

Court of Appeal recognizes that vacation granted "by anticipation" to employees is not a gift and puts an end to "double dipping"

It appears that a recent Court of Appeal¹ decision may have put an end to the receipt by certain employees of "double compensation" with respect to vacation time granted from the start of their employment. In the case in question, the *Commission des normes du travail* was claiming statutory vacation pay on behalf of two employees from their employer, Nestlé Canada Inc.

Under the *Act respecting Labour Standards* (the "**Act**"), Quebec employees accrue vacation in one year, known as the reference year, which is then taken in the following year. However, certain employers offer vacation on a "current year" basis, under which employees are provided with vacation entitlement from the start of their employment. In the past, the *Commission des normes du travail* has considered this "vacation in advance" to be a "gift" from the employer. Consequently, if the employee's employment terminated before the end of the reference year, the employer was required to also pay out accrued vacation time that would have been taken in the year following the end of the reference year. The result was double compensation for employees.

Since May 1, 2003, Section 70 of the Act has permitted employees to take their vacation during the reference year, from the start of their employment, as long as it is at the employee's request, and not imposed by the employer.

However, in the *Nestlé* case, the Court of Appeal confirmed that although the employer violated Section 70 of the Act by requiring its employees to take their vacation during the reference year, since the vacation pay had already been paid, no pecuniary damages were suffered by the employees as a result of taking the vacation time prematurely. In so deciding, the Court of Appeal rejected the argument that the vacation pay paid "in advance" was a "gift" and confirmed that this argument had no legal basis.

In light of *Nestlé*, employers who grant employees vacation "in advance" can now argue that this was not a gratuitous gesture and that those employees are therefore not entitled to "double compensation" in the event that their employment terminates before the conclusion of the reference year.

This newsletter was prepared by members of the Employment and Labour Group at Stikeman Elliott.

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¹ Nestlé Canada inc. c. Commission des normes du travail, D.T.E. 2009T-838 (C.A.).