific wording of the *Act*.

This analysis of the statute begins with Section 2, which states:

The purposes of this Act are to

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,

The operative phrase in this case is "at least." The *Act* is not restricted to the application of minimum standards only. This theme is repeated in Section 16, as follows:

An employer must pay an employee at least the minimum wage as prescribed in the regulations.

Section 18(1) requires employers to pay "all wages owing to an employee" within 48 hours of termination of employment by the employer. The definition of "wages" is not restricted to the minimum wage. Section 57 of the *Act*, at issue in the original complaint in this case, states:

(1) An employer must give an employee an annual vacation of

(a) at least 2 weeks, after 12 consecutive months of employment, or

(b) at least 3 weeks, after 5 consecutive years of employment.

The Director frequently requires employers to pay wages above the minimum based on a contract of employment. The logical consequence of the Decision #D027/97 is that the Director would only be able to recover unpaid wages equivalent to the current legal

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minimum. The statute does not bear such an interpretation. Nor does it limit the Director to recovering pay for unused annual vacation to the levels specified in Section 18.

Turning to the merits of the original Determination, it is noteworthy that Evinger was responsible for scheduling her own vacation. She had three months notice of her termination and obviously chose not to take all of her vacation. It would be unfair to the employer who gave an employee such latitude to be liable for vacation pay after termination. One of the purposes of the *Act* is “to encourage open communication between employers and employees.” It would be contrary to that purpose to permit an employee to deliberately arrange work schedules to maximize her financial benefits without informing her employer. On the evidence in this case, Evinger did not inform her employer that it would be liable for vacation pay at the end of her term of employment.

ORDER

For these reasons, Decision #D027/97 is canceled. The effect of this decision is to confirm Determination No. CDET 003902.

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Mark Thompson
Adjudicator
Employment Standards Tribunal

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