

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 (as amended)

**TRIBUNAL MEMBER:** Ian Lawson

**FILE No.:** 2005A/71

**DATE OF DECISION:** July 6, 2005

## DECISION

### SUBMISSIONS

Ted Mitchell

on behalf of the Director of Employment Standards

### OVERVIEW

1. On April 7, 2005, I decided an appeal by Advantage Plumbing and Drainage Inc. (“Advantage”) from Determination ER#114-480 issued by Ted Mitchell, a delegate of the Director of Employment Standards on December 2, 2004 (BC EST#D047/05). 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. In my decision, I found Advantage’s method of paying statutory holiday pay to be contrary to sections 44 to 46 of the *Act*, but I also found the Determination to be in error by effectively requiring Advantage to pay statutory holiday pay twice to Brown. Advantage had paid 1.08% of Brown’s total gross sales to him as statutory holiday pay, but the Determination required Advantage to pay \$574.30, which was the correct calculation of total statutory holiday pay owing to Brown. As the *Act* does not specify any date by which statutory holiday pay must be paid by an employer, and as this Tribunal had previously expressed concern about Determinations which effectively required employers to pay twice for statutory holiday pay which had not been paid in accordance with sections 44 to 46, I decided Advantage should be credited with what it had already paid to Brown. As it was not clear from the record what figure amounted to 1.08% of Brown’s total gross sales, I referred the matter back to the Director.
2. The delegate has now corresponded with the parties and set out his calculation of what Brown had already received from Advantage as statutory holiday pay in a letter to the Tribunal dated April 26, 2005. The result: by paying Brown 1.08% of his total gross sales, Advantage had paid him \$573.76. Advantage does not disagree with this figure. The total statutory holiday pay found owing to Brown, by applying the correct calculation pursuant to sections 44 to 46 of the *Act*, was \$574.30. As a result, Advantage must pay to Brown a further \$0.54 on account of statutory holiday pay.
3. It is obvious, therefore, that in the final analysis this dispute has become a tempest in a teapot. As I noted in my original decision, the Tribunal has consistently ruled that statutory holiday pay cannot be paid as a percentage of total sales earned by commission employees. Previous decisions demonstrated that any percentage formula fails to comply with sections 44 to 46, especially where employees worked on a statutory holiday. I found two Tribunal decisions in which members had been persuaded that a percentage system complied with the *Act*, but I ruled those decisions had been wrongly decided (*Monarch Beauty Supply*, BC EST #D062/00 and #D090/02). I note that in the *Monarch Beauty Supply* decisions, the employer had actually paid more than what it was required to pay under sections 44 to 46, and further, the employer had apparently engaged in substantial discussions with the Director about whether it could pay statutory holiday pay by way of a percentage of gross sales. The fact the employer in those cases had paid more than the statutory minimum had influenced the Tribunal to approve of the percentage schemes in those two decisions.
4. Having now seen the result in the present case, it is difficult indeed to defend the time and effort that has been expended just to secure an additional \$0.54 to Brown. I noted in my original decision that the Director exercised discretion not to impose an administrative penalty against Advantage for failing to pay statutory holiday pay in accordance with sections 44 to 46 of the *Act*. Today, however, the Director has no such discretion. If the same Determination had been issued against Advantage today, a minimum

mandatory administrative penalty of \$500.00 would have been imposed. If Advantage had previously breached the *Act*, the penalty would climb to \$2,500.00 and then \$10,000.00. These penalties would render future tempests over statutory holiday pay much more painful for employers than it has been for Advantage in the present case.

5. I therefore repeat my observation in the original decision that employers have much to lose if they continue to gamble with paying statutory holiday pay to commission employees as a percentage of gross sales. Having noted the attractiveness and simplicity for employers in paying statutory holiday pay by way of percentage schemes, and seeing as I have in this case that such schemes are capable of coming very close to the statutory minimum, but having at the same time concluded such schemes do not comply with sections 44 to 46 of the *Act*, I regret that it is up to the Legislature to solve this problem. It is clearly contrary to the fairness and efficiency principles to have disputes over small amounts come up regularly and become the subject of mandatory penalties far exceeding the amounts at stake. I can only hope the Director might raise this issue when the *Act* is next reviewed.
6. The Determination under appeal also dealt with Brown's vacation pay having been paid as 1.31% of his gross sales. I found in the original decision that unlike the case with statutory holiday pay, the parties are free to enter into written agreements for the creative payment of vacation pay and there was no problem in principle to using a percentage scheme. Advantage's problem, however, was that it did not enter into a written agreement with Brown, and so the Determination correctly found that section 58 had not been complied with. Again, however, Advantage had paid some amount of money to Brown as vacation pay and I found it to be unfair for Advantage to have to pay him twice as a result of the Determination. I therefore referred the vacation pay issue back to the Director, and see the delegate has found a further \$20.00 was owing to Brown in vacation pay. Advantage takes no issue with that amount, and it illustrates again the risks an employer runs if its percentage scheme fails to pay at least the statutory minimum, and exposes the employer as a result to administrative penalties.

## **ORDER**

7. Pursuant to section 115(1)(a) of the *Act*, Determination ER#114-480 issued by Ted Mitchell, a delegate of the Director of Employment Standards on December 2, 2004 is varied as follows:
  1. the amount of statutory holiday pay owing to Brown by Advantage is \$0.54; and
  2. the amount of vacation pay owing to Brown by Advantage is \$20.00.
8. Interest is payable on these amounts pursuant to section 88.

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**Ian Lawson**  
**Member**  
**Employment Standards Tribunal**