Employment Standards TRIBUNAL

An appeal

- by -

Brandt Tractor Ltd.
("Brandt")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2013A/15

DATE OF DECISION: August 8, 2013

DECISION

SUBMISSIONS

Jean Torrens and Henry Chan	counsel for Brandt Tractor Ltd.
Todd L. Kerr	counsel for Shannon Claypool
Adele Adamic	counsel for the Director of Employment Standards

OVERVIEW

1. Pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") Brandt Tractor Ltd. ("Brandt") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 31, 2013.

2. The Determination found that Brandt had contravened Part 7, section 58 of the *Act* in respect of the employment of Shannon L. Claypool ("Claypool") and ordered Brandt to pay Claypool an amount of $9,039.91, an amount that included wages and interest under section 88 of the *Act*. The Director also found Brandt had contravened Section 46 of the *Employment Standards Regulation* (the *"Regulation"*) by failing to produce or deliver records as required under section 85(1) of the *Act*.

3. The Director imposed administrative penalties on Brandt under Section 29(1) of the *Regulation* in the amount of $1,000.00.

4. The total amount of the Determination is $10,039.91.

5. In this appeal, Brandt alleges the Director erred in law in interpreting and applying sections 58 and 80 of the *Act* and in awarding vacation pay to Claypool at the rate of 6%, rather than at the statutory minimum rate of 4%. Brandt also alleges the Director failed to observe principles of natural justice in making the Determination by disregarding material evidence in calculating the amount of vacation pay payable on commissions earned by Claypool. As well, while not listed as a ground of appeal, it is apparent from the appeal submission that Brandt seeks to introduce evidence into the appeal that was not before the Director at the time the Determination was being made.

6. This appeal was initially assigned for consideration under section 114 of the *Act*. After assessing the arguments made in the appeal, I determined it was appropriate to have the positions of all of the parties on the issues raised. Accordingly, I requested, and have received, responses to the appeal from counsel for Claypool and counsel for the Director. I have also received a final reply from counsel for Brandt to the submissions of Claypool and the Director.

7. I now have before me the Appeal Form and the appeal submission provided on behalf of Brandt, the Determination, the Reasons for the Determination, the section 112(5) "record" provided by the Director, the submissions made on behalf of Claypool and the Director and the final response filed on behalf of Brandt. The "record" has been provided to Brandt, who has objected to the inclusion of an earlier Determination that had addressed Claypool's complaint. The objection and the response of the Director have been noted. I agree that the earlier Determination is not probative and does not need to be considered in deciding this appeal.

8. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds this appeal can be decided from the Determination, the written submissions on behalf of the parties and the material on the section 112(5) "record", together with any additional evidence allowed by the Tribunal to be added to the "record".

ISSUE

9. The issues in this appeal are whether Brandt has shown the Director made any of the alleged errors of law or failed to observe principles of natural justice in making the Determination. The appeal submission also raises an issue concerning whether Brandt is seeking to add new evidence into the appeal and, if so, whether it ought to be allowed.

THE FACTS

10. The Determination contains an extensive recitation of the evidence submitted by and on behalf of both Brandt and Claypool. A restatement of that evidence in this decision is unnecessary and superfluous. It suffices for the purposes of this appeal that Claypool was employed by Brandt as a Commercial Product Specialist from March 13, 2006, until June 28, 2010, when he was terminated by Brandt. He was responsible for selling commercial equipment in a defined sales area. Following his termination, Claypool filed a complaint claiming wages in the form of unpaid commissions and annual vacation pay.

11. During his employment, Claypool was paid by way of a base salary of $21,000 a year plus commissions. There was an employment agreement between Claypool and Brandt containing, *inter alia*, provisions for remuneration and annual vacation, vacation pay and statutory holiday pay. Clauses 5.2 and 5.3 of the employment agreement state:

> 5.2 The Employee will receive vacation pay as follows: (a) during his vacation, the continuance of his Base Salary as well as all commissions attributable to the Employee on sales by Brandt within his territory, and (b) on each commission payment, 6% vacation pay will be included on all commissions, in accordance with Schedule "B". For greater clarity, vacation pay on commissions shall be limited to 6% even if an Employee is entitled to annual vacation that exceeds the relevant provincial employment or labour standards legislation.
>
> 5.3 The Employee shall receive statutory holiday pay as follows: (a) on the statutory holiday, the continuance of his Base Salary, and (b) on each commission payment, 4% statutory holiday pay will be included on all commissions, in accordance with Schedule "B".

12. Schedule "B" included the following provision, under the heading "Commissions":

> All Commission amounts set out in this Schedule "B" include 6% vacation pay and 4% statutory holiday pay.

13. Claypool was paid his base salary semi-monthly – half on the fifteenth of each month and the remainder at the end of each month. He was paid commission earnings at the end of the month following the month in which they were earned.

14. The Director found Claypool was not entitled to any additional commission wages as he had not, according to the terms of his employment agreement, earned the commissions he claimed. That finding has not been appealed and does not need to be addressed any further in this decision.

15. The Director found Claypool was entitled to vacation pay on commission wages earned by him during his employment with Brandt. The Determination expresses three reasons for reaching this finding.

16. First, the *Act* does not permit the inclusion of vacation pay in commission wages. Second, Clause 5.2 and those parts of Schedule "B" of the employment agreement dealing with vacation pay entitlement provide less than the minimum vacation pay standards required by section 58 of the *Act* and, pursuant to section 4 of the *Act*, are of no effect. Third, Brandt breached the statutory requirement for an employer to pay annual vacation pay on an employee's "total wages" at the applicable percentage. The rationale for these findings is found at pages R28-R31 of the Determination and include a consideration of the purposes of the *Act*, an analysis of the provisions of section 58, both on its own terms as applied to the facts and in the context of the purposes of the *Act*, a review of Court and Tribunal decisions that are consistent with the facts of the matter and which might have a bearing on the result and an assessment of the merits of the arguments made on behalf of Brandt.

17. The Director made note of a submission made on behalf of Claypool asserting ambiguity in the vacation pay provisions of the employment agreement but, while accepting that submission had some merit, found it was not necessary to reach any final conclusion on it because of the finding based on section 4 of the *Act*.

18. In calculating Claypool's vacation pay entitlement in the Determination, the Director found the statutory recovery period in section 80 applied to wages that became payable between December 29, 2009, to June 28, 2010, and, applying the interplay of sections 57 and 58 to the available facts, found that Claypool was entitled to vacation pay on commissions from March 13, 2008, to March 12, 2009; that such entitlement "became payable" between March 13, 2009, and March 12, 2010; that (primarily as a result of the failure of Brandt to respond to a Demand for Employer Records) the precise dates on which this vacation pay entitlement became payable could not be determined; that it was appropriate to find the vacation entitlement "became payable" at the end of the period; that the date on which the entitlement "became payable" was within the statutory recovery period; and that Claypool was entitled to vacation pay on commissions from March 13, 2009, until the date of his termination.

19. The Director refused to deduct any overpayment Brandt alleged had been made in error.

ARGUMENT

20. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was being made.*

21. An appeal to the Tribunal under Section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and

argument that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

22. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. More particularly, a party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

23. Counsel for Brandt argues the Director committed three errors of law and failed to observe principles of natural justice in making the Determination. I shall address each of these arguments in turn and will refer to them as the section 58 issue, the section 80 issue, the vacation pay percentage issue, and the natural justice issue.

24. On the section 58 issue, Brandt argues the Director failed to consider three decisions of the Tribunal – *Advantage Plumbing and Draining Inc.*, BC EST # D053/05, *Coquihalla Towing Ltd.*, BC EST # D285/96 and *National Signcorp Investments Ltd.*, BC EST # D163/98 – accepting instead the reasoning and effect of *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards) (1994), 99 B.C.L.R. (2d) 37 (S.C.).*

25. In response, Claypool submits the Director made no error on the section 58 issue. The cases referred to by Brandt in the appeal were, contrary to the assertion made in the appeal, considered by the Director but were not found to be applicable. Claypool says Brandt is simply repeating the same arguments in the appeal that were made to the Director, hoping the Tribunal will reach a different conclusion, without demonstrating any error in the Determination.

26. Counsel for the Director also asserts there is no error in the Determination on the section 58 issue, making two key points: first, that the result in *Atlas Travel Service Ltd.* (*supra*), remains an effective and cogent guide to the correct interpretation of section 58; and second, that interpretation has, with minor variations based on the particular facts of those cases, been consistently applied by the Tribunal and endorsed by the Court in the judicial review decision *VCR Print Company Ltd. v. British Columbia (Employment Standards Tribunal) and others*, 2003 BCSC 442.

27. In his final reply, counsel for Brandt revisits the arguments made in respect of the *Atlas Travel Service Ltd.* (*supra*) decision and seeks to distinguish the effect of the *VCR Print Company Ltd.* (*supra*) decision.

28. On the section 80 issue, Brandt argues (in the alternative) the Director erred in not limiting Claypool's vacation entitlement to the six month period immediately prior to his termination. The appeal submission states the decision of the Director appears to have been based on an "apparent failure by Brandt to provide the dates of annual vacation taken by Claypool". The submission acknowledges this failure but says it was "inadvertent". The appeal submission includes a summary of the information that was not provided to the Director during the complaint investigation. Brandt also argues that, because commissions were paid on a monthly basis in the month following the one in which they were earned, the Director erred by failing to limit the calculation of vacation pay to commissions earned beginning November 1, 2010.

29. In response, Claypool submits the Director did not err; that the failure of Brandt to provide a precise record of vacation dates justified the approach taken to calculating vacation pay owed.

30. The Director's submission notes two difficulties with Brandt's appeal on this issue. First, sections 57 and 58 of the *Act* create separate obligations. For the purposes of the *Act* it does not matter if Claypool took all the

vacation time off to which he was entitled under section 57, he must also have been paid the annual vacation pay entitlements mandated under section 58. Second, there was an annual vacation pay deficiency in each year of Claypool's employment because Brandt did not calculate annual vacation pay on total wages.

31. In his final reply on this issue, counsel for Brandt reiterates that the failure to provide records was unintentional and that the recovery period must reflect the actual facts, which were that Brandt received vacation time off in his first year of employment and that he received commissions on a monthly basis.

32. On the vacation pay percentage issue, counsel for Brandt argues if Claypool is entitled to additional vacation pay on commissions earned, such vacation pay should be calculated at the statutory rate of 4%, rather than at the contractual rate of 6%. This argument is based on the Director finding section 4 of the *Act* applied to the contractual provision that included annual vacation pay in commission wages. Brandt argues that if the contractual provisions are void, the employment agreement is consequently silent on the percentage of vacation pay entitlement which would then become the percentage mandated under the statute.

33. In response, counsel for Claypool says the Director did not err by using the 6% rate as that rate does not contravene any requirement of the *Act*. The response of counsel for the Director substantially echoes Claypool's response and submits the decision relied on by Brandt to support this argument, *Kenpo Greenhouses Ltd. v. British Columbia (Director of Employment Standards)*, (1997) 32 B.C.L.R. (3d) 347 (B.C.S.C), is distinguishable on its facts.

34. In final reply, Brandt says there is no case law that allows the Director, or the Tribunal, to void one aspect of a contractual provision while upholding another. Counsel says the whole provision is affected, meaning there is no requirement on Brandt to pay the 6% rate and making the statutory percentage applicable.

35. On the natural justice issue, counsel for Brandt alleges the Director failed to consider that Claypool received vacation time off (and vacation pay) from his first day of employment and submits the Director's failure to consider the effect of this material fact is a breach of principles of natural justice.

36. In response, counsel for Claypool says there was no breach of natural justice, since essential aspects of the "facts" which Brandt says were not considered were never provided to the Director for consideration. Counsel for the Director has made no submission on the natural justice issue.

37. The final reply by Brandt contains no direct comment on Claypool's response.

ANALYSIS

38. Before considering each of the issues raised in the appeal, and identified above, it is necessary to consider two matters that have arisen in the submissions filed by the parties.

39. The first matter relates to the inclusion in the submission made on behalf of the Director of an argument pointing to errors in the Determination relating to the cause for Claypool's termination and the resulting date of termination. While counsel notes these errors are "not further grounds for appeal", the Tribunal is nevertheless, invited by counsel to consider whether these "errors" entitle Claypool to additional commission wages and a recalculation of vacation pay entitlement.

40. There has been no appeal filed in respect of either matter raised in this part of the Director's response. The time limited for doing so has long since expired. Section 86 of the *Act* allows the Director to vary a Determination under certain conditions, but the window for doing that has also long since closed. This part

of the submission of the Director is not properly made and will not be considered or addressed further in this decision.

41. The other matter concerns counsel for Brandt's more global objection to the submissions made by the Director on the appeal. Counsel for Brandt contends the submissions overstep the "line" between explanation and advocacy and should be afforded little, if any, weight.

42. In *British Columbia Securities Commission*, BC EST # RD121/07 (Judicial Review dismissed, *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244), the Tribunal substantially confirmed – with some variations – the principles originally developed in *BWI Business World Incorporated*, BC EST # D050/96, that the *Act* contemplates the Director having a role in the appeal and reconsideration processes in the *Act* and, as a matter of policy grounded in the purposes and objectives of the *Act*, is allowed to make complete submissions on all aspects of an appeal, including natural justice: see paragraphs 22 – 28.

43. While the elements of the Director's submission that I have addressed above give me some cause for concern (and I have ignored those elements for the purposes of this appeal), the principal aspects of the Director's submission address questions of law relating to interpretation and administration of the *Act*, for which the Director is primarily responsible, and I do not find the Director's submissions on those issues to be over the line or justify minimizing their cogency and relevance.

44. Returning to the appeal, my initial comment in my analysis of the section 58 issue is that it is apparent from a reading of the Determination that the Director did not "fail to consider" the three decisions referred to by counsel for Brandt. The Director did not, however, accept those decisions had the effect advanced by Brandt. I agree completely with the analysis of the Director on the section 58 issue.

45. For reference, the relevant part of section 58 reads:

> *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.*

46. As found by the Director, subsection (1) establishes the scope of the obligation on an employer to pay annual vacation pay; subsection (2) establishes how the obligation created in subsection (1) may be paid, providing two – and only two – methods of paying annual vacation pay. Once again, I agree with the view of the Director on the interpretation of the interrelationship of the two subsections: subsection (2) cannot be read in a way that permits annual vacation pay to be calculated in a way that affects the statutory obligation created in subsection (1).

47. The Director has correctly stated it "is well established that an employer cannot incorporate vacation pay within the commission structure as an all inclusive amount". In *Howard C. Chui operating as Label Express*, BC EST # D239/03, the Tribunal summarized the law under the *Act* relating to that point:

> It is apparent that the correct interpretation of section 58, is that vacation pay may not be included in a commission structure: *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards) (1994), 99 B.C.L.R. (2d) 37 (S.C.).* The Tribunal's jurisprudence in *British Columbia (Director of Employment Standards),* BCEST #RD348/01 [the *"VCR Print Company Ltd.* reconsideration"], makes it plain that vacation pay cannot be included in a commission. This reasoning applies equally when the employee is paid by an hourly rate combined with a bonus or commission. By virtue of jurisprudence, section 58 of the *Act*, requires the Employer to "pay something extra" for the vacation.

48. None of the cases relied on by counsel for Brandt affect the above statement. Two of the cases precede the above comments. To the extent they suggest an interpretation of section 58 that is different from that expressed above and in the *VCR Print Company Ltd.* reconsideration, they should not be considered sound law. The other – *Advantage Plumbing Ltd.* – should not be read out of context. On the section 58 issue which arose in that decision (or rather decisions as there are two *Advantage Plumbing Ltd.* decisions involving different employees but addressing the same issues), the Director found Advantage had not complied with section 58 because there was no written agreement that allowed Advantage to pay annual vacation pay in a way other than that prescribed by section 58(2)(b)(i). In the appeal, the Tribunal was not asked to consider the validity of the annual vacation formula. It was unnecessary for the final result. There are two other points to be made about the general comment relating to section 58. First the comments speak to "alternate forms of payment", not restructuring entitlement. Second, the cautionary words found in the comment, "(assuming the formula resulted in the employees receiving at least the minimum annual vacation required by section 58)", must be given due regard.

49. In sum, I am not persuaded the Director has made any error of law in the interpretation of section 58 and its application to the facts of the case. This argument is dismissed.

50. It is not necessary to deal with the argument by Brandt addressing the "ambiguity" argument made by counsel for Kerr before the Director and the Director's comments on that. The Director made no error by not dealing with that argument and made no final decision on its merits.

51. On the section 80 issue, I am not persuaded the Director made any error in calculating the recovery period. The difficulties with Brandt's submissions on this issue are manifold. First, the submissions presume the employment agreement provision allowing Brandt to pay vacation pay on commissions monthly has effect. It does not. Second, the submissions presume the Director ought to be governed by those provisions in determining Claypool's statutory entitlement. They are wrong in that presumption. Third, the submissions invite the Tribunal to endorse a "set off", where annual vacation entitlements provided to Claypool by Brandt during his years of employment should be used to "set off" or reduce his statutory annual vacation pay entitlement. Section 21 does not allow this to happen. Fourth, the argument that the exact dates of Claypool's vacation time off in 2009 and 2010 would further reduce his annual vacation pay entitlement requires the Tribunal to accept in this appeal evidence that was not provided to the Director during the complaint investigation; Brandt failed to comply with a Demand made under section 85 which, had it been met, might have provided the Director with the information they now seek to provide. The apparent reason for not providing this information, which Brandt says was "inadvertent", was based on the assumption it was not necessary. They were wrong on that and, in any event, such an assumption is not theirs to make. The evidence of the dates of Claypool's vacation time off in 2009 and 2010 will not be accepted or considered in the appeal. This conclusion is grounded in the Tribunal's approach to evidence sought to be introduced for the first time on appeal: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.

52. This argument does not demonstrate an error of law and is also dismissed.

53. On the issue of the vacation pay percentage, it is worth setting out section 4 of the *Act*:

> *4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to section 3 (2) or (4), has no effect.*

54. The provision does not, on its wording, "void" any agreement affecting employment under the *Act*, but operates to give "no effect" to an agreement that seeks to waive any of the minimum requirements of the *Act* other than those specifically referred to. The Director was correct to give "no effect" to the agreement to include vacation pay in commission wages, as such a vacation pay structure does not comply with the annual vacation pay requirements of the *Act* and its inclusion in the employment agreement seeks to waive those requirements. The agreement to pay an annual vacation pay rate of 6% does not, however, stand on the same footing. There is no contravention of the *Act* in such an agreement. This argument is simply Brandt seeking to have the Tribunal rewrite the agreement for annual vacation pay on commissions because Brandt failed to comply with the requirements of the *Act*. Even if the Tribunal had authority to do so, there are sound reasons for not engaging in what is, essentially, speculation about what the terms of such an agreement would have been or ought to be.

55. This argument is dismissed and, in sum, the ground of appeal alleging the Director committed errors of law in making the Determination is not made out.

56. On the natural justice argument, I adopt and apply the comments I made in dismissing the section 80 issue to this ground of appeal. As well, I agree entirely with the submission of counsel for Claypool on this issue: it is disingenuous for Brandt to allege the Director has "failed to consider" material facts in respect of which Brandt, inadvertently or otherwise, failed to provide any evidence during the investigation.

57. Based on the above, I find Brandt has not demonstrated the Director committed any reviewable error in the Determination and, accordingly, this ground is denied.

58. The appeal is dismissed.

ORDER

59. Pursuant to section 115 of the *Act*, I order the Determination dated January 31, 2013, be confirmed in the amount of $10,039.91, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal