Employment Standards TRIBUNAL

An appeal

- by -

Wolfe Chevrolet Oldsmobile Ltd.
("Wolfe")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2003A/104, 2003A/105 & 2003A/106

DATE OF DECISION: July 3, 2003

DECISION

OVERVIEW

This decision addresses appeals made pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Wolfe Chevrolet Oldsmobile Ltd. ("Wolfe") of three Determinations that were issued on April 1, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determinations concluded that Wolfe had contravened Part 7, Section 58 of the *Act* in respect of the employment of Ron Baczuk ("Baczuk"), Michelle Alford ("Alford") and Ken Sorensen ("Sorensen") (collectively, the "business managers") and Part 3, Section 21 in respect of the employment of Sorensen and ordered Wolfe to cease contravening and to comply with the *Act* and to pay an amount of $4,834.92 to Baczuk, $1,873.28 to Alford and $15,288.42 to Sorensen.

Wolfe says the director erred in law in reaching the decision that the business managers were entitled to annual vacation pay in the amount ordered and failed to observe principles of natural justice in making the Determinations. There is a commonality to each of the Determinations, both on the facts and on the analysis of the claim by each of the business managers for vacation pay that allows the appeal to be addressed in one decision. The appeal submissions on each of the Determinations are identical.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions. The appeal does not request an oral hearing.

ISSUE

The issue is whether the Director erred in law in concluding the business managers were entitled to annual vacation pay in the amount ordered and failed to observe principles of natural justice in making the Determinations.

FACTS

The Determinations indicate that Wolfe operates a car dealership on Boundary Road in Vancouver. Baczuk started working for the Wolfe on September 1, 2001. He worked as a Business Office Manager and was paid on a 100% commission basis. He tendered his resignation and his last day of work was September 10, 2002. He filed a complaint with the Director claiming vacation pay for his entire period of employment. Alford started working for Wolfe on March 1, 1999. She worked as a business manager and was paid on a 100% commission basis. She was on maternity leave from August 27, 2001 to September 5, 2002. On September 2, 2002 she tendered her resignation. She filed a complaint claiming vacation pay from March 1, 1999 to September 2, 2002. She also claimed a car allowance of $200.00 a month that had been discontinued when she went on maternity leave. Sorensen started working for Wolfe on October 11, 1994. He resigned his employment on August 23, 2002. At the time of his resignation he was a business manager and was paid on a 100% commission basis. He filed a complaint with the Director claiming vacation pay for his entire period of employment, statutory holiday pay for Labour Day, 2002, reimbursement for an unsubstantiated deduction from his wages and compensation for length of service.

The Determination and material on file also indicate that the gross profits of the work done in the business office were pooled and the business managers were paid a share of that pool on a predetermined ratio.

Each of the business managers had taken some vacation time off during their respective claim periods and, while away, continued to receive their share of the commission pool.

Wolfe argued that vacation pay was included in the commissions paid to the business managers. The Director did not accept this argument:

> This kind of arrangement would not be acceptable under the Act unless the employer could demonstrate that each employee had agreed to this arrangement. This is because this is the kind of pay structure that implies that vacation pay is paid every pay period. Section 58(2) says that this cannot be done without each employee's agreement. The employer has provided no evidence of this. As well, vacation pay was never recorded as a separate item on the employee's pay statement or in the payroll records as required by Sections 27 and 28 of the Act.

As an additional and alternative position, Wolfe argued that the share of the commission pool received by the business managers while taking vacation time off was not wages and should be deducted from vacation pay entitlement. The Director also rejected that argument, stating:

> . . . the employer's position does not accord with the requirements of the Act. Commissions are "wages"; they are not transformed into something else simply because commissions are pooled. Simply put, such a view would mean that if you had 10 sales people earning an average of $1,000 a month on an individual basis, that each employee would be entitled to $40 vacation pay on those commissions. The employer's total liability of the month would be $400. However, if these employees 'pooled' their commissions so that employees continued to receive commission payments on their vacation, they would not be entitled to vacation pay and the employer would have no liability for vacation pay.

The Determination was issued following a hearing by the Director. The Determination noted that some new issues were raised at the hearing and that the parties were given an additional period of time to make submissions on those issues. The hearing was held on February 11, 2003. Wolfe filed a submission on the new issues on February 24, 2003. Sorensen replied on March 5, 2003.

The new issues raised included the claim by Sorensen for reimbursement of $1000.00 for an unsubstantiated deduction from wages. The Determination relating to the claims by Sorensen contained the following analysis on that claim:

> Section 21 of the Act states that "an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose". The complainant alleged that during his last month, he received an advance of $1,500 and yet $2,500 was deducted from his cheque. He asked for an accounting from the employer and did not received an acceptable explanation . . . . Mr. Field, the controller for the employer, also tried to explain this matter at the hearing. At the time, he said that the $1,000 was as a result of advances given by the employer. At the same time, he said that advances were cleared up every month. This would not explain what happened in the final pay period, where the advance was only $1,500, yet $2500 was deducted. In their submission on February 24, 2003, the employer finally explained that the $1000.00 had to do with a computer purchase made in November, 2000. It is clear that the employer [sic] authorized six equal deductions be made to pay for this computer. Now the employer reports that only 5 deductions were made, four for the requested amount of $535.97 and one for $71.99. Perhaps some other arrangement was made, but the details of this were lost in the employer's ponderous accounting reports. In the absence of an explanation for why this deduction was made some 18 months after it should have been made, I am not prepared to find this deduction was proper.

The claims by Sorensen for statutory holiday pay for Labour Day 2000 and compensation for length of service and the claim by Alford for car allowance were not allowed. There has been no appeal by either Sorensen or Alford.

ARGUMENT AND ANALYSIS

Wolfe argues the Director failed to comply with principles of natural justice in making the Determinations by adopting a procedure for addressing the new issues that did not provide a fair opportunity to be heard and did not provide an opportunity for reply, submission and cross examination on the new issues. The new issues were Sorensen's claims for compensation for length of service and repayment of improper deductions and Alford's claim for entitlement to a car allowance during her maternity leave.

The appeals do not outline how the Director failed to comply with principles of natural justice in making the Determination on Baczuk's complaint. In fact, it is clear from the material that there was no failure by the Director to comply with principles of natural justice in making the Determination on Baczuk's complaint - Wolfe knew what Baczuk's complaint was and had a full and fair opportunity to respond to it.

Similarly, the appeals do not identify how the Director failed to comply with principles of natural justice in making the Determination relating to Alford. Wolfe was made aware of her car allowance claim during the Director's hearing on February 11, 2003. The Determination on Alford's claims indicates Wolfe was allowed to make a detailed submission on the car allowance claim February 24, 2003. In its appeals, Wolfe does not say it was unaware of any elements of the claim or that it did not have an opportunity to respond to it. No prejudice to Wolfe is apparent and none has been asserted. The Director denied this part of the claim made by Alford. I do not find a failure by the Director to comply with principles of natural justice in making the Determination on Alford's claims.

The argument in the appeals on the natural justice ground are directed at the new issues raised by Sorensen at the Director's hearing. In the appeals, Wolfe says:

> . . . the Respondent [Wolfe] was clearly prejudiced by the delegate's insistence on trying to have a hearing whereby no notice was given of the issues and particulars to the Employer; the Employer was forced to try and call evidence during the course of the hearing even though it had no notice of the issue, nor of the particulars; the Employer produced evidence after the hearing, to which the complainant responded with his own evidence, but the Respondent was not given an opportunity to cross-examine the Complainant on this evidence; the Complainant provided a submission to the Branch on this new evidence, to which the Respondent was not given a copy of the submission, nor a chance to reply; and the Determination relies on the submission of the Complainant in reaching its conclusion.

The argument also refers exclusively to the Determination on Sorensen's complaint.

In the circumstances, I do not agree that the Director failed to comply with principles of natural justice in making the Determination on Sorensen's claims. Wolfe knew what the claim was and had a reasonable opportunity to respond to the claim, including an opportunity to present evidence and argument relating to the claim and to establish the deduction was proper. Wolfe was given that opportunity at the Director's hearing and was given a further opportunity to provide evidence and argument subsequent to the hearing. On the face of the Determination, this part of the claim by Sorensen was accepted because Wolfe failed to establish the deduction was proper. I can see nothing in the Determination which indicates the decision was influenced by any assertions made by Sorensen in his March 5, 2003 submission.

This aspect of the appeals is without merit and is dismissed.

Turning to the issue of whether the Director erred in law in reaching the conclusion that the business managers were entitled to annual vacation pay, I will start by correcting what I perceive to be a misconception about the relationship between the obligation to give an employee an annual vacation and the obligation to pay annual vacation pay. Those obligations are, in fact, two separate obligations. The *Act* does not require an employer to provide an employee with a paid annual vacation. Section 57 says an employer must give an employee an annual vacation of at least two weeks after 12 consecutive months of employment - increasing to at least three weeks after five consecutive years of employment. Section 58 say an employer must pay an employee annual vacation pay, after 5 calendar days of employment, of at least 4% of the employee's total wages during the year of employment entitling the employee to vacation pay - increasing to 6% of total wages after 5 consecutive years. Subsections 57(2) and (3) tell an employer when an employee must take annual vacation and subsection 58(2) tells the employer when annual vacation pay is required, or by agreement is allowed, to be paid.

Wolfe argues the amounts received the business managers while they were on vacation time off must characterized as vacation pay:

> . . . in the case of Mr. Baczuk, Mr. Sorensen and Ms. Alford, the amounts they received while they were away from work, and not providing anything in the way of benefit to their Employer while they were away, can only be characterized as vacation pay, an amount paid to them by the Employer while they were on vacation.

Wolfe says the Director erred in law in reaching a different conclusion.

In answering this argument, I make note of several things. First, I note the wording of subsection 58(2), which says:

58 (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 to in writing by the employer and the employee, or

(ii) provided by collective agreement.

There is no indication in any of the material that Wolfe had paid "vacation pay" to the business managers at least 7 days before the beginning of any period of vacation taken by them. Second, there was no evidence the business managers had agreed in writing for vacation pay to be paid on scheduled paydays. There was, in fact, a finding against the position of Wolfe on that point; one which has not been specifically appealed. Third, there was no strong evidence that vacation pay was included in the commission rate. In any event, the following comments from the Tribunal in *British Columbia (Director of Employment Standards) (Re V.C.R. Print Co. Ltd)*, BC EST #RD348/01 (Reconsideration of BC EST #D498/00) are applicable:

> In our view, the Adjudicator erred in permitting a "set off or deduction" of the commissions received by the employees while on vacation, from the vacation pay entitlement. It is clear that an employer cannot incorporate vacation pay or statutory holiday pay within the commission structure, as an all inclusive amount: *Atlas Travel Services Ltd. v. British Columbia (Director of Employment Standards)* (1994), 99 B.C.L.R. (2d) 37 (S.C.), *Monday Publications Ltd.*, BCEST #D296/98 (Reconsideration of BCEST #D059/98). A number of these cases comment on the

> absurdity that ensues where the employee takes time off and the wages are reduced when the employer does not calculate vacation pay correctly.

Fourth, vacation pay was not treated as a separate item on the business manager's pay stubs, which, as noted in the Determinations, was a failure to comply with the requirements of Sections 27 and 28 of the *Act*. Finally, there was no statutory obligation to provide Baczuk with vacation time off during his 12 months of employment. On the basis of the foregoing, it would be quite inconsistent with the facts and with the requirements of the *Act* to find the amounts attributable to those periods where the business managers took vacation time off should be characterized as "vacation pay" for the purposes of the *Act*. The Director found the amounts were not vacation pay and I am not persuaded there was any error in law in that finding.

That does not end the matter. The argument made by Wolfe does not depend entirely on the share of the commissions paid to the business managers while they were taking some vacation time off being characterized as "vacation pay" for the purposes of the *Act*.

I have already rejected the proposition that the Director erred in finding the amounts paid could not be considered vacation pay under the *Act*, but implicit in that argument, which is re-stated in other parts of the appeal submission, is an assertion that the amounts paid to the business managers in those months which included vacation time off was not wages. The appeal submission states:

> We say that this analysis is practical, since normally when employees are away from work on vacation and are paid, that amount must be construed as either wages, coming due to the individual, or an amount paid in lieu of vacation, which must be deducted from the vacation pay amount owing to the employee.

In other words, Wolfe says the share of commissions paid to the business managers when they took vacation time off is not wages and Wolfe should be allowed to deduct that amount from their vacation pay entitlement under the *Act*. This argument is dependent on a conclusion that the share of the commissions paid to the business managers while taking some vacation time off was not wages.

The Determination set out the following evidence given on behalf of Wolfe by Mr. Allan Field, the controller for Wolfe:

> There is a gross profit from the financing operation and after-market sales. This profit is pooled and divided by predetermined ratios. There is no splitting of commission regarding who did the work. Mr. Field referred to the Employer's Tab 5 as an example of a business office calculation. While the business office managers were off on vacation, they are still included in the figures for commission, i.e., while they are away on vacation and not doing any work for the employer. This is because if a business manager is away on vacation, another business manager would take over. The same thing happens if a business manager is on a regularly scheduled day off. There is no tracking of any individual commissions that business managers earn and they don't have any ongoing relationship with customers. If the business manager sells an extended warranty, the profit goes into the pool.

While it is not specifically stated in the Determination, the material on file shows the commission was calculated and paid on a monthly basis. The business managers received a mid-month draw. As indicated in the above reference, there was no tracking of any individual commissions. Nor does there appear to have been any tracking of commissions earned on any specific day or during any specific week. It is clear that both Wolfe and the business managers considered the process of earning the commissions

to be a "team effort". In one of the documents submitted by Wolfe, dated April 12, 2001 and titled "Business Office Remuneration", it states, under the heading "Income":

1. The business office shall be considered one unit for income purposes, irrespective of the number of employees engaged therein.

It would seem appropriate at this stage to refer to the definitions of "wages" and "work" found in the *Act*:

> *"wages" includes*
>
> *(a) salaries, commissions or money, paid or payable by an employer to an employee for work,*
>
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
>
> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
>
> *(d) money required to be paid in accordance with*
>
> *(i) a determination, other than cost required to be paid under section 79(1)(f), or*
>
> *(ii) a settlement agreement or an order of the tribunal, and*
>
> *(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,*
>
> *but does not include*
>
> *(f) gratuities,*
>
> *(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
>
> *(h) allowances or expenses, and*
>
> *(i) penalties.*

The Tribunal has noted in many decisions that the above definition is inclusive, not exclusive.

> *"work" means the labour or services an employee performs for an employer whether at the employee's residence or elsewhere.*

At the Director's hearing and in this appeal, Wolfe has referred to, and relied on, several Tribunal decisions bearing on this issue, most particularly *British Columbia (Director of Employment Standards) (Re V.C.R. Print Co. Ltd)*, BC EST #RD348/01 (Reconsideration of BC EST #D498/00) and *Hewitt Rand Corporation*, BC EST #D271/99. In the former decision, the Tribunal was faced with the question of whether the employer could deduct amounts received by a commissioned sales employee while on vacation from the vacation pay entitlement of that employee and decided, in the circumstances of that case, that it could not. The decision considered the question of whether the amounts paid on vacation were wages or vacation pay. The following excerpts capture the reasoning on that question:

> The Delegate found that commissions generated from the employee's clients, while the employee was on vacation, were wages. The Adjudicator found that commissions generated while on vacation were vacation pay. Vacation pay is calculated on the total earnings in a year - see s. 58(1)(a)(b). In our view there is no distinction between commissions paid while an employee is

> on vacation, or commissions generated from the employee's clients, while that employee is on vacation. In our view the legal character of the payments made was "wages", as it is commission or money paid for work. If the commissions generated from the vacation employee's "clients" by the working employee are not considered "wages" then the vacationing employee suffers a penalty for taking a vacation. The vacationing employee would earn less by taking a vacation, than by remaining at the workplace. We note that there was a reciprocal arrangement in place. The non-vacationing employees covered the vacation of the absent employee, without pay. The absent employee would, when he was at work, perform the same functions for his colleagues, when they were absent, also without pay. The reciprocal arrangement included that each would continue to receive commissions from their own clients while on vacation in return for being available to perform and for performing reciprocal work. The absent employee should have received full credit for the receipts as wages, with vacation pay calculated on the total amount received in a year. This reciprocal arrangement ensured that there was no loss of income during the vacation period, but did not pay the vacationing employee vacation pay.

Wolfe argues the above decision is confined to circumstances where the commissions were generated from the employee's clients. The Director found the circumstances relating to these appeals to be consistent with the kind of reciprocal arrangement that was in place in the *V.C.R. Print* case.

Wolfe argued that the *Hewitt Rand Corporation* decision is relevant, as in that case the Tribunal said that the employer could deduct monies received by an employee on vacation from that employee's vacation entitlement. In the *V.C.R. Print* reconsideration decision the Tribunal noted, however, that:

> . . . the "wage bargain" in *Hewitt Rand Corporation* was substantially different than the wage bargain in this case. In *Hewitt Rand Corporation* the commissions were based on "performance of the branch" in which the employee worked, and were not as is evident in this case based solely on sales or commissions received from the "employee's clients".

The reconsideration panel also noted that merits of the issue of "deduction of monies received" while on vacation, from vacation pay, was not considered by the Tribunal in the reconsideration of the *Hewitt Rand Corporation* decision. An aspect of the *Hewitt Rand Corporation* decision was that the commission paid to the employee could not be directly related to any work performed by that employee.

In his reply to the appeal, Baczuk, quite astutely and accurately, says that while Wolfe and the Director have presented their respective interpretations of previous decisions of the Tribunal, "each case presents its own unique set of facts and circumstances".

The Determination concluded the commissions were wages:

> In my view, the employer's position does not accord with the requirements of the Act. Commissions are "wages"; they are not transformed into something else simply because the commissions are pooled.

I agree with that statement. Wolfe established and nurtured the "team approach" where the commissions earned were not specifically attributable to the work of any particular business manager, but to all of them. The commissions were calculated on a monthly basis based on, and directly related to, the work done by all of the business managers in the month. In addition, there is evidence supporting a conclusion that Wolfe did not intend that the business manager's wages would be affected by days off.

From an evidentiary perspective, there is a fundamental flaw to the position argued by Wolfe in that it presumes the share of the commissions paid to the business managers while they were taking some

vacation time off was unrelated to any work they performed. That position is contradicted by evidence given by Mr. Field and by Sorensen. Mr. Field indicated that when one of the business managers was away, the others would take over all the work. Sorensen testified that when one business manager took vacation, or other, time off, the other business managers would work on his (or her) deals, resulting in an increased work load for the remaining business managers. In my view, it is not unreasonable to conclude the business managers earned their share of the commissions on days they were not at work by accepting an increased workload while other business managers were away.

On balance, I agree with the Director that the circumstances in this case are more consistent with those found in *V.C.R. Print*, than in *Hewitt Rand Corporation*. The Director did not err in finding the share of the commissions paid to the business managers while they were taking some vacation time off were wages for the purposes of the *Act* and Wolfe is not entitled to set off those amounts against vacation pay entitlement under the *Act*.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations dated April 1, 2003 be confirmed in their respective amounts, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal