

ONTARIO LABOUR RELATIONS BOARD

0048-02-ES Larry Nash, Applicant v. **Pan-Oston Ltd.** and Ministry of Labour, Responding Parties.

Employment Practices Branch File No. **21104798**

BEFORE: Stephen Raymond, Vice-Chair.

APPEARANCES: Larry Nash appeared on his own behalf; Rhonda Shirreff and Aileen Doris for Pan-Oston Ltd.; Judie Im for the Ministry of Labour.

DECISION OF THE BOARD; September 26, 2002

1. This is an application by Mr. Larry Nash (“Mr. Nash”) under section 68 of the *Employment Standards Act*, R.S.O. 1990, c.E-14, as amended (“the Act”) for review of a refusal by Employment Standards Officer Karen Drew, #527 (“the Officer”) to issue an order on February 20, 2002. The application was filed with the Board on April 5, 2002.

2. An oral decision was issued at the conclusion of the hearing as set out below.

3. Mr. Nash commenced employment with Pan-Oston Ltd. on January 3, 1984. His employment continued until January 8, 2001 when it was terminated. From that date, Pan-Oston paid him by way of salary continuance eight weeks termination pay, seventeen weeks severance pay and a further seventeen weeks of pay. This exceeds substantially Mr. Nash’s entitlement under the Act.

4. Mr. Nash claims that because he received the payments by way of salary continuance rather than by way of a lump sum that he should receive his statutory entitlements again. I disagree. The purpose of the Act is to ensure that minimum standards are met. In this case, they were not only met; they were exceeded.

5. Mr. Nash may be correct about one point. Pursuant to section 58(15) of the Act the employer may not pay severance pay by means of instalment (salary continuance) without the approval of the Director of Employment Standards. That approval was not provided. The Act may have been violated. If there has been a violation it is a technical. (Although it was not argued before me, it may be that by making the payments that it did, Pan-Oston provided a greater right or benefit pursuant to section 4(2) of the Act and that there is not even a violation.)

6. I agree with the reasoning in *Carroll (Re)* [1996] O.E.S.A.D. No. 209, where, on facts similar to those before me, the Adjudicator found at paragraphs 21 and 22:

21. As Mr. Fukuzawa pointed out, there are varying opinions on whether an employer can pay severance pay and termination pay through salary continuation, without the consent of the employee. In this case, Mr. Carroll did not consent, although he also did not appear to complain. In any event, I

have concluded that the consent of the employee is not required. I do not share the concern of Adjudicator Briggs in *Dirk Krist* (above) that lack of consent of the employee made it "... entirely too easy for employers to circumvent their obligations under the Act even in the event that those intentions were proper." In my view, a salary continuation plan as a means to meet the employer's statutory obligations to pay termination pay and severance pay does have some risks. It is a breach of section 7(5) and if it is contingent on mitigation, it may not meet the requirements of the Act. However, I am not prepared to conclude that an employee must consent to the plan before it can be considered a payment of entitlements under the Act. It can offer benefits to both the employee and the employer, and so long as the particular plan provides the statutory entitlements, I would not interfere.

22. I conclude, therefore, that Mr. Carroll is not entitled to severance pay under the Act at this time, because it has already been paid to him by the Employer.

7. Given this decision, there is no reason to consider the issue of whether the application has been made in a timely way.
8. The application is dismissed.

"Stephen Raymond"
for the Board