

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Monday Publications Ltd.
("Monday")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 97/755

DATE OF HEARING: December 16, 1997

DATE OF DECISION: February 3, 1998

DECISION

APPEARANCES

Les Jamieson, Esq. for Monday Publications Ltd
Sandy Mayzell
Bill Green
Helen Murenbeeld
Ruby Della-Siega

OVERVIEW

Following a change in the controlling shareholders of Monday Publications Ltd., from Andrew Lynch to Island Publications Ltd., Ms. Murenbeeld complained to the Director of Employment Standards concerning non-payment of statutory holiday pay by the Employer Monday Publications Ltd. to its commissioned advertising sales people. A second complaint of inadequate vacation pay was added to the complaint. After an investigation the Director's delegate determined that statutory holiday pay was due and owing to the employees appearing on this matter including Sandy Mayzell, Bill Green, Helen Murenbeeld and Ruby Della-Siega, and to the non appearing employees, Lynne Bain, Jay Brown, April Davidson and Dan Mallagan. I was advised by counsel for Monday, Mr. Jamieson, that a settlement had been reached with Dan Mallagan.

At the hearing in Victoria on December 16, 1997 I heard the evidence of Andrew Lynch, George Hefflefinger, and Bert Reinecke for Monday. I also heard evidence from Sandy Mayzell, Bill Green, Helen Murenbeeld and Ruby Della-Siega. All parties were given an opportunity to open, cross examine witnesses, and make submissions.

After considering the oral evidence and documents adduced at the hearing, as well as documents filed with the Registrar of this Tribunal, I determined that statutory holiday pay is owing to the employees, and the Determination of the Director's delegate is confirmed.

ISSUE TO BE DECIDED

Did Monday Publications Ltd. fail to pay to its commissioned sales persons statutory holiday pay in accordance with the *Employment Standards Act* (the "Act")?

FACTS

Monday Publications Ltd. is a Victoria based publisher of a group of magazines, which includes Monday Magazine, a weekly newspaper. It employed a number of commissioned sales persons, including Sandy Mayzell, Bill Green, Helen Murenbeeld and Ruby Della-Siega, Lynne Bain, Jay Brown, April Davidson and Dan Mallagan. At all times material

BC EST #D059/98

to this complaint Andrew Lynch, or Andrew Lynch and George Hefflefinger were the publishers of Monday. I was advised by counsel that the shares of Monday Publications Ltd. have been sold to Island Publishers Ltd. Mr. Lynch is liable for any claims arising from former employees, under the terms of an indemnity agreement. The sale of the business was announced to the employees on May 10, 1996. The complaint was made to the Director on May 13, 1996 by Helen Murenbeeld, on an anonymous basis.

Mr. Lynch was the president and publisher of the company for 22 years. He interviewed all the employees, who appeared, with the exception of Bill Green. He did not keep notes of his interviews. Typically the interview that he conducted was a second interview of the employee to see if the prospective employee would make a motivated sales person and whether that prospective employee could relate to the publisher. All employees when they started were put on a draw for 3 months to get going, and then an individualized pattern of payment was established, sometimes consisting of straight commission, salary plus commission, or draw against commissions.

Monday was closed on all statutory holidays. None of the employees were required by the employer to work on statutory holidays. There was no evidence, before me that any employee worked a statutory holiday. None of the employees asserted that they worked on a statutory holiday during the course of their employment.

The issues of statutory holiday and vacation pay were not raised by any employee to Mr. Lynch or Mr. Hefflefinger prior to May 10, 1996 when Mr. Lynch sold his shares in the business to Island Publications Ltd.. Ms. Weins, the accountant, did not raise this issue with either of these gentlemen as the result of any employee inquiry. I find as a fact that there was no inquiry by any salesperson concerning statutory holiday pay, with any person in management, prior to May 13, 1996.

In making this finding, I have rejected the evidence of Helen Murenbeeld. Ms. Murenbeeld testified that she had discussed this matter with Ms. Weins, however, her testimony did not satisfy me that this issue was raised by her prior to filing her complaint with the Employment Standards Branch. I specifically reject the evidence and submissions of Ms. Murenbeeld that she was told to take a hike by Mr. Lynch when she alleges that she raised the issue of holiday pay on May 13, 1996. I note firstly, that this complaint was made anonymously. If Ms. Murenbeeld had confronted Mr. Lynch, as she suggested in her evidence, there would not have been any need to make an anonymous complaint. Secondly, I accept Mr. Lynch's evidence that at the time Ms. Murenbeeld alleges that she raised the issue, he was trying to reassure employees concerning continued employment, and attempting to continue employment for the employees. It is not probable that this conversation occurred as stated by Ms. Murenbeeld.

It was the employer's intention that the commission structure include all matters necessary to motivate the employees, including statutory holiday and vacation pay. Monday paid a higher commission amount than other publishers in the Victoria publishing trade. The rate was higher by 5 %, over other weekly magazines. In 1987, the commission structure was changed by the employer to include vacation pay and statutory holiday pay. The commission structure was intended by Mr. Lynch to include all items necessary to motivate

the employees to succeed, including payment for vacations and statutory holidays. A separate percentage of the commission was not specifically assigned for vacation and statutory holidays.

None of the cheques filed in this proceeding set out the amount allocated to vacation pay or statutory holiday pay. Sandy Mayzell, employed from October 1994 to January 1997 received a combination of salary and commission. In months when a statutory holiday fell, her cheque amounts remained constant. Her evidence was that the issue of statutory holiday pay was discussed among the commission sales persons, but not aggressively pursued. I infer that she did not raise the issue with management at Monday.

Bill Green, employed from August 1991 to June 1996, worked purely on commission. Bill Green, admitted in cross-examination that the commission was meant to be all inclusive. His payments did not decrease in months when a statutory holiday occurred. He was on salary for a 6 month period before he went onto commissions.

Helen Murenbeeld worked for Monday from February 1992 to April 4, 1997. From 1992 to January of 1997 Ms. Murenbeeld took draws against commission. From January of 1997 to April of 1997 she had a guaranteed draw. Her cheques were not reduced during the months when a holiday fell. I note that she earned roughly \$2,166 per pay period, even when a statutory holiday fell within a pay period. Some of her cheque stubs note receipt of vacation pay in particular, pay period 16 - \$600.00, Pay period 21 in 1996. Ms. Murenbeeld's rate of commission varied from project to project.

Ruby Della-Siega started working for Monday in 1984 as a commissioned sales person, and she remains an employee. She was on a 15 % commission. She does not recall any discussions of what was included in the commission rate.

Mr. Lynch testified concerning the arrangements with all the commissioned salespersons including Lynne Bain, Jay Brown and April Davidson.

Lynne Bain, an employee of Monday since the early 1980's did not appear at this hearing. She was paid by way of commissions (100%). She received some salary for management responsibilities. Mr. Lynch testified that Ms. Bain never discussed the statutory holiday issue with Mr. Lynch. Mr. Lynch also testified that she was aware that the employer intended the commission arrangement to be all inclusive, particularly inclusive of holiday pay.

Jay Brown, a short term employee of Monday, who did not appear, was paid by a draw against commissions. His performance never increased to the point that he earned more than his draw.

April Davidson, who did not appear at this hearing, commenced with Monday as a salaried receptionist. She became a commissioned salesperson, and was paid by way of a draw against commissions. She was involved in a serious motor vehicle collision, and is on the company health program. She was on a base draw, and received her base draw during months when there was a statutory holiday.

The employer's evidence was to the effect that it tried to comply at all times with the provisions of the *Act* as it changed over time.

The employer had published an employee policy and procedures manual which was delivered to each employee. The policy indicates:

In all respects the company complies with the laws of British Columbia and for Canada in regards to maximum hours of work, pay for statutory holidays, paid vacation time, payments of behalf of employees for unemployment insurance and the remission of tax deductions to Revenue Canada. Many of these obligations are detailed below.

The conditions of work, compensation and holidays for those employees who are paid on a commission will be as described in their contract with the company.

The Director's delegate found that there was no documentary evidence that vacation pay or statutory holiday pay was included in the commission structure. The Director's delegate did not interview the publisher and owner Andrew Lynch. The Director's delegate did not interview Ruby Della-Siega, a long term employee of Monday Publications Ltd..

At the request of the Director's delegate, Monday, prepared calculations which related to a summary of 10% of the bi-weekly pay, for those pay periods in which a statutory holiday occurred. The amounts calculated were as follows:

Lynne Bain	\$3,641.71
Jay Brown	\$ 424.99
April Davidson	\$ 69.00
Ruby Della-Siega	\$ 4,296.28
Bill Green	\$ 734.70
Helen Murenbeeld	\$ 3,283.84
Dan Mallaghan	\$ 2,060.16
Sandy Mayzell	\$ 1,143.26
Judith Spice	\$ 1,374.87

The Director's delegate determined that each of the above named employees, with the exception of Judith Spice were entitled to statutory holiday as set out above. The Judith Spice claim was settled and did not form part of the determination. The Director's delegate found that a total of \$16,810.83 was owing to the employees from Monday for statutory holiday pay.

The Director's delegate found Monday complied with the *Act* in connection with vacation pay.

ANALYSIS

The burden is on the employer to demonstrate on a balance of probabilities that a determination should be varied. Generally, this means that the appellant must demonstrate an error in the manner in which the Director's delegate approached the matter, or an error in fact or law.

The employees in this case, are of the view that the Determination should be upheld, or in the case of Helen Murenbeeld, the compensation for statutory holidays should be increased to cover the period arising from the date of complaint.

In this case, I do not find it a particularly compelling argument to assert that the lack of records, or notes on pay cheque stubs, proves an entitlement by commissioned sales persons to statutory holiday pay. The *Act* does not require the employer to set out on an employees pay stub the amount of the cheque that goes for vacation pay or statutory holiday pay. Section 27 of the *Act* specifies a number of things that must be set out on a cheque, statutory holiday pay, however, is not one of those items.

Much was made by the employees that there was no written contract of employment, and therefore no proof that statutory holiday pay was included in the commission structure. The law of British Columbia does not require the terms of an employment contract be set out in writing, with the exception of contracts concerning the employment of a domestic. The terms of the contract can be proven from oral evidence, documents, or inferred from the conduct of the parties.

I found that the publisher, Andrew Lynch, gave credible evidence, and I accept his evidence that the commission structure included statutory holiday and vacation pay. The commission structure was **intended** by Mr. Lynch to provide everything necessary to motivate each employee to succeed in sales. Monday accommodated each of its employees by providing a payment structure to meet the needs of that employee. Mr. Lynch's evidence, which was not significantly challenged during cross-examination by each of the employees, remains that he addressed his mind to this issue in setting the commission structure. He indicated that in 1978 the commission structure was revamped to include holiday pay. While he has a direct pecuniary interest in these proceedings, he gave his evidence in a credible and straightforward manner.

I note further, that the employer's policy refers to the 4% and 6% entitlement to vacation pay, depending on years of service, on page 3. The policy also refers to general holidays, which I find are statutory holidays on page 4.

There was no objection made by any employee to any management person at Monday Publications Ltd. by any of the commissioned sales people concerning vacation pay, until after they were notified of the sale of the company. Ruby Della-Siega worked for the company since 1984, and made no complaint concerning the issue of vacation pay. Each of the other employees, while working for a short time period, did not complain to any management person concerning vacation pay. Clearly the employees believed that the commission structure included vacation pay and statutory holiday pay. That fact can be inferred from performance of the employment contract without complaint over substantial periods of time.

I reject the testimony of Ms. Murenbeelt that the issues of vacation pay and statutory holiday pay were raised by various employees at various times. This testimony is in conflict with the testimony of the other employees, as well as the testimony of Messrs. Lynch and Heffleflinger. I found Ms. Murenbeelt to be an argumentative and evasive witness, who editorialized during the course of her questioning of the witnesses. Where there is a conflict between her evidence and the evidence of Lynch and Heffleflinger, I prefer their evidence.

While the commission sales persons may have discussed these issues amongst themselves it was not an issue presented to Mr. Lynch or Mr. Hefflefinger. Ms. Murenbeeld indicates that she raised this issue with Alice Weins the accountant. Ms. Weins could have been called as a witness by Ms. Murenbeeld, but she was not called. There is no documentary evidence that Ms. Weins was made aware of this issue.

In this particular case, the employer argues that the method chosen by the Director's delegate would result in a pay increase for the commissioned sales employees, who did not work any statutory holidays.

This particular argument was raised in the case of *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)* (1994), 99 B.C.L.R. (2d) 37 (S.C.). This case dealt with the predecessor legislation. Mr. Justice Braidwood held:

The argument fails on a logical basis. By the *Employment Standards Act*, s. 36(1)(b), after five years of employment, an employee shall be entitled to three weeks of vacation. By the contract the travel agents signed with Atlas Travel, after two years of vacation, an employee would be entitled to three weeks of vacation. Assuming a base commission of 50 percent, the *Employment Standards Act* provides for 2 per cent vacation pay per week. therefore, with 2 weeks of vacation, the employee is receiving 46 per cent commission. With 3 weeks of vacation, that commission drops down to 44 per cent. This is an absurd result, for **an employee's "total wages" ought not to decline with seniority in order to fund a statutory obligation which rests with an employer.**

The *Employment Standards Act* sets up a scheme whereby an employer is obligated to pay an employee something in addition to their wages for annual vacations and general holidays. Section 37(1) states that the annual vacation pay shall be calculated on the employee's total wages. Therefore the appellant's attempt to have the employee's commission include their vacation and holiday pay does not comply with the *Employment Standards Act*.

(my emphasis)

I am unable to distinguish this authority from the present case, and therefore I am bound by this Supreme Court authority. I note that this Tribunal has considered this issue in *W.M. Schultz Trucking Ltd.* (BC EST #D127/97), in the context of a pay structure that was based on a percentage of revenues generated by trucks, inclusive of statutory holiday and vacation pay. The inclusion of statutory holiday pay in a piecework structure does not comply with the requirements of the *Act*: *Foresil Enterprises Ltd.*, BC EST #D201/96. While the

parties did apparently agree that the commission structure included holiday pay, it appears that it is an agreement which is void, because it breaches the provisions of s. 4 of the *Act*.

The purpose of the statutory holiday pay provisions of the *Act* is to ensure that employees are able to take their statutory holidays, with pay, or alternatively receive compensation if they are directed by the employer to work their holiday. The *Act* characterizes commission or hourly payments as wages (s. 1.). In pay periods when statutory holidays fell, there was no opportunity for an employee to work and generate commissions. While regular employees would be paid for the day they didn't work, the commissioned sales person would not have the opportunity to generate commissions because of the closure of the business. While hourly employees would be paid wages for that same day, the opportunity to generate commissions would be lost because of the holiday.

I accept that Monday Publications Ltd. made reasonable attempts to comply with the *Act*. In light of the decided authorities, however, I am unable to find any error in the approach of the Director's delegate.

ORDER

Pursuant to 115 of the *Act*, the Determination dated September 19, 1997 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal