

# When Is a Use-It-Or-Lose-It Vacation Policy Enforceable?



Many companies give their employees more paid vacation days than the applicable employment standards laws require. But there's often a catch: The employee must use their extra vacation days before the end of the year and can't cash out or carry unused vacation days forward to the next year. While "use-it-or-lose-it" is generally unenforceable for the minimum paid vacation days required under employment standards laws, it may be valid for extra days beyond the minimum. At that point, the issue becomes one not of employment standards but contract law. Rule of Thumb: Use-it-or-lose-it is a proper limitation for extra vacation days, provided that there's no express or tacit side agreement to pay the employee for those unused extra days. The following 2 cases illustrate how these rules play out in actual situations.

## **Use-It-Or-Lose-It Vacation Pay Rule Is Unenforceable**

Here's a case where an employee was found to be entitled to pay for unused extra vacation days despite a use-it-or-lose-it policy.

### **Situation**

A company manager terminated without cause in 1997 after 30 years of faithful service sues his employer for, among other things, payment for 413 unused vacation days accrued since 1981. The company had a "no banking" policy barring employees from accruing unused vacation days beyond the employment standards required minimum. But the employee claimed he was exempt from the policy and had received verbal assurances from his supervisor that he'd be paid for all his "banked" vacation time when he retired.

### **Ruling**

The BC Supreme Court ruled that the employee was entitled to pay for all his unused vacation days.

### **Reasoning**

The key factor was the testimony of the employee's supervisor and a regional VP, stating that the company didn't always apply its no-banking policy to senior managers. The supervisor also admitted to telling the employee that he'd be paid for his unused vacation time and that he had granted the same exemptions to other

managers who were in a similar position. The regional VP confirmed this account in his own testimony. So, the court ruled that the company had to honour what amounted to a “tacit understanding” that the employee had with his supervisor and pay the unused vacation. The case was sent back down for a determination of the number of unused vacation days the employee had accrued.

[\*MacDonald v. Wajax Industries Ltd.\*](#), 1999 CanLII 5147 (BC SC).

## Use-It-Or-Lose-It Vacation Pay Rule Is Enforceable

Here’s another case involving a similar situation but totally different outcome.

### Situation

A company terminated the employment of a former president and managing director after 30 years of service. The employee sued the company for \$28,356—the value of the 69 unused vacation days that he had accrued over a 4-year period. The company argued that the employee wasn’t entitled to be paid for those days citing the following provision of its written vacation policy: “No carry-over of vacations from one year to the next is to be permitted.” The employee claimed that this policy didn’t apply to senior executives like himself.

### Ruling

The Ontario Superior Court of Justice sided with the company, finding that the employee was entitled to pay for unused vacation days only up to his minimum allotment under the *Employment Standards Act* over the 4 years and nothing above that.

### Reasoning

The language in the policy barring carry-over of unused vacation was “both clear and unambiguous,” the court explained. And unlike in the MacDonald case, there were no documents, correspondence, or other evidence of a side agreement or tacit understanding to exempt the employee from the policy. “More probably than not, the [vacation] policies were intended to apply to all employees, including senior executives,” the court reasoned. As evidence of that, the court noted that when the company was acquired, the employee himself communicated its vacation policy to the acquiring firm. “A third party would be and should be entitled to rely on the published document,” that is the written policy, the court concluded.

[\*Emery v. Royal Oak Mines Inc.\*](#), 1995 CanLII 7074 (ON SC).

## Takeaway & What to Do

Here are the lessons to take away from this briefing:

1. You must pay employees for all vacation days to which they’re entitled under the employment standards laws of your jurisdiction.
2. A use-it-or-lose-it policy purporting to take away employees’ right to be paid for these days is illegal, except or unless as provided by that employment standards law.
3. The extra paid vacation days that you voluntarily give employees above the employment standards law minimum, if any, are subject to reasonable restrictions in accordance with contract law, which may include a use-it-or-lose-it ban on cashing out or carrying forward unused vacation days to the next year.
4. However, as with any other contractual term, a use-it-or-lose-it restriction may

be waived, either expressly in writing or via verbal communications or behaviour suggesting the existence of an understanding or tacit agreement to exempt the employee from the restriction and pay for unused vacation days accrued over previous years.