

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.;

The issue in this appeal is whether the Labour Standards Tribunal erred in law in its decision dated May 25, 1992. It found the respondent was entitled to vacation pay in the amount of \$2,425.62 and ordered the appellant to pay it.

For the purposes of this complaint, the respondent was employed by the appellant as a tow truck operator from March, 1989 until February 22, 1991. He claimed that he was to be paid 47% of his gross receipts, after deducting certain operating expenses, not including vacation pay. The appellant said he was to be paid 43% of gross receipts, after operating deductions, plus 4% vacation pay, thus bringing his total recovery to 47%. The issue was joined with the appellant (employer) alleging that the respondent (employee) had been paid his vacation pay while the respondent alleged he had not.

At the hearing before the Tribunal, evidence was given by witnesses favourable to each side of the main issue.

After reviewing ss. 32 and 33 of the **Labour Standards Code**, R.S.N.S. 1989, c. 246, the Tribunal stated:

"It is clear that Section 32 of the Labour Standards Code imposes a duty on the part of an employer to give an unbroken vacation of at least two weeks to an employee who has worked for a continuous twelve month period. Mr. Irving was such an employee.

Section 33 (1) allows an employee who works less than ninety per cent of the regular working hours during a continuous twelve month period to waive the entitlement. Section 33 (2) specifies that such a waiver must be in writing and in such cases the employer shall pay an amount at least

equal to 4% of the wages of the employee.

In the present case there was no evidence that the Complainant worked for less than ninety percent of the regular working hours and there was no notice in writing that the employee was exercising the option to waive Section 32.

Therefore in these circumstances any attempt by the employer to include vacation pay in wages instead of providing an unbroken vacation period with pay is a violation of the Labour Standards Code."

Confronted with contradictory evidence, the Tribunal obviously decided the respondent met the burden of proving his case by a preponderance of evidence. There was evidence upon which, if accepted, the Tribunal could reach such a conclusion.

Section 20(2) of the **Code** provides:

(2) Any party to an order or decision of the Tribunal may, within thirty days of the mailing of the order or decision, appeal to the Appeal Division of the Supreme Court on a question of law or jurisdiction.

The subject matter of the complaint falls within the statutory jurisdiction of the Tribunal. That leaves to be decided whether this appeal raises a question of law. On that issue s. 20(1) of the **Code** is relevant. It provides:

(1) If in any proceeding before the Tribunal a question arises under this Act as to whether

(a) a person is an employer or employee;

(b) an employer or other person is doing or has done anything prohibited by this Act,

the Tribunal shall decide the question and the decision or order of the Tribunal is final and conclusive and not open to question or review except as provided by subsection (2).

The Tribunal found the respondent was an employee at the times material to this complaint. Whether the appellant "has done anything prohibited by the **Act**"

in the context of this dispute is a finding of fact to be made by the Tribunal based upon the evidence before it. It would become a question of law if, for example, the Tribunal made a decision upon which there was no evidence adduced to

support it. Such is not this case.

The submission of the appellant that the Tribunal erred by not considering whether the respondent was a commission salesperson is without merit. There are two reasons. The first is that it was not argued before the Tribunal and the second is that even if it had been, there was no evidence placed before the Tribunal to support it.

In making its order under s. 26 of the **Code**, as the Tribunal did, by specifically describing the award as "being 4% of gross earnings during the period in question" indicates the Tribunal concluded that the respondent had not been paid the vacation pay to which it found he was entitled during the ordinary course of his employment.

The Board acted within the jurisdiction and authority conferred upon it by the Legislature. Accordingly the appeal is dismissed, without costs.

C.J.N.S.

Concurred in:

Hallett, J.A.

Roscoe, J.A.

