BC EST #D221/99

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of appeals pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

TSI Telequip Services Inc., Bruce Thompson, Director/Officer of TSI Telequip Services Inc., Fay Joyce Thompson, Director/Officer of TSI Telequip Services Inc.
- and - Christophe Morisseau

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Alison H. Narod
FILE NOS.:	99/020, 99/023, 99/024 & 99/025
DATES OF HEARING:	April 9, 1999 and May 5, 1999
DATE OF DECISION:	June 3, 1999

DECISION

OVERVIEW

All parties appeal a number of determinations of a Delegate of the Director of Employment Standards, each dated December 22, 1998.

In the corporate Determination, the Delegate ordered that TSI Telequip Services Inc ("TSI", also referred to as the "Employer") pay Christophe Morisseau $16,960.61 in respect to unpaid commissions, unpaid overrides, unpaid monthly and annual bonus, unpaid Fonorola fees/commission, unpaid vacation and unpaid salary plus interest.

In separate Determinations of the same date, the Delegate ordered that Bruce Thompson and Fay Thompson, both of whom are directors or officers of TSI, were personally liable pursuant to Section 96(1) of the Employment Standards Act for up to 2 months' unpaid wages owed to Mr. Morisseau. Each were ordered liable to pay $20,918.29 respecting unpaid wages, vacation pay plus interest.

ISSUES TO BE DECIDED

TSI appeals the Delegate's Determinations:

1. that certain commissions are owed to Mr. Morisseau;

2. that Mr. Morisseau is entitled to an annual bonus;

3. that Mr. Morisseau is entitled to payment of his last week's wages on the basis of a salary of $5,000.00 per month;

4. that Mr. Morisseau is entitled to 12.5 days unpaid vacation; and

5. that Mr. Morisseau's claim not be reduced by the amount of $42.60 respecting overpayment made to Mr. Morisseau.

Fay and Bruce Thompson each appeal the Delegate's Determinations respecting their personal liability, saying the order ought not to exceed the total amount that TSI is ordered to pay Mr. Morisseau. The Delegate ordered them each liable to pay to Mr. Morisseau the equivalent of two months unpaid wages. That amount exceeded the Determination against the Corporate Employer. Fay and Bruce Thompson are correct and I rule in their favour in that regard.

Mr. Morisseau appeals the Delegate's decision to deny his claim for commission on sales made by Bruce Thompson after Mr. Morisseau was promoted to Sales Manager.

FACTS AND ANALYSIS

At the outset, I note that credibility was an issue in this case. I found Mr. Morisseau and his witnesses, to be credible and forthright. I found Mr. Thompson to be an evasive and unreliable witness. He demonstrated a willingness to exaggerate and mislead.

Preliminary Objection

The Delegate raised a preliminary objection to the admissibility of documentary evidence which the Employer supplied in support of its appeal. She indicated that the Employer was given numerous opportunities to provide documentation in support of its position during the course of her investigation and although it repeatedly promised to do so, it never did. She submitted that it ought not be permitted on appeal to adduce and rely on new evidence which it could have but failed to produce to her.

Mr. Thompson, on behalf of the Employer, submitted that some of the documents objected to had been shown to the Delegate by the Employer or provided to her by Mr. Morisseau. Mr. Thompson claimed to be unable to give any indication of what proportion of the documents he submitted at the hearing had not previously been provided to the Delegate.

The Delegate was unable to say whether any of the documents had been submitted to her by anyone other than the Employer, including Mr. Morisseau. She had not reviewed them for that purpose. Rather, she took the position that any documents that the Employer had not submitted to her itself were "new evidence" which it could not rely on even if the same documents had been submitted to her by someone else, including Mr. Morisseau. In this regard, she relied on *Tri West Tractor*, BC EST #D268/96, *Kaiser Stables*, BC EST #D58/97 and *514536 B.C. Ltd., operating as National Loans* BC EST #D391/98.

In *Kaiser Stables*, the Adjudicator held inadmissible evidence that the appellant employer had not provided to the Investigating Officer. In that case, there was a consistent and wilful refusal by the employer to participate in the Officer's investigation. In subsequent cases where there has been a concerted refusal to participate in an investigation, Adjudicators have refused to permit an employer to rely on evidence that was available and could have been produced to the Investigating Officer.

It is not an invariable rule that evidence is inadmissible merely because it was not provided to the Investigating Officer. As noted in *Speciality Motor Cars (1970) Ltd.*, BC EST #D570/98, the principles concerning admissibility of evidence must include considerations of the rights of the parties to a fair hearing, such as, but not limited to, the importance of the evidence, the reason why it was not initially disclosed and any prejudice to the parties resulting from such non-disclosure.

In the instant case, the Employer argued that the Determination was issued precipitously and was a surprise to it. Had it known the Determination was about to be made, it would have provided the

documents earlier. I find, however, that the Employer was given numerous opportunities to supply documentation in advance of the Determination. It was not until the Employer advised the Delegate that it might go into bankruptcy that the Delegate, acting prudently, issued the Determination in order to protect Mr. Morisseau's rights under the Act.

Had the Delegate been able to show that the documentary evidence was truly "new" evidence not previously provided to her by anyone and that the party seeking to adduce it had possessed it and wilfully refused to produce it to her, I would have been more favourably disposed towards upholding the Delegate's objection. However, if documents have already been produced to the Investigating Officer by any other source, they are not new evidence. Any party is entitled on an appeal to rely on documentary evidence produced to the Investigating Officer, regardless of who produced it. In the circumstances, I was unable to conclude on the basis of the preliminary submissions that the documentation was truly "new" evidence.

I might add that this was an unfortunate result because it became clear during the hearing that, despite his preliminary submissions, Mr. Thompson well knew that the vast majority of the documents he supplied as part of the Employer's appeal had not previously been produced to the Investigating Officer.

TSI'S Appeal

TSI sells telephone systems, voice mail and long distance packages.

> Mr. Morisseau was hired on May 5, 1993 as a sales representative. He was promoted to Sales Manager in July, 1995. In October, 1997, he and TSI renegotiated his compensation. Mr. Morisseau left TSI's employ on November 7, 1997.

1) Basis of Commissions

Mr. Thompson, on behalf of TSI, submits that Mr. Morisseau is entitled to commissions based on "actual" sales made. This, he says, means that Mr. Morisseau's commission is to be calculated, not on the basis of the contract price the customer agreed to pay in the contract it initially signed with TSI, but, if the contract price is at any time subsequently renegotiated to a lower rate, then on that lower rate.

Specifically, Mr. Thompson says that, on this basis, Mr. Morisseau's claim for commission on the following accounts ought to be reduced as follows:

Account	Contract Sales	"Actual" Sales
Nelson Hotel	$ 14,000.00	$ 10,000.00
Roxy Hotel	$ 12,000.00	$ 9,000.00
Dakota Hotel	$ 16,000.00	$ 0.00

Executive Inn	$ 88,375.00	$ 68,375.00

Mr. Thompson says the Nelson Hotel account's contract price was reduced in June of 1998. He thinks, but is not sure, that the Roxy Hotel account's contract price was reduced in the Spring of 1997. He says the Dakota Hotel never entered a contract to purchase a $16,000.00 voice mail system at all. He says that the Executive Inn account's contract price was reduced in April, 1999, as of the first date of hearing of this matter.

There is no disagreement that prior to November 1997, Mr. Morisseau was to be paid a salary of $2,000.00 per month plus 5% commission "payable on all new sales and major M.A.C.'s". Additionally, the original employment contract says the following about payment of commissions:

> Commission Payment Outline
>
> Sales booked with a deposit and all of the appropriate paperwork will be paid half of the commission in the next pay period, and the second half at the end of the month of cut-over and invoicing. Sales commission is paid once a month on the last business day of each month. Management reserves the right to withhold the payment until the invoice is paid by the customer where it is deemed appropriate.
>
> and:
>
> Charge Backs
>
> For non-payment or cost overruns (due to sales oversights or negligence) where applicable, the sales person will be notified at 60 days of non-payment and will have 30 days to receive payment after which if we are unsuccessful in receiving payment, the charge back will occur.

Mr. Thompson relies on the last sentence of the paragraph titled "Commission Payment Outline" in support of his submission that TSI can withhold payment of commission on an account not paid. He says TSI is not bound by the paragraph titled "Charge Backs" because it was "waived" by the practice of the parties. The practice, he says, was to discuss problem accounts and he says the problem accounts were discussed daily.

Mr. Thompson agreed that none of the contract prices that are in dispute were renegotiated downwards as a result of any complaints about Mr. Morisseau's sales oversights or negligence. He says all of the disputed contracts involved customers who would not pay their accounts. In order to convince these customers to promise to pay their accounts, TSI renegotiated lower contract prices.

Mr. Thompson provides no evidence where, in accordance with the alleged practice, a problem account was discussed with Mr. Morisseau, the contract price was later reduced and Mr. Morisseau was paid a commission based on the reduced contract price. There is, however, evidence that on at least one occasion, TSI gave written notice to Mr. Morisseau in accordance with the paragraph titled

"Charge Backs" and TSI subsequently reduced the commission paid to Mr. Morisseau.

Mr. Morisseau says that under his employment contract, commission could only be reduced in two circumstances: if there was no payment or if there were cost overruns due to his sales oversights or negligence. However, in order to rely on the charge back provision, TSI was obliged to give him 60 days notice.

Mr. Morisseau denies that the charge back provision was waived. He denies there was a daily practice of discussing problem accounts. He says he was given 60 days notice and was charged-back on a commission once during his tenure. Moreover, he points out that TSI only claimed it could reduce his commission on the accounts in dispute after he left TSI's employ, not before. He also notes that TSI negotiated the reduced contract prices in dispute long after he left TSI's employ. Mr. Morisseau points out that the information about renegotiated prices was not put before the Delegate. Additionally, he says all of TSI's claimed changes are in its favour, not his.

The Delegate held that the Employer's practice of making "charge backs" for "sales oversights or negligence" that caused cost overruns was more likely an attempt by the employer to mitigate by not paying a sales commission where there was an administrative oversight such as a failure to do a credit check or to invoice in a timely manner. This practice, she held, was prohibited by Section 21(2) of the Act.

Additionally, she held that the employment contract contravened S. 21(2) of the Act which prohibits an Employer from requiring a Complainant to pay any of its business costs, which this contract attempted to do.

I agree with the Delegate that under Section 21(2), the Employer cannot charge-back its business costs to Mr. Morisseau. For example, it cannot charge-back amounts its says are due to the negligence of others or to faulty equipment. I do not agree that reduction of a sales commission due to non-payment of an account is in all cases an attempt by an Employer to require a sales person to pay its business costs. Whether it is or not depends on the basis of the sales person's entitlement to commission.

A sales person's entitlement to a commission on sales depends on the terms of the employment contract and on the validity of those terms in the face of the Employment Standards Act. The payment of commissions can be made contingent on the occurrence of certain events, such as, in that case, completion of a sale rather than arrangement of a sale *(Kocis (Re)* BC EST#D331/98).

In this case, all parties are agreed that commission is calculated on the basis of sales made, as adjusted by "adds and deletes", and as reflected in the invoice to the customer. They agree that half of the commission is due once the sales agreement is signed and a deposit paid and the balance is due once the account is installed and invoiced. The evidence is that the account is invoiced after installation or "cut-over". A cut-over is when an existing system is switched over to a newly installed replacement system. I note that Mr. Morisseau's letter to TSI of October 27, 1997 confirms that his commissions were to be due when the outstanding installations were completed.

Mr. Thompson said it can take many months after a contract of sale is entered for the installation and cut-over to occur. John Howard McCarthy Junior, a former Senior Technician and Services Supervisor employed by TSI, gave evidence that 80 - 85% of installations occur within 2 months after the sale and they would never exceed 6 months. Cut-overs typically occur within a week of installations. I accept Mr. McCarthy's evidence over Mr. Thompson's on this point.

Contractual provisions which make entitlement to commission contingent on completion of installation do not contravene the Act. With one exception, the employer has not contested whether the installations were made and the accounts were invoiced.

The exception relates to the Dakota Hotel account. The parties agreed that the Dakota is also referred to as the Nelson Hotel and that it is owned by Granville Entertainment Group ("GEG"). The Employer makes a strong argument that no commission was due on this account because the sale alleged, a sale of a $16,000.00 voice mail system, was never made or installed.

Mr. Morisseau says the sale was made. He and the customer signed a contract whereby the customer would purchase a voice mail system. He does not know whether the system was ever installed. I accept that evidence.

According to documentation submitted by Mr. Morisseau and prepared by TSI based on information he supplied to it, the sale to the Dakota Hotel occurred by July, 1997. Mr. McCarthy gave evidence that he understood there was an order to install a voice mail system at the Dakota. He did not recall seeing a signed order, but it was not unusual for a system to be installed without there being a signed order. He said he worked at the Dakota Hotel doing preparatory work which would accommodate the installation of a voice-mail system. He did not know whether one was ultimately installed. Mr. McCarthy gave evidence that there were discussions with the customer, at which he was present, about alternate means of providing the Dakota Hotel with voice mail service, such as by installing it at the Roxy Hotel, which was also owned by GEG, the owner of the Dakota. He could not specifically recall when that discussion occurred. Mr. McCarthy left TSI's employ at the end of May 1998.

Mr. Morisseau supplied a fax from "Bruce" of TSI to "Blaine", dated May 20, 1997 containing references to TSI selling a voice mail system to the Dakota Hotel. Mr. Thompson recalled the fax and discussions associated with it.

The Employer supplied a letter to Blaine Culling, of GEG, dated April 27, 1998, seeking payment of overdue accounts. It attached a "Statement of Indebtedness", which refers to invoices issued to "Roxy", "GEG", "Nelson", "Dakota" and others. As Mr. Morisseau points out, according to that document, the total amounts invoiced exceeded the amounts of the sales he claims he made to the Nelson, Dakota and Roxy and could well encompass the voice mail sale he claims he made to the Dakota. The separate invoicing to the Nelson and the Dakota was not adequately explained by the Employer.

The Employer and Mr. Morisseau submitted a series of monthly Commission Statements for Mr. Morisseau prepared by the Employer's staff and checked and approved by Fay Thompson and Bruce Thompson. The first reference in the Commission Statements to the sale of a voice mail system to the Dakota Hotel is in the July, 1997 statement. It is repeated each month thereafter up to and including the October, 1997 statement. There is no similar notation for any other customer in these statements. In the November, 1997 statement (prepared and provided by TSI) there is no longer any reference at all in this statement to the voice mail system for the Dakota Hotel. However, in the same sequential place as the reference to the Dakota Hotel was formerly located, there is a reference to a voice mail in the same amount for the Nelson Hotel. Additionally, alongside the Nelson Hotel reference is the notation "SEE RECONCILIATION LETTER". The Employer did not provide a copy of the "reconciliation letter".

The Employer supplied a faxed version of a letter dated March 24, 1999 signed by Blaine Culling as President, Hotel Dakota. The "re" line says: "Re: Bruce Thompson and Telequip Networks Ltd." It says, "the Hotel Dakota has not at this time or anytime purchased a voice mail system from Bruce Thompson or Telequip." Mr. Culling was not called as a witness.

There are many evidentiary problems with this document. First of all, it is hearsay evidence. Not only was it not supplied until the first day of hearing, but it refers to Telequip Networks Ltd., which is not a party to any of these complaints. Moreover, the evidence is that this customer was considered a problem account and there may be a variety of reasons it would be willing to supply a letter in which it would deny liability for an unpaid account.

Additionally, there is the unexplained matter of the "reconciliation letter" referred to in the October and November, 1997 Commission Statements which was not produced. As noted, the October, 1997 statement refers to a $16,000.00 voice mail system sold to Dakota and the November, 1997 statement refers to a $16,000.00 voice mail system sold to Nelson. The Dakota and the Nelson are the same hotel. It is entirely possible that there was a sale originally made in the name of the Dakota and later altered to reflect the name of the Nelson, and that this is reflected in the reconciliation letter. As noted, Mr. Culling signed the March 24, 1999 letter as president of the Hotel Dakota. Other correspondence with this individual are with him as a representative of GEG, the owner of the Nelson, the Dakota and the Roxy. It is possible that Mr. Culling signed the letter on behalf of the Dakota Hotel

and not GEG because as suggested by the October and November 1997 Commission Statements there had been a reconciliation pursuant to which the sale to the Dakota had been transferred to the Nelson Hotel's account. In that event, the letter may contain apparently true statements, but the disputed sale itself may have taken place.

The onus of proof in an appeal is on the Appellant, TSI. An adverse inference can be drawn from its failure to call Mr. Culling, and its failure to produce the reconciliation letter referred to in the November, 1997 Commission Statement to explain the differences between October and November statements respecting the voice mail sales to the Dakota and the Nelson. TSI failed to explain the discrepancies in the evidence.

I accept Mr. Morisseau's evidence that he sold a voice mail system to the Dakota Hotel and Mr. McCarthy's evidence that he understood there was an order for a voice mail system at the Dakota and that he did preparatory work for the system.

In view of the conflicting and unexplained evidence of TSI, I find it unlikely that Mr. Thompson was unaware, after his discussions with Mr. Culling in May 1997 and his review of Mr. Morisseau's July, 1997 Commission Statements, that Mr. Morisseau had sold a $16,000.00 voice mail system to the Dakota. Although I am loathe to order that TSI pay a commission if it did not install a voice mail system, it has failed to discharge its onus and convince me on the evidence and on a balance of probabilities that the sale was not made and that a voice mail system to service the Dakota/Nelson, was not installed at that or another location owned by GEG.

With respect to the balance of the contested accounts, there is no dispute over whether the systems sold were installed or "cut-over". The dispute relates to whether or not the Employer can later renegotiate the sales price to a lower amount for reasons unrelated to Mr. Morisseau's performance and pay commission on the new lower amount, rather than the original amount.

In my view, the employment contract gives the Employer the discretion to withhold payment of commission where it is deemed appropriate. It must exercise that discretion reasonably (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1 (S.C.C.) per McLachlin J., Laforest J. And L'Heureux-Dube J., concurring, dissenting in part, *Greenberg v. Meffert* (1985), 50 O.R. 755, 18 D.L.R. (4th) 548 (Ont. C.A.) leave to appeal refused, [1985] 2 S.C.R. ix, 30 D.L.R. (4th) 768n., *Truckers Garage v. Krell*, (1993), 68 O.A.C. 106, 3 C.C.L.L. (2d) 157).

The Employer has not demonstrated a practice of exercising this discretion during Mr. Morisseau's tenure. It is not reasonable for it to attempt to exercise it after Mr. Morisseau left its employ in a manner detrimental to Mr. Morisseau.

In any event, the "charge-back" clause qualifies this discretion by setting out circumstances where commissions can be charged back.

I agree with the Delegate to the extent that the contractual provisions permitting charge-backs for reasons unrelated to Mr. Morisseau's performance run afoul of Section 21(2). Additionally, because TSI did not comply with the notice requirements of the charge-back provision, it cannot otherwise reduce the commission payable on the disputed accounts. I uphold the Delegate's determinations respecting the commissions to be paid to Mr. Morisseau on the accounts in dispute.

2) Annual Bonus

Mr. Thompson says the Delegate erred in determining that TSI owed Mr. Morisseau an annual bonus.

Mr. Thompson says that Mr. Morisseau was not entitled to an annual bonus in the 1997 - 1998 year at all because in order to be entitled to the bonus he must have met three criteria. He must have earned over $360,000.00 in sales, he must have expended effort in assisting with collections and he must have been employed in May of the following year in order to qualify for a bonus for the preceding 12 months. Mr. Thompson admits he paid Mr. Morisseau part of his annual bonus in October 1997 but says this was in consideration for a promotion to Sales Manager. However, as soon as Mr. Morisseau received the bonus he quit and thereby frustrated the new employment contract. As a result, Mr. Morisseau did not qualify for the bonus. Therefore Mr. Morisseau ought to repay any monies TSI paid him on account of bonus for the year from May 1997 to May, 1998.

Mr. Morisseau disputes this. He says under his employment contract the only requirement was that he achieve sales in excess of $360,000.00. He achieved sales in excess of $520,000.00 in the first half of the year. He says that the understanding of sales staff was that as soon as you meet quota, you earn bonus. He says it was only for bookkeeping reasons that the bonus was not paid until May.

Alan Dion, a former TSI sales person, gave evidence about the annual bonus. He said his understanding was that once a sales person met quota, he earned it. He said there was no requirement that the sales person be employed in May. Mr. Dion never actually received a bonus. He said that one of the reasons the bonus was paid in May was for bookkeeping reasons. A second reason was that the Employer had a right to make charge backs and these could not be ascertained until the end of the year. Mr. Dion said he came close to getting a bonus one year, but after charge backs were deducted his sales fell below the quota.

As noted above, Mr. Morisseau accepts that "charge-backs" can be made where problems with the

sale are attributable to his own performance. He points out that TSI does not allege there were any charge backs for reasons attributable to him that ought to have reduced his bonus.

Mr. Thompson acknowledged that if Mr. Morisseau's sales were reduced by the difference between the amount of sales Mr. Morisseau says he ought to receive commission on and the "actual" sales TSI says he made, Mr. Morisseau's total sales would still exceed the quota.

Mr. Morisseau also says that the fact that TSI agreed as part of a revision to his commission structure in 1998 to pay his outstanding bonuses supports his claim that there was no requirement that he be employed in May to receive his annual bonus.

Mr. Morisseau's original employment contract says the following respecting the annual bonus:

> Quota Club
> $360,000.00 annual volume (all sources) starting May 1994 earns TSI Telequip Sales Representatives a 7 day trip to an exotic location such as HAWAII or MEXICO.

There is no stipulation in that clause that the Sales Representative be employed in May of any year to be entitled to the annual bonus. Mr. Morisseau exceeded the bonus. TSI failed to prove there were sufficient charge backs to disentitle him to the annual bonus.

Mr. Morisseau submitted a letter dated October 27, 1997 which he says sets out the new commission structure agreed to by TSI. That letter states, in part,

> Because this is a new contract starting November, 1997, it is imperative that Telequip pays all outstanding bonuses (monthly/quarterly, yearly (over $360,000.00)) before October 31, 1997 and commit the payment of the remaining commissions when the outstanding installations are completed.

He says the Employer later attempted to renege on this agreement by proposing further revisions and this was what led him to resign with a few days notice.

Mr. Thompson disputes that an agreement was reached and, as noted, says that the agreement was frustrated when Mr. Morisseau quit. I prefer Mr. Morisseau's evidence over Mr. Thompson's evidence and find that an agreement was reached. Mr. Thompson later attempted to renege on the agreement. He repudiated the contract and Mr. Morisseau was entitled to quit. Mr. Thompson cannot rely on the claim Mr. Morisseau frustrated the contract and that Mr. Morisseau was not entitled to the bonus he had agreed to pay.

As a result, I accept Mr. Morisseau's evidence that he was entitled to the annual bonus even though he was not employed in May, 1998 and that, in any event, the Employer agreed to pay him his outstanding bonus by October 31, 1997. He is therefore entitled to payment of the unpaid bonus of $596.00 as ordered by the Delegate.

3) Last Week's Pay

The Delegate held that the changed compensation plan associated with Mr. Morisseau's promotion to Sales Manager was enforceable and therefore, his last week's pay ought to be based on his salary in that position. His salary under the new arrangement was $5,000.00 per month.

TSI contests that finding saying that the employment contract was frustrated when Mr. Morisseau quit in November 1997.

In view of my finding that the agreement to the new compensation plan was not frustrated, I find there was no error in the Delegate's decision that Mr. Morisseau's last week's wages be based on his salary of $5,000.00 per month.

4) Vacation

The Delegate held that Mr. Morisseau was entitled to 12.5 days vacation.

TSI submitted that the Delegate erred in so holding and that Mr. Morisseau was only entitled to 2.5 days vacation.

Mr. Morisseau's employment contract provided for 3 weeks paid vacation. At the hearing, the parties agreed that Mr. Morisseau was given 15 working days vacation each calendar year to be taken within the same calendar year. Mr. Morisseau claimed that out of his allotment of 15 days for the 1997 calendar year, 12.5 days remained outstanding.

Mr. Morisseau provided documentation to the Delegate which was relied on in making the determination. This includes a statement of his vacation entitlement and the dates when he took vacation, a copy of an excerpt from TSI's payroll records and a memo from Fay Thompson, dated February 3, 1997, stating that TSI's records of his vacation entitlement was incomplete to that date.

As part of its appeal, TSI submitted documentation it had not provided to the Delegate, which indicated that as of September 9, 1997, Mr. Morisseau was entitled to 11.5 vacation days. TSI also took the position that it could deduct from his annual vacation allotment bonus vacation days it granted Mr. Morisseau, that it could pro-rate his vacation entitlement for the portion of the 1997 calendar year he did not work and that it could deduct a further half day for time Mr. Morisseau spent travelling back from a convention (because he could have scheduled the return trip during non-working hours). TSI and Mr. Morisseau also differed over whether or not he had taken 16 as opposed to 18 days vacation during the summer of 1994. As noted, TSI claimed that at the time Mr. Morisseau left, he had only 2.5 vacation days remaining.

I cannot confidently rely on TSI's documentation as it is internally contradictory. Additionally, it appears on at least one document that TSI deducted bonus vacation days from his recorded entitlement after Mr. Morisseau left its employ and that it failed to add the bonus days to the allotment before later

deducting them.

In view of Mr. Morisseau's acknowledgment that the vacation was allocated and to be taken in the year it was earned, I accept Mr. Morisseau's calculations, but I agree with the Employer that the annual entitlement ought to have been pro-rated for the portion of 1997 after he left its employ and would therefore reduce his vacation entitlement by 2.5 days to 10 days in total.

5) Overpayment

TSI claims it overpaid Mr. Morisseau $42.60 in May, 1997 as a result of an error it made in calculating his commissions. It submits that he owes TSI this amount and it ought to be deducted from the monies owed to him.

TSI took the position before the Delegate that it had made a number of overpayments to Mr. Morisseau. Despite its advice that it would provide particulars and details of these claims to the Delegate, it did not do so before she made her Determinations. It renews its claim in this appeal but limits it to the claimed overpayment of $42.60. It provided particulars on the first day of hearing. Mr. Morisseau objects to TSI's late disclosure of particulars and supporting documentation. I need not deal with that objection in view of my conclusion.

Section 21(1) of the *Act* states:

> S. 21(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada , an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

What TSI seeks to do is to set off a debt it says Mr. Morisseau owes it against unpaid wages it owes him. This is prohibited by s. 21(1). TSI has other avenues to seek repayment of claimed debts.

I dismiss this aspect of the appeal.

Christophe Morisseau's Appeal

Mr. Morisseau claims that from and after July, 1995, he ought to have been paid a 1.5% commission on sales made by Mr. Thompson.

He says he is entitled to this because, when he was promoted from Sales Representative to Sales Manager, he proposed in a letter of July 24, 1995 that he be paid the following commission as a term of the new position:

"1.5% of monthly total volume of the sales force (minimum 2 sales people) excluding Long Distance."

Mr. Morisseau says that Mr. Thompson deliberately defeated his right to commission on a minimum sales force of two Sales Representatives. This is because Mr. Thompson was the only person with the authority to hire new Sales Representatives and, when the sales complement fell to below the minimum of two, Mr. Thompson did not hire replacement Sales Representatives. Mr. Morisseau says Mr. Thompson did not hire more Sales Representatives because he did not want to pay Mr. Morisseau additional commissions. Instead, Mr. Thompson spent most of his time selling and effectively became a Sales Representative.

Mr. Thompson denies that his sales were to be included in the calculation of Mr. Morisseau's commission and points to his letter of July 27, 1995 in which he accepted Mr. Morisseau's proposals. It states:

> "...we will both establish a sales team quota which is acceptable to the company and recognizable as attainable by you. I suggest this quota for Tony and Louis (or whoever else) is established in September after 60 days of training and prospecting is done by them."

Tony and Louis were Sales Representatives employed by TSI at the time.

The parties agree that Mr. Thompson spent at least 60% of his time selling before Mr. Morisseau was promoted. Mr. Morisseau acknowledged that he could not establish that the amount of time Mr. Thompson spent selling changed after Mr. Morisseau was promoted.

Mr. Morisseau says that Mr. Thompson had the sole authority to hire new Sales Representatives and was obliged under their 1995 exchange of letters to ensure that at all times there was a minimum of two Sales Representatives. Mr. Thompson disputes this and says Mr. Morisseau had the authority to hire Sales Representatives. Mr. Thompson acknowledges that he would have to approve any prospective new hires. There was a dispute about whether Mr. Morisseau hired Garrett Ungaro. However, it is clear to me that although Mr. Morisseau ultimately informed Mr. Ungaro of TSI's offer to hire him, it was Mr. Thompson who made the decision to hire Mr. Ungaro and set his terms and conditions of employment.

In my view, the exchange of letters does not confirm an agreement that Mr. Morisseau would receive commission on Mr. Thompson's sales. Mr. Morisseau's letter of July 24, 1995 refers to the "sales force" as comprising a minimum of two "sales people". Mr. Thompson's response refers to two Sales Representatives by name. Neither letter refers to Mr. Thompson as being included in the group of sales people covered by the commission. This exchange of correspondence does not contemplate the Mr. Thompson would be considered one of the sales people whose sales would be counted as part of Mr. Morisseau's commissions.

Nor is there any evidence to support that Mr. Thompson altered his pattern of sales activities after Mr.

Morisseau's promotion. Therefore, I find that he did not effectively "become" a sales person in order to defeat Mr. Morisseau's entitlement to commissions.

Further, the exchange of letters does not establish a committment that if the complement of sales people fell below two, TSI either through Mr. Thompson or Mr. Morisseau, would be obliged to hire more sales people to return to a minimum of two. Even if I am wrong in this regard, there is no evidence before me of the commission that likely would have been earned had there been a sales force of two Sales Representatives (excluding Mr. Thompson who, as I have said did not alter his pattern of selling) throughout the relevant period.

I therefore dismiss Mr. Morisseau's appeal.

ORDER

I confirm the Delegate's Determination with respect to amounts which she ordered TSI to pay to Mr. Morisseau, with the exception that the amount of unpaid vacation to be paid is reduced from 12.5 days to 10 days. I leave the re-calculation of the Determination to the Delegate.

Additionally, I order that the Delegate's Determinations respecting Bruce Thompson and Fay Thompson each be reduced to the lesser of the amount of the corporate determination or two months unpaid wages.

Alison H. Narod
Adjudicator
Employment Standards Tribunal