



5 Things you should know about vacation leave in 2010

By Gavin Goffe

Christmas is fast approaching and most employees will be hoping to take some time off work. This holiday season will be the first since parliament made important changes to the Holidays with Pay Act (the "Act"). In this article, we look at 5 important facts about vacation leave, and then touch on how the recent change in the law could affect employers and employees alike.

1. **Statutory Minimums.** The minimum amount of vacation leave that an employer must grant is 2 weeks for each year worked by an employee with fewer than 10 years' service and 3 weeks for each year worked by an employee with more than 10 years' service. For purposes of calculating vacation leave, a worker is treated as having worked for a full year if he has worked for more than 220 days. These are minimums only and can be increased by agreement between the employer and employee. Although vacation leave is a statutory right, it should generally be exercised only with the approval of the employer. This approval should not be unreasonably withheld.
2. **Earning Leave vs Taking Leave.** Many employers and employees are labouring under a mistaken assumption, which is that vacation leave is not earned during the first year of employment. To the contrary, an employee begins to accumulate leave once he has worked for 110 days. Vacation leave earned in any given year of employment is normally granted in the following year of employment, unless there is an agreement with the employer that allows for leave to be taken in the year it is earned. In other words, leave earned in year 1 may be taken in year 2 and leave earned in year 2 may be taken in year 3, and so on. It is very important (especially when the employment contract comes to an end) for an employee to know whether he's taking leave that was earned in the current year as opposed to the preceding year. In many cases where leave is taken in the year after it's earned, an employee will be entitled to receive a payment in respect of unused vacation leave if he is dismissed.
3. **Carrying forward leave.** An employer is not required by law to permit vacation leave to be carried forward at all, however, the law allows vacation leave to be carried forward for up to 3 years if so provided in an agreement between the parties. If an employer does not allow vacation leave to be carried forward, it has a greater responsibility to ensure that the employee can reasonably make use of the leave.
4. **Payment in respect of unused vacation leave.** If an employment contract (whether in writing or not) is terminated before an employee has taken all of his vacation leave, the employer is obliged to pay the employee an amount equal to the salary that would have been paid in respect of that period. This is irrespective of who terminates the contract.
5. **Termination of the employment contract.** Usually, when an employer dismisses an employee, the last thing they want to have to do is allow him to remain in the workplace for the notice period. That is why many employers will seek to make a payment in lieu of notice – which simply means that the employer is paying the salary in respect of the notice period in advance so that the employment contract may be immediately terminated, as opposed to being terminated at the end of the notice period. In such a case, the employer should also pay for the unused vacation as well. Some employers might try to kill 2 birds with 1 stone by attempting to send the employee on vacation leave during the notice period. An employer cannot force an employee to take his vacation leave during the period of notice of dismissal. If, however, an employer wishes the employee to work for the duration of the notice period and the employee does not wish to work, the employee may apply to take his vacation leave during that period, but the employer could reasonably refuse to grant that leave. It will often be in an employee's interests to request that he be allowed to take his vacation leave prior to the termination of the contract. The reason is that the contract is treated as continuing while the employee is on leave (even if there is no intention to return to that job) and the employee will be entitled to the usual benefits during that period, such as health and life insurance.

A longer period of employment could also translate into significantly more money if it results in the employee having sufficient years of service to qualify them as being vested in the pension plan.

When the recent amendments to the Act come into force, breaches by an employer will be punishable by a maximum fine of \$250,000 or up to 3 months in prison. Prior to the amendment, the maximum fine was \$200. The obligations on an employer under the Act were intended to be of a continuing nature. Thus, if an employer's vacation leave policy contravenes the law, then it may be liable to the \$250,000 fine even though at the time that the policy was implemented, the applicable fine was only \$200.

The amendment also raised the jurisdiction of the Resident Magistrate's court to hear claims valued at up to \$500,000 for employment contracts falling under the Act. This means that an employee ought to have quicker and more affordable access to a court to have his rights determined and defended. Now might be an opportune time to dust off that vacation leave policy document along with the christmas decorations.

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