

**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 -

Astro Guard Alarms Vancouver Ltd.  
("Astro" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Ib S. Petersen
<b>FILE NO.:</b>	2000/26
<b>HEARING DATE:</b>	March 16, 2000
<b>DECISION DATE:</b>	April 18, 2000



**DECISION**

**SUBMISSIONS**

Mr. Robert Gilbertson	on behalf of the Employer
Mr. Dieter Nowak	on behalf of himself
Ms. Martha Rans	on behalf of the Director

**OVERVIEW**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on December 24, 1999 which determined that Dieter Nowak (Nowak”) was owed \$3,365.14 on account of wages (commissions), vacation pay and interest. The vacation pay entitlement was calculated as 4% of \$70,133.86 (based on Nowak’s income in 1997 and 1998 according to his T-4 slips) less \$200 paid, for a total of \$2,627.35. Unpaid commission was found to be \$550.

According to the Determination, Astro operates a security alarm and vacuum sales business in Coquitlam and Nowak was employed there from November 1996 to January 15, 1999 as a salesman/manager. The conclusions of the Determination may be briefly summarized as follows:

1. While the delegate accepted that Nowak supervised at least one employee, most of his time was spent on sales and, in the result, he did not accept that Nowak was a manager under the *Act*.
2. The delegate found that certain invoices had not been paid.
3. As the delegate did not accept that Nowak was a manager under the *Act*, he found that Nowak was entitled to statutory holiday pay.
4. As well, the delegate concluded that Nowak was entitled to vacation pay. In part, he reached that conclusion on the basis that the complainant’s pay statements did not show any payments for vacation pay and statutory holidays. The delegate rejected the Employer’s evidence that Nowak had taken paid time off due a motor vehicle accident and a house fire, and preferred Nowak’s denial that he took vacation and was paid vacation pay for these periods. The delegate also did not accept that time Nowak had taken off for medical treatment was paid vacation time.

**ISSUES**

The Employer appeals the Determination. The issue before me is whether the delegate erred when he determined that the Employer owed commissions and vacation pay to Nowak.

## PRELIMINARY ISSUE

A hearing was held at the Tribunal's offices in Vancouver on March 16, 2000.

The Employer requested that the Director produce certain documents, including Nowak's income tax records, cellular telephone records and vehicle rental records. Counsel for the Director took issue with the request. She was of the view that the records requested were not relevant and that, in any event, it was not for the Director to produce such records. Nowak was prepared to show the Employer the telephone and vehicle rental records but did not consider the income tax pertinent. The Employer disagreed and argued that the documents requested were clearly relevant to the issue before me. In any event, the Employer withdrew the request for the documents and indicated its preference for "getting on with the evidence". In the result, there was no need for me to deal with the Employer's request.

## FACTS AND ANALYSIS

As argued by the Director, the burden to show that the delegate erred in making his Determination rests with the appellant, in this case, the Employer. For the reasons set out below, I am generally not satisfied that the Employer has met that burden.

At the hearing, Gilbertson testified for the Employer. He took issue with the manner in which the delegate had carried out the investigation in this matter. In particular, he explained that the delegate had refused to interview witnesses and review documents suggested by the Employer. The witnesses were two management employees involved in the supervision of Nowak who, according to Gilbertson, had information and detailed records. Gilbertson explained that the delegate told him that the evidence he had was not relevant. As I understood the Employer's evidence, the documents that the delegate refused to review consisted of commission statements (and summaries of same) which Gilbertson said were attached to the pay stubs received by Nowak. Nowak disagreed that the commission statements were attached to his pay stubs. He agreed, however, that he had copies of these documents and that he received the summaries with his pay stubs. Gilbertson explained that he brought "Employee Earnings Records" to a meeting with the delegate and that the latter rejected these as evidence of vacation pay. I agree generally with the Employer that the documents are relevant. The documents pertain to the issues of payment of commissions and vacation pay. On the other hand, I am of the view, for reasons set out in more detail below, that the documents are not compelling evidence that the Employer paid commissions and vacation pay. Moreover, if the management employees had any information relevant to the issues before me, they did not testify to that at the hearing.

Insofar as the delegate found against the Employer because of the Employer's failure to keep proper records, I agree that is inappropriate. The *Act* and *Regulation* provide for specific penalties for failing to keep proper records. If the delegate is of the view that the records fail to meet the standards required, he has the discretion to consider whether the circumstances are such that penalties are appropriate. The relevant issues before the delegate, as before me, is simply whether or not the Employer paid commissions and vacation pay. The Employer's lack of proper records, and I agree with the delegate that the records do not meet the requirements of Section 28 of the *Act*,

is but one of several factors to consider. It does not follow from the Employer's lack of proper records that the Employer failed to pay commissions and vacation pay. That depends on the particular circumstances of the case. It is, nevertheless, as a matter of practicality, clear that proper payroll records carry considerable weight and, therefore, everything being equal, an employer which fails to keep proper records may find it difficult to substantiate its case as a matter of evidence. There are sound policy reasons for requiring an employer to keep such records. In my opinion, the delegate did not find against the Employer simply because it did not keep proper records.

On a fair reading of the Determination, is clear to me that the delegate considered the evidence before him. The delegate considered the Employer's records that purported to show that Nowak was paid vacation pay on April 15, September 15 and December 15, 1998. He also considered the Employer's explanation that Nowak was off work for several periods with pay and noted that Nowak denied taking time off for vacation and receiving vacation pay. The delegate noted:

"I prefer the evidence of the complainant in this regard for several reasons. First, the employer states that the pay periods above are the dates he was off as the complainant did not receive a commission earning in these pay periods. A commission is earned and becomes due and payable after installation and payment by the customer. .... <T>hen there is a lag of several weeks between the sales call and payment for the commission. Therefore, it is not probable that the complainant was off work in the weeks in which he had no commission earning (which is the period the employer has recorded as a holiday pay). The week in which the complainant did not receive a commission payment could only indicate the complainant did not generate a sale several weeks prior to the week in which no commission is paid. Secondly, the pay statements issued to the complainant do not record any payment for vacation pay or holiday pay. Finally, there are several pay periods, other than the above noted ones, where the complainant did not have any commission earnings and they were not designated as vacation."

The delegate also did not accept that the time taken off for hospital treatment was paid vacation time:

"Section 59 of the Act ... states that an employer cannot reduce an employee's vacation or vacation pay because he was paid sick pay. Although the employee was off work during these periods the payroll records do not indicate that they were paid vacation days. The employer knew that he was in attendance at the hospital getting these treatments and obviously paid him his base salary while he was at the hospital. I have no evidence to indicate the payment for the time getting treatments was other than sick days. The employer cannot pay someone for a sick day and then retroactively turn around and call this vacation time and pay."

In any event, having heard the evidence that the Employer says is vital to its case, I am generally not satisfied that the delegate erred in his conclusions. Gilbertson reviewed and explained the records which the Employer sought to rely on in this appeal. These records consisted of the following:

1. commission statements (and commission summaries and other notes) from the end of January 1998 to January 15, 1999;
2. examples of pay stubs;
3. "Employee Earnings Records" from October 1997 to February 1999;
4. a memorandum to Nowak;
5. a letter from George Siegle ("Siegle");
6. an except from the Determination; and
7. an except from a submission by Nowak.

The pay stubs do not indicate that vacation was taken or paid. Among the commission statements was a note, date-stamped April 15, 1998, stating that Nowak was away and had no commission earnings due and was asking for "holiday pay". The note is addressed to "Rob" (Gilbertson) and I understood the evidence to be that the note was from Siegle. Nowak says he never received this note. Siegle was present at the hearing but did not testify. Gilbertson also pointed to another note, date-stamped September 15, 1998, which stated "Dieter has no comm. due for this pay period. Base only." A further note, date-stamped November 13, 1998, is similar. I understood from Nowak that he received the last two notes but not the first. He denies receiving any note or statement regarding vacation pay or holiday pay. I find it more likely than not, based on all of the evidence before me that Nowak did not receive the note dated April 15, 1998. The other two notes are not compelling evidence of vacation pay.

As mentioned, the delegate rejected Gilbertson's Employee Earnings Records as evidence of the Employer having paid vacation pay to Nowak. These records were kept by Gilbertson and set out for the employee, date of payment/pay period, regular payment, commission, gross, income tax, E.I., CPP, other and net pay. The column marked holiday pay was crossed out and commission substituted. Generally, Nowak was paid a base salary of \$600 twice a month. Certain pay periods have the notation "H.P." (June 13, 1998, December 31, 1997, April 15, 1998, September 15, 1998, and December 15 and 31, 1998,). Gilbertson explained that he wrote the notation when he paid vacation pay to Nowak. Gilbertson does not claim that Nowak was privy to the Employee Earnings Records. The two notes--regarding "base only"--correspond to pay periods where Nowak was paid his base salary only. As noted above, in my view, the notation simply indicates just that--that Nowak was paid "base only". In other instances, December 31, 1997 and December 15 and 31, 1998, the records indicate that Nowak was paid commissions as well. I do not find these records to be compelling evidence of the Employer having paid vacation pay. The records are not consistent with the Employer's argument.

With respect to the June 13, 1997 "H.P." notation, Gilbertson explained that Nowak started with the Employer as a salesperson with a base salary of \$1,200 plus commission. After six months, he was to be compensated by commissions only. Apparently, this was the Employer's normal practice. However, Nowak explained to the Employer that he could not afford this arrangement. Gilbertson

then offered him the sales manager position which would provide the same base salary of \$1,200 plus commission. Gilbertson explained that in order to start as sales manager from a “clean slate” the Employer paid \$600 as vacation pay. In that period, ending June 13, 1997, he says, the Employer paid \$1,200 of which \$600 was “H.P.” or vacation pay. I do note, that Nowak was not paid his base salary for the previous pay period, though he was paid commissions. In cross examination by the Employer, Nowak testified that he thought the payment “retroactive” for the previous pay period.

In short, I do not find that the delegate erred in his conclusion that the Employer failed to pay vacation pay.

The Employer’s argument then boils down to the proposition that Nowak had time off with his salary being continued. Nowak denied taking any vacation time. While I understand that the Employer, in its appeal submission and in its dealings with the delegate, claimed that Nowak had taken time off with pay, the Employer did not testify as to the circumstances in any particular detail. On one of the documents--the “Employee Earnings Records” produced by the Employer--there are notes suggesting that Nowak took one week off to deal with a house fire, two weeks off to deal with medical problems, one week to deal with family problems, two weeks to deal with car problems and all statutory holidays. The Employer suggests that Nowak took a total of 10 weeks off in one year. This is not supported by the Employer’s records. Moreover, and in any event, I do not find this evidence particularly compelling. In view of Nowak’s denial that he took time off for vacation purposes, and the burden on appeal, there is little evidence before me to challenge the conclusions of the delegate on this point.

I would like to add that the Employer’s interpretation of the *Act* is not correct. Even if I accepted--and I do not--that the Employer “continued” Nowak’s salary during vacation time by simply paying base salary, that would fall short of the requirements of the *Act* because vacation pay is based on the “employee’s total wages during the year of employment entitling the employee to the vacation pay” (Section 58). Total wages includes commissions (Section 1 “wages”).

The delegate made a balanced and careful analysis of the records with respect to unpaid commissions. He allowed some of the claimed commissions and disallowed other commissions. If there was any evidence with respect to the unpaid commission earnings, the Employer did not direct me to this. In the result, I am not going to disturb his conclusions with respect to commissions owing.

Nowak did not dispute that the delegate calculated the vacation pay owed based on T-4 earnings of \$70,133.86 and that this amount included an automobile allowance. As I understood the evidence, the automobile allowance was substantial, and the Employer argues that it is improper to include this allowance in the amount on which vacation pay is calculated. I agree with the Employer. Vacation pay is based on the employee’s wages, and “wages” do not include “allowances or expenses” (Section 1). In the result, and as suggested by counsel for the Director, I refer the calculation of vacation pay owed back to the Director.

**ORDER**

The Determination dated December 24, 1999 is confirmed except to the extent that the calculation of vacation pay owed is referred back to the Director in accordance with the principle set out herein.

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**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**