

IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ZEHRS MARKETS,
A DIVISION OF ZEHRMART LIMITED
- The Employer

-and-

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 1977
- The Union

AND IN THE MATTER OF two Union grievances regarding vacation pay

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Robert W. Kitchen	- Counsel
Darlene Lyons	- Manager, Payroll
Sharon Hughes	- Manager, Industrial Relations
Dave Graf	- Director, Industrial Relations

On behalf of the Union:

John L. Stout	- Counsel
Scott Penner	- Secretary-Treasurer
Art McIntosh	- Business Agent

Hearings held October 18, 2000 and January 11, 2001 in Kitchener, Ontario.

AWARD

I. INTRODUCTION

Two Union grievances raised the issue of the correct method of calculating vacation pay. This collective agreement provided for vacation pay as a percentage of "gross wages". The parties advocated different approaches to calculate gross wages and thus different approaches to determine an employee's vacation pay.

II. THE EVIDENCE

On the first hearing day the parties engaged in settlement discussions but were unable to resolve their dispute. The parties then sought an interpretation of the collective agreement. They led no evidence, having agreed that there was no evidence which would be of assistance in the interpretation of the disputed provisions of the collective agreement.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the relevant provisions of the parties' 1994-2000 collective agreement:

ARTICLE 31 - ANNUAL VACATIONS FOR FULL TIME EMPLOYEES

31.01 (a) The date for determining the length of vacation in a calendar year, and the remuneration, shall be July 1 in that calendar year. Vacation pay will be paid at the time an employee takes his or her vacation. Vacation taken prior to July shall be paid at an employee's base weekly rate of pay provided vacation pay has been accrued. Vacation taken after July first (1st) shall be paid based on the calculation of the applicable percentage rate, less the amount paid out as vacation taken prior to July, divided by the number of weeks of vacation remaining. If vacation are not taken due to the Company's request, the monies will still be paid out.

...

(c) Gross wages will be deemed to include:

Regular hours, Time and one-half, Double time, Night shopping premiums, Night shift premiums, Temporary assignment, Refrigeration checks, Retro wages, Sick pay, Statutory Holiday pay, Jury

duty, Company meetings, Bereavement, Christmas bonus.

...

31.03 Employees with twelve (12) months' completed service and less than four (4) years' completed service at June 30, shall receive two (2) weeks vacation and remuneration shall be four percent (4%) of gross wages earned in the period July 1 of the previous year to June 30 of the vacation calendar year.

...

[Note: Articles 31.04 through 31.07 provide, in similar language, for vacation pay at various percentages of "gross wages" based on an employee's years of service.]

31.09 . . . Vacations must be taken between January 1 and December 31 of each year.

...

IV. THE POSITION OF THE UNION

The parties agreed that vacation pay was excluded in calculating gross wages.

The Union submitted that the difference between the parties arose because vacation was earned using the July through June period (Article 31.01 (a)) but taken on a calendar year basis (Article 31.09). The Union noted that an employee who was entitled to two (2) weeks vacation in each calendar year could take some or all of that vacation before July 1, the date for establishing the amount of vacation pay owed. Therefore an employee entitled to two (2) weeks vacation in each calendar year could take zero (0), one (1), two (2), three (3) or four (4) weeks vacation in any July 1 through June 30 period. When calculating gross wages, if the Employer simply added together all the wages, overtime, premium payments, etc. (as included in Article 31.01 (c)) and excluded the vacation pay for the vacation time actually taken during that period, then an employee might receive as vacation pay four percent (4%) of 48 weeks pay, or 49, 50, 51, or even 52 weeks pay. This approach created variation in the amount of vacation pay.

The Union submitted that the parties did not intend the above variation in vacation pay. The

Union provided examples of how the calculation should be made. The Union submitted that the correct approach was to take an employee's total earnings from July 1 through June 30 and then deduct the vacation entitlement (that is, the pay for the two weeks' vacation entitlement in the above example) so that, in effect, all employees with two weeks vacation would receive vacation pay as four percent (4%) of 50 weeks pay, regardless of the actual number of weeks vacation that employee took during the July through June period. This would provide consistency and predictability.

It was the Union's position that calculating vacation pay as the Employer suggested penalized employees who took vacation in the first six months of the year.

V. THE POSITION OF THE EMPLOYER

The Employer also presented various examples showing how vacation pay should be calculated. The Employer focused on the definition of gross wages in Article 31.01 (c) and said that the proper approach in determining vacation pay was to calculate the total amounts earned by an employee by way of regular hours, overtime, shift premiums, etc., for July 1 to June 30. The total of those payments was the employee's gross wages. The Employer submitted that the employee's vacation pay was a percentage of this amount of gross wages. For example, if the employee was entitled to two weeks vacation, the Employer should simply take four percent (4%) of that employee's gross wages, calculated in the above manner, as the amount of the vacation pay.

The Employer agreed that this dispute arose because an employee may take his or her vacation in an irregular fashion. The Employer agreed that an employee could take differing numbers of weeks of vacation during any July 1 through June 30 period. But the agreement clearly indicated that vacation pay was to be based on gross wages, a concept which did not include vacation pay. If an employee took four weeks vacation in the period of July through

June, the vacation pay credited on July 1 would be 4% of the pay for the remaining 48 weeks of work, because that employee earned income included as part of gross wages only during those 48 weeks. However, if an employee took no vacation between July 1 and June 30, he or she would be credited with vacation pay of 4% of the pay for 52 weeks of work because that employee earned income included as gross wages during all 52 weeks. While this allowed for variations from year to year, it averaged out over time. In any event, the Employer said this was the approach agreed upon by the parties and required by the collective agreement.

In response to the Union interpretation, the Employer said that the collective agreement did not require that the calculation of vacation pay begin with total income, did not then require the deduction of an amount for vacation pay, and certainly did not contemplate the deduction of a vacation pay entitlement as distinct from the actual amount of vacation pay paid in that period.

VI. CONCLUSIONS

The issue of the method of calculating vacation pay was raised by the Union because of its concern about variations in employees' vacation pay. Under the Employer interpretation variations can occur depending on when an employee takes vacation. While I understand the Union's desire for consistency in the amount of vacation pay and its concern that employees may be penalized for taking their vacation early, my role is to interpret the collective agreement. What, then, is required by the collective agreement in calculating vacation pay?

Under Article 31.03 (and the Articles which follow for employees with longer service) vacation pay is specified as a percentage of the gross wages earned in the July through June period. Gross wages includes (as provided in Article 31.01 (c)) "Regular hours, Time and

one-half, Double time, Night shopping premiums, Night shift premiums, Temporary assignment, Refrigeration checks, Retro wages, Sick pay, Statutory Holiday pay, Jury duty, Company meetings, Bereavement, Christmas bonus." In my view the normal meaning of these words and the correct interpretation of the agreement requires the Employer to add the payments made for the purposes included in Article 31.01 (c), that is add all the amounts earned in the July through June period for all of those reasons included in the definition of gross wages (excluding vacation pay which the parties agreed was not to be included in gross wages). Vacation pay is then determined by taking the appropriate percentage. This was also the Employer's position.

While the Union interpretation would smooth the amounts of vacation pay, I have rejected it as the proper interpretation of this collective agreement for three related reasons:

1. First, the Union interpretation does not fit easily with the language of the agreement. I do not think the parties would have used the words describing gross wages in Article 31.01 (c) if they had intended to begin with the concept of total earnings and then subtract an employee's vacation entitlement.
2. Secondly, the parties agreed that vacation pay is not included in gross wages. But, in some cases, the Union would include vacation pay as part of gross wages. For example, assume an employee works 48 weeks and takes four weeks vacation. The Union says to begin with 52 weeks total income and deduct two weeks of vacation pay. Because only two weeks of vacation entitlement are deducted, two weeks of vacation pay remain included in the calculation of gross wages.
3. Thirdly, in other cases the Union interpretation would exclude items listed in Article 31.01 (c) from the amount of gross wages. Assume an employee works all 52 weeks and earns regular wages in each week. Again the Union says to begin with 52 weeks total income and deduct two weeks of vacation pay. A deduction equal to two weeks vacation entitlement, in effect, excludes two weeks of regular wages which Article 31.01 (c) says are to be included in gross wages.

In summary, under this agreement the Employer is required to calculate an employee's gross wages by adding together the amounts included within the description of gross wages in Article 31.01 (c) which were earned in the July 1 through June 30 period. The Employer is then to calculate the amount of vacation pay by taking the appropriate percentage of that employee's gross wages.

The parties sought my interpretation of their agreement as it relates to the above issue and I do not know whether this will necessitate any changes in the calculation of vacation pay. I refer this matter back to the parties but I will remain seised to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 9th day of February, 2001.

Howard Snow, Arbitrator