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-

National Signcorp Investments Ltd.

("Signcorp" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	97/791
DATE OF HEARING:	April 8th, 1998
DATE OF DECISION:	April 29th, 1998

DECISION

APPEARANCES

Andrea Rayment	Counsel for National Signcorp Investments Ltd.
John Ball	on his own behalf
Wayne Bond	on his own behalf
Bernard T. Gifford	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by National Signcorp Investments Ltd. ("Signcorp" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on October 21st, 1997 under file number 08249 (the "Determination").

I should also note, for the record, that one of the employees named in the Determination, Derek Christiansen, submitted a brief one-page letter to the Tribunal, received by fax on April 2nd, 1998, apparently taking issue with the Director's failure to award him any statutory holiday pay. Inasmuch as Mr. Christiansen has not filed an appeal with the Tribunal from the Determination (and the time for so doing has long since expired), I indicated to the parties at the outset of the appeal hearing that I did not intend to address the matters raised in his April 2nd communication. I might add that this position was supported by both counsel for the employer and the Director's delegate.

The Director's delegate originally determined that Signcorp owed twelve named individuals $75,886.54 on account of unpaid vacation and statutory holiday pay. The twelve individuals named in the Determination are: John Ball, Wayne Bond, Derek Christiansen, Scott Hiller, Mark Houlihan, Charles Lipp, Shaun McCarthy, Leonard Olson, Ted Olson, Jeanette Schmidt, Randy Sigouin and Chris Wickett.

By way of a letter to the Tribunal dated December 24th, 1998, the delegate advised that the total amount due should be revised to $62,797.25. In a subsequent letter to the Tribunal, dated February 25th, 1998, the delegate advised that the correct amount due should be revised yet again to $59,139.71. I understand from the delegate that this latter figure represents the Director's current view as to the employer's liability.

At the outset of the appeal hearing, I was advised by counsel for the employer and the Director's delegate that the statutory holiday pay claims of the 8 employees who were found to be owed statutory holiday pay had been resolved in the total amount of $14,900.16 together with interest to

be calculated in accordance with section 88 of the *Act*. The particulars of the parties' agreement are set out below:

Employee	Statutory Holiday Pay Owed (excl. interest)
Bond, W.	$ 427.65
Lipp, C.	$2,457.83
McCarthy, S.	$ 111.51
Olson, L.	$ 195.71
Olson, T.	$1,258.03
Schmidt, J.	$2,448.01
Sigouin, R.	$7,830.00
Wickett, C.	$ 171.52
TOTAL	$14,900.16

ISSUES TO BE DECIDED

Counsel for the employer submits that the Determination, as amended, is in error in two respects:

- First, the Director erred in awarding the 11 "sales representatives" (*i.e.*, every complainant except John Ball) vacation pay as these employees had already been paid all the vacation pay to which they were entitled except for Randy Sigouin who was paid vacation pay at a rate of 4% rather than the mandated 6% [see section 58(1)(b) of the *Act*]. In the case of Sigouin, the employer acknowledges that it is obliged to pay him a further $4,056.77 plus accrued interest.

- Second, the amount awarded to John Ball on account of vacation pay is incorrect.

FACTS AND ANALYSIS

Signcorp installs and manufactures electrical and neon signs. The company has offices situated in Delta, Calgary, Edmonton and Toronto. The Determination only concerns the claims of some employees of the Delta, B.C. operation. During the period in question, 11 of the 12 complainant employees were employed as sales representatives; John Ball--who held the title Vice-President (Sales)--was their direct supervisor.

Vacation Pay for the 11 Sales Representatives

At the point of engagement, each of the 11 sales representatives signed employment agreements that provided for an initial "salary plus commission" compensation package and which, after a certain period of time (which varies from employee to employee), "rolled-over" into a 100% commission formula. Clause 4 of the employees' compensation agreements is of particular concern in this appeal:

> "4) Commission/draw, commission/salary and straight commission earnings are 100th/104th of the amount paid. Four (4) 104ths are considered to be vacation pay which will be paid at each pay period."

Thus, the employer's approach to compensation was to agree to pay a "global commission" (which was based on the individual's sales and leasing volume) to each representative and then allocate the commission between "regular earnings" and "vacation pay". This allocation was specifically set out on each employee's pay stub for each pay period--in other words, the dollar amount shown as "commissions" was something less than the full commission payable with the balance due being recorded as "holiday pay paid" (*i.e.,* vacation pay). The facts of the present case distinguish it from *InterCity Appraisals Ltd.* [1996] BC EST #D245/96 (cited to me by both counsel for the employer and by the Director's delegate) where I found there was no agreement between the parties to include vacation pay in the commission rate and where there were no payroll records showing that vacation pay had ever been paid to the complainants.

The point in dispute between the employer and the Director concerns whether or not Clause 4, noted above, satisfies the employer's statutory obligation to pay vacation pay. The Director determined that it did not and, accordingly, awarded the 11 sales representatives vacation pay based on their "global" commission earnings.

Section 58 of the *Act* governs the payment of vacation pay:

> **Vacation pay**
> 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 pay days, if agreed by the employer and the employee or by collective agreement.
>
> (3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

It is to be noted that 58(2)(b) specifically provides that an employer and an employee may agree that vacation pay will be paid at each pay period. Further, section 27(1)(f) of the *Act* mandates that any monies paid on account of vacation pay be separately itemized on the employee's payday wage statement.

In my view, the system that the employer has put in 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 commission 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.

While the employer's approach to the payment of vacation would not have passed muster under the former *Employment Standards Act,* S.B.C. 1980 c. 10 inasmuch as section 37 of that Act did not contain the equivalent of section 58(2)(b) of the current *Act,* the employer's approach is, in my opinion, lawful under the current *Act.* For this reason, I cannot accede to the Director's submission that the employer's argument must fail by reason of the B.C. Supreme Court's decision in *Atlas Travel Service Ltd. v. B.C. (Director of Employment Standards)* (1994), 99 B.C.L.R. (2d) 37. In *Atlas Travel,* the employees signed an agreement that simply provided "Payment for vacation, which is included in your commission earnings, is prescribed by the Employment Standards Act of British Columbia"; the amount payable as vacation pay (and also statutory holiday pay that was similarly "rolled" into the commission rate) was never separately identified on the employees' payday wage statements and, clearly, the employer's approach violated section 37 of the former Act.

The Director's delegate submitted that the employer's approach to the payment of vacation pay would inevitably lead to an absurd result, namely, that after five consecutive years of service the employee would then absorb, in effect, a decrease in pay. A similar argument was advanced, and accepted by the court, in *Atlas Travel.* If, in fact, the employee was not entitled to additional vacation pay after 5 consecutive years of service then, indeed, there would be an absurdity. However, that is not the employer's position. As noted at the outset of these Reasons, counsel for the employer conceded that in the case of Mr. Sigouin (who is the only employee with at least 5

consecutive years of service), he is entitled to an additional 2% vacation pay which the employer calculates to be $4,056.77.

The fact that a presently lawful agreement might, given the effluxion of time, offend the *Act* does not justify finding that otherwise lawful agreement to be void. For example, section 63 of the *Act* provides for compensation for length of service to increase with consecutive years of service. An initial agreement to pay, say, the equivalent of four weeks' wages as termination pay is not void merely because, at some future point, the minimum provisions of the Act will mandate a payment equivalent to 5 to 8 weeks' wages.

Nor is it correct, in my view, to ignore whatever payments have been made in the event the contractual agreement fails to meet the minimum standards set out in the *Act*. For example, assume that an employer pays its employees at an hourly rate that is $2 below the minimum wage. Clearly, such an agreement or practice is void by reason of section 4 of the *Act*, but it would inappropriate to remedy this violation by ordering the employer to pay all of the employees an additional sum of money representing the minimum hourly wage for each hour worked; rather, the proper remedy would be to order the employer to pay the employees a further $2 per hour for each hour worked.

Similarly, in the instant case, the employer's compensation agreement becomes void once an employee reaches the 5-year service mark, *but only insofar as that particular employee is concerned.* At the 5-year mark, the employer is then obliged, by reason of section 57(1)(b) of the *Act*, to pay an additional 2% vacation pay.

John Ball's Vacation Pay Claim

There are two components to Mr. Ball's claim. First, Mr. Ball claimed, and the Director accepted, that he took less than his full entitlement of vacation days in the years 1994 to 1996. In each of those years he was entitled to 15 vacation days but he did not take 15 days each year despite his entitlement to do so. The employer simply states that Ball took his entire vacation allotment in each of the three years; Ball denies so doing. The Director's delegate determined that Mr. Ball had not taken 13 vacation days during the period in question.

The Director apparently relied on a document that Ball reconstructed from his daily appointment diary for the years in question; the employer has no records upon which it can rely, merely the recollection of the firm's senior officers. Ms. Armitage, an officer, director and shareholder of Signcorp (and the firm's sole witness) frankly conceded that the firm "did not track vacation or sick days". Although Mr. Ball acknowledged that his failure to take the 13 days in question was more a matter of personal choice than employer dictate, I note that section 57(2) of the *Act* places the onus on the employer to ensure that employees take all of the vacation time to which they are entitled. Finally, I would note that Mr. Ball's position does not appear to be something that was "trumped-up" after he left Signcorp's employ; an internal company memorandum purporting to be the notes of meetings held with Ball on November 13th and 15th, 1996 records Ball's position that he had not, in previous years, taken his full vacation time allotment.

The employer bears the burden of proving that the Director erred in awarding Mr. Ball the sum of $3,599.96 on account of 13 accrued vacation days that were not taken. In my view, the employer has simply failed to meet its burden in this regard.

The second component of Mr. Ball's vacation pay claim arises from his compensation formula; Ball was paid an annual salary plus a "commission override" (in essence, a percentage commission based on the sales generated by the sales representatives who reported to him). While he was on vacation, Ball's salary continued as did the payment of any commission overrides.

The Director's delegate held that Ball was entitled to a further 6% vacation pay on the commission overrides generated during the year, including any overrides generated while Ball was away on vacation. I must confess that I cannot see the logic of this approach. Given that the employer continued to pay both Ball's salary and his commission overrides, in full, during the time that he was away on vacation, if he is then awarded a further 6% of the commission overrides generated (and already paid) during the year (including overrides generated while he was on vacation), he stands in the position of having been paid twice over for that aspect of his vacation pay. Accordingly, this aspect of the Determination (a total of $6,344.06, before interest) cannot stand.

ORDER

Pursuant to section 115 of the *Act*, I order the Determination to be varied as follows:

i) Statutory Holiday Pay is awarded in the total amount of $14,900.16 (to be allocated among the 8 employees as noted above);

ii) The award of vacation pay for the 11 sales representatives is set aside in its entirety;

iii) Randy Sigouin is awarded the sum of $4,056.77 on account of unpaid vacation pay;

iv) The award to John Ball of $3,599.96 on account of 13 accrued vacation days that were not taken is confirmed; and

v) The award to John Ball of $6,344.06 on account of vacation pay on commission overrides is set aside in its entirety.

In addition to the above amounts, the employer is also legally obliged to pay interest, which shall be calculated by the Director in accordance with section 88 of the *Act*. In the event the Director disagrees with the employer's calculation of Mr. Sigouin's additional vacation pay entitlement, I will, upon notice from the Director, settle that issue on the basis of written submissions. The Director shall have 30 days from the date of issuance of these Reasons to notify, in writing, the Tribunal Registrar if there is a dispute with respect to this latter calculation.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal