Employment Standards TRIBUNAL

An appeal

- by -

Advantage Plumbing and Drainage Inc.
("Advantage")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: Ian Lawson

FILE No.: 2005A/6

DATE OF DECISION: April 7, 2005

DECISION

SUBMISSIONS

Fred van Hunenstijn	on behalf of Advantage Plumbing and Drainage Inc.
Ted Mitchell	on behalf of the Director
Lindsay Brown	on his own behalf

OVERVIEW

This is an appeal by Advantage Plumbing and Drainage Inc. ("Advantage") pursuant to section 112 of the *Employment Standards Act*. The appeal is from Determination ER#114-480 issued by Ted Mitchell, a delegate of the Director of Employment Standards on December 2, 2004. The Determination required Advantage to pay vacation pay and statutory holiday pay with interest to Lindsay Brown ("Brown") in the total amount of $1,469.38. The delegate exercised his discretion not to impose an administrative penalty because the contraventions occurred before November 30, 2002.

Advantage filed its appeal on January 10, 2005. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Advantage operates a plumbing and drainage business in Burnaby, British Columbia. Advantage employed Brown in its business between November 5, 2001 and April 10, 2002. Brown was dismissed for cause upon the basis he was in a conflict of interest, having allegedly taken jobs arranged by Advantage and performed them under his own business. Brown filed a complaint with the Director on April 18, 2002, alleging he was owed compensation for length of service, regular wages, vacation pay and statutory holiday pay. After an investigation, the delegate found no merit to Brown's complaint that he was owed regular wages and compensation for length of service. The delegate found, however, that Brown was owed vacation pay and statutory holiday pay.

Advantage customarily had its employees enter into a written employment contract, whereby employees were paid on a commission basis. While a contract was apparently written for Brown, he never signed it. The contracts provided for vacation pay and statutory holiday pay to be paid on each regular pay day, as a further percentage of the employees' gross sales. Clause 14 of the contract which had been prepared for Brown (but not signed) reads as follows:

> 14. Employee [*sic*] shall be paid a commission or fee on services rendered only, subject to statutory deductions, and such fees or commission to be equivalent to an aggregate of 35% percent of the Aggregate Gross Sales before Provincial Sales Tax and Goods and Services Tax effected directly by Employee [*sic*].
>
> The 35% is expressly made up as follows:

The commission shall be:	base rate	32.61%
	+ vacation pay	1.31%
	+ statutory holiday pay	1.08%

> Aggregate Gross Sales shall mean sales effected directly by Employee excluding parts, materials and specialty tool rentals, all to be deducted at cost before calculation as above (hereinafter collectively referred to as the "Fee" or "Commission"). Fee or Commission is 32.61% plus vacation pay and statutory holiday pay and Employee shall be deemed paid vacation pay and statutory holiday pay to date with each aggregate Commission payment and shall not be entitled to or claim further vacation pay or statutory holiday pay.

Advantage paid Brown pursuant to the terms of this unsigned contract. The delegate found that in the absence of written agreement, vacation pay of $743.76 was not paid to Brown in accordance with the *Act*, and statutory holiday pay of $574.30 was also found payable to Brown.

Advantage's Notice of Appeal alleges the Director erred in law and failed to observe the principles of natural justice in making the Determination. Advantage submits its commission-based method of paying vacation pay and statutory holiday pay does not contravene the *Act*, and the delegate should have recognized an agreement as to this method of payment was made between the parties, even though Brown never signed Advantage's employment contract. Advantage further submits the delegate erred in law by failing to find Brown had actually been overpaid, as his rate of pay was based on his alleged false representation to Advantage that he was a qualified gas fitter. Brown submits he made it clear to Advantage that he lacked that qualification when he was hired.

ISSUE

Whether the delegate made any error in law respecting Brown's entitlement to vacation pay and statutory holiday pay.

ANALYSIS

Advantage makes no submission in relation to its natural justice ground of appeal, and there are no facts I can see that could impugn the fairness of the delegate's investigation. This aspect of Advantage's appeal must therefore be dismissed.

Advantage does not appear to have raised the overpayment issue before the delegate, and seeks to have me consider "new" evidence in the form of a document endorsed by the relevant government authority attesting to the fact Brown was not a qualified gas fitter. A remarkable period of time elapsed between the date of Brown's complaint and the date of the Determination (more than 2 years and 8 months). Some correspondence and documents passed between the parties and the delegate in late 2002 and early 2003, and then nothing seems to have happened until the Determination was issued in December, 2004. This unexplained delay is clearly contrary to one of the purposes of the *Act* expressed in section 1(d), to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. In all that time, however, Advantage apparently did not deliver to the delegate the document on which it now seeks to rely in submitting the delegate erred by failing to find Brown had been overpaid. It is well-established in Tribunal jurisprudence that an appellant may not normally introduce on appeal evidence which could have been put before the delegate but was not (see *Tri-West Tractor Ltd.* BCEST #D268/96, and *Kaiser Stables Ltd.* BCEST #D058/97). In the absence of any explanation why this

evidence could not have been put before the delegate, or why Advantage did not raise the overpayment issue in the course of the delegate's investigation, I decline to admit the new evidence and I dismiss this aspect of the appeal. The real issue in Advantage's appeal is whether any error was made in the award of vacation pay and statutory holiday pay.

Sections 58 of the *Act* reads in part:

58 (1) An employer must pay an employee the following amount of vacation pay:

(a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;

(b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.

(2) Vacation pay must be paid to an employee

(a) at least 7 days before the beginning of the employee's annual vacation, or

(b) on the employee's scheduled paydays, if

(i) agreed in writing by the employer and the employee, or

(ii) provided by the collective agreement.

The *Act* therefore allows for an employer and employee to agree in writing to alternate forms of payment of vacation pay, and in principle there seems no reason to think Advantage's percentage formula, if expressed in a written agreement, would be contrary to the *Act* (assuming the formula resulted in employees receiving at least the minimum vacation pay required by section 58). In this case, however, there is simply no such agreement. While Advantage clearly believed Brown had agreed to its customary method of paying vacation pay, it can only be Brown's written agreement that allows Advantage to depart from its obligation to pay vacation pay as prescribed in section 58. I therefore find the delegate made no error in finding Advantage had not complied with section 58.

An employer's obligation to pay statutory holiday pay is set out in sections 44 to 46 of the *Act* as follows:

44 An employer must comply with section 45 or 46 in respect of an employee who has been employed by the employer to at least 30 calendar days before the statutory holiday and has

(a) worked or earned wages for 15 of the 30 calendar days preceding the statutory holiday, or

(b) worked under an averaging agreement under section 37 at any time within that 30 calendar day period.

45 (1) An employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday under section 48, must be paid an amount equal to at least an average day's pay determined by the formula

amount paid ÷ days worked

where

amount paid	is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 calendar day period preceding the statutory holiday,

including vacation pay that is paid or payable for any days of vacation taken within that period, less any amounts paid or payable for overtime, and

days worked — is the number of days the employee worked or earned wages within that 30 calendar day period.

(2) The average day's pay provided under subsection (1) applies whether or not the statutory holiday falls on the employee's regularly scheduled day off.

46 An employee who works on a statutory holiday must be paid for that day

(a) 1 ½ times the employee's regular wage for the time worked up to 12 hours,

(b) double the employee's regular wage for any time worked over 12 hours, and

(c) an average day's pay, as determined using the formula in section 45(1).

The legislature, therefore, has not prescribed exactly when statutory holiday pay is to be paid, in contrast with the *Act's* precise requirements for the payment of vacation pay. The *Act* requires that statutory holiday pay be based upon an employee's average daily pay, on the basis of wages earned during the 30 calendar days prior to the statutory holiday. If an employee works on a statutory holiday, section 46 requires that the employee's "regular wage" be multiplied 1.5 or 2 times.

With two exceptions, the Tribunal has consistently held that statutory holiday pay cannot be paid as a simple percentage of an employee's gross commissions: *Re W.M. Schultz Trucking Ltd.*, BCEST #D127/97; *Re Monday Publications Ltd.*, BCEST #D297/98; *Re Specialty Motor Cars (1970) Ltd.*, BCEST #D570/98. The reason employers in those cases did not comply with sections 44 to 46 of the *Act* is succinctly summarized in the following passage from the *Schultz Trucking* decision:

> The argument of the employer, statutory holiday is included in the 28% paid on the gross earnings of the truck driven, leads to the curious result that the regular wage of the employee when he works the statutory holiday is less than the regular wage when he takes the day off with pay. This inconsistency becomes even more pronounced if I am being asked to accept that the payment for the additional day is also included in the 28% figure. The result is an employee would have his regular wage adjusted up and down depending on whether the pay period for which they received wages included a statutory holiday, whether the statutory holiday was worked or not worked and whether the statutorily required day off with pay is part of the 28%. This would be an absurd result, and the *Act* cannot be interpreted to cause a reduction in an employees [*sic*] regular wage in order to receive a statutory benefit. The inclusion of statutory holiday pay in a piecework or commission wage structure does not comply with requirements of the *Act*.

While in this case it does not appear that Brown worked on any statutory holiday, the further problem is that Advantage has not calculated his statutory holiday on the basis of his "average day's pay" arising from earnings in the 30 days prior to the holiday. Commission earnings can vary widely from month to month; the *Act* prescribes that at a minimum, employees who are given a day off on a statutory holiday must be paid in accordance with their average earnings in the previous 30 days. If Brown had a high-earnings month prior to a statutory holiday, the minimum standard is that he must be paid an average daily wage based on that good month. The converse is true in the event he had a low-earning month. Unlike the *Act's* provisions regarding vacation pay, there is no ability for an employer and employee to "opt out" of this minimum standard, in writing or otherwise.

It is admittedly attractive to employers to wish to pay statutory holiday pay as a percentage of commission employees' total earnings, as this avoids the extra work of calculating average daily pay during each 30-day period prior to a statutory holiday. Further, payment of statutory holiday pay as a percentage of average commission earnings might well come close to meeting the statutory minimum if the percentage figure is high enough (in which case the amount paid for statutory holidays could also exceed the minimum in some cases). The two exceptions in the Tribunal's consistent jurisprudence on this issue relate to the same employer and are examples of how these attractive practicalities can lead adjudicators to stray from the plain language of the *Act*.

In *Monarch Beauty Supply*, BCEST #D062/00, Adjudicator Love heard there had been extensive consultations between the employer and the Employment Standards Branch regarding the acceptability of the employer's method of paying statutory holiday pay as a percentage of monthly commissions. Further, it appears the percentage commission actually paid to the employee in question as statutory holiday pay exceeded the statutory minimum. The issue was whether or not the employer was correct in paying statutory holiday pay as a percentage of commission, instead of on the basis of average daily earnings during the 30 days prior to the holiday. The delegate concluded the employee had not been paid statutory holiday pay in accordance with the *Act*, but Adjudicator Love concluded the Determination was in error in that regard and the employer was not liable to pay anything further to the employee on account of statutory holiday pay (I note no mention of this finding of error was made in the "Order" section of this decision, which simply refers the matter back to the Director for a re-calculation of wages). In his reasons, Adjudicator Love found persuasive the following passage from *National Signcorp Investments Ltd.,* BCEST #D163/98, a decision of Adjudicator Thornicroft:

> In my view, the system the employer has put into place with respect to the payment of vacation pay is in full compliance with the Act. This system is completely transparent; it was agreed (in writing) between the employer and the employee at the outset of the employment relationship; and it separately identifies "regular" commission earnings and vacation pay on each payday wage statement. The Director's delegate concedes that if the employer had, from the outset, simply reduced the global commissioned rate by an amount equivalent to vacation pay and then added that latter amount to each employee's pay on each payday, the requirements of the Act would have been satisfied. For my part, I cannot fathom why the same result cannot be lawfully accomplished by simply paying a global commission rate and then allocating a portion of that commission to vacation pay so long as that system is clearly explained to the employee at the outset of the employment relationship and the vacation pay portion is clearly identified and accounted for on the employee's wage statement.

Adjudicator Love then stated: "While this is a decision [*National Signcorp*] which deals primarily with the vacation pay, [*sic*] it also deals in principle with a commissioned employee where the parties agreed at the outset of the relationship, and the documentation reflected that a portion of the commissioned earnings was paid to the employee as vacation pay."

This same passage from *National Signcorp* also influenced Adjudicator Petersen in reaching a similar result in another *Monarch Beauty Supply* decision, BCEST #D090/02, which is the second exception in the Tribunal's jurisprudence on statutory holiday pay. In that case, the employer paid statutory holiday pay as 3.6% of employees' gross commissions in each monthly pay period. The employer argued it had again paid each employee more than what the *Act* would have required, and relied on Adjudicator Love's decision in submitting it had complied with the *Act*. Adjudicator Petersen found Adjudicator Love's previous decision to be "determinative" and quoted extensively from it.

Adjudicator Petersen's reasons are expressed as follows:

> What this essentially boils down to [the quotation from Adjudicator Love's *Monarch Beauty Supply* decision] is that the commissioned sales representatives were entitled to an average day's pay for the statutory holidays and sales meetings, including travel, and, in my view, the Employer's system or method provided for that. ...
>
> Even if I am wrong with respect to the above, and the Employer's method is inconsistent with the *Act*, I would, nevertheless, still, in the circumstances, allow the Employer to be credited for amounts paid on account of statutory holidays and sales meetings. There is no good reason why the Employees should be paid twice for those.

Neither of these two *Monarch Beauty Supply* decisions refers to *Schultz Trucking* or the Tribunal's previous jurisprudence on statutory holiday pay. In both decisions, the Adjudicators were influenced by *National Signcorp*, which was exclusively a decision in relation to vacation pay (the Determination under appeal in that case had indeed awarded statutory holiday pay, but the parties had reached agreement on that issue and Adjudicator Thornicroft only needed to address the vacation pay issue). The *Act's* vacation pay provisions, however, are different from the statutory holiday pay provisions in one important respect: the parties can agree in writing to change the method of paying vacation pay, but there is no "opting out" clause respecting statutory holiday pay. The liberty extended to employers in *National Signcorp* to pay vacation pay as a percentage of commission earnings, therefore, cannot apply to the payment of statutory holiday pay. In my view, these two *Monarch Beauty Supply* decisions are wrongly decided, to the extent they could be interpreted as departing from the Tribunal's established jurisprudence on statutory vacation pay.

The concerns of Adjudicators Love and Pedersen on this issue, however, ought to be accorded some consideration. It does indeed seem contrary to the fairness principle in section 2(d) of the *Act* that employers would have to pay employees twice for statutory holiday pay, merely because the employer wrongly elected to depart from the plain language of sections 44 to 46. That also happens to be the issue raised in the present appeal by Advantage, which argues it has already paid Brown statutory holiday pay (but admittedly not in accordance with the *Act*). In this case, however, it is clear Advantage did not come even close to paying what Brown was entitled to under the *Act*: the Determination found statutory holiday pay owing in the amount of $574.30, whereas 1.08% of Brown's gross earnings for 2001 and 2002 ($18,593.97, according to his T4's) is far less than that amount. Nevertheless, if Brown's wage was 32.61% of his gross earnings, is it fair that the Determination under appeal awards him an additional 2.39% of his gross earnings *plus* the $1,318.06 determined to be owing for vacation pay and statutory holiday pay? In my view, this type of result influenced Adjudicators Love and Pedersen just as much as the quoted passage from *National Signcorp*.

It therefore strikes me as unfair for Advantage not to receive credit for the sums it has already paid Brown on account of its misguided effort to pay vacation pay and statutory holiday pay. Indeed, by denying credit to Advantage for what it had already paid, the delegate has in effect amended the contract of employment and awarded Brown a wage of 35% instead of the 32.61% the parties intended. Although I am well aware Brown did not sign the agreement Advantage had drafted for him, I am comfortable concluding the bargain they struck upon his employment was that he would receive a wage of 32.61% of his gross sales plus 1.31% for vacation pay and 1.08% for statutory holiday pay.

Looking again at the *Monarch Beauty Supply* decisions, I see no reason why Brown should receive a windfall as a result of Advantage's failure to comply with sections 44 to 46. The *Act* does not specify

when statutory holiday pay must be paid. This Tribunal has held that statutory holiday pay is an exception to the general requirement in section 17 that employers must pay wages at least semi-monthly and within eight days of the end of a pay period: *Re Fabrisol Holdings Ltd.*, BCEST #D376/96. If an employer has paid some, but not all, of its obligation to pay vacation pay and statutory holiday pay by the time a Determination is made, I see no reason why that employer should not be credited with the monies it did pay, and only the balance owing should be made the subject of a Determination.

This should not be seen as an invitation to employers to continue gambling on whether they can get away with paying a percentage of commission earnings as statutory holiday pay. Employers who ignore the plain language of sections 44 to 46 of the *Act* risk not only having Determinations issued against them, but also the imposition of administrative penalties under section 98. Advantage is extraordinarily fortunate in this case, as the delegate exercised his discretion not to impose an administrative penalty (such discretion was allowed, because these contraventions occurred before the current "mandatory" penalty regime was enacted). Administrative penalties can now reach $10,000.00 for multiple offenders, so prudent employers must ensure they calculate statutory holiday pay in strict compliance with the plain language of the *Act*.

The Determination in this case, however, does not set out exactly what sums Brown actually received from Advantage on account of vacation pay and statutory holiday pay. The delegate found the total of Brown's T4 earnings for 2001 and 2002 was $18,593.97, and I presume those figures include vacation pay and statutory holiday pay. The record contains an inch of photocopies of Brown's pay stubs, but at the same time, the delegate noted in the Determination that he could not separate out figures for "net invoice amount" and "parts" from Advantage's records. Even though three years have gone by since Brown's complaint, I have no choice but to refer the matter back to the Director for further investigation, with the hope that this further investigation will be given the highest possible priority given the extraordinary delay that has already occurred.

ORDER

Pursuant to section 115(1)(b) of the *Act*, I refer this matter back to the Director for further investigation into the following:

1. to determine what amount of money Brown was paid by Advantage above 32.61% of his gross earnings in 2001 and 2002; and
2. to determine whether or not that amount satisfies Brown's entitlement to vacation pay and statutory holiday pay.

Ian Lawson
Member
Employment Standards Tribunal