EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

InterCity Appraisals Ltd.

("InterCity")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	96/424
DATE OF HEARING:	October 1st, 1996
WRITTEN SUBMISSIONS RECEIVED	October 4th & 11th, 1996
DATE OF DECISION:	October 22nd, 1996

DECISION

APPEARANCES

Dean A. Crawford	for InterCity Appraisals Ltd.
Michael S. LaPorte	on his own behalf
Douglas A. Niemi	on his own behalf
Lynne L. Egan & Catherine Hunt	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by InterCity Appraisals Ltd. ("InterCity") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 003048 issued by the Director of Employment Standards (the "Director") on June 26th, 1996. The Director determined that InterCity owed its former employees, Michael S. LaPorte ("LaPorte") and Douglas A. Niemi ("Niemi"), the sum of $17,833.41 on account of unauthorized deductions (section 21), unpaid statutory holiday pay (sections 44 and 45), unpaid vacation pay [section 58(1)(b)] and severance pay (section 63). The Director determined that LaPorte was entitled to $9,181.62 and Niemi to $8,651.79. For convenience, I will refer to LaPorte and Niemi as "the employees".

The two employees formerly worked with InterCity as real estate appraisers. During their tenure with InterCity they were paid pursuant to a series of commission formulae. The employees both resigned, with two weeks' notice, on September 6, 1995 (see Exhibit 1); their last day of work was October 13, 1996. After resigning from InterCity, the two employees continued working as real estate appraisers through their own firm, Niemi & LaPorte Appraisals Ltd.

InterCity has appealed the Determination on the grounds that the Director erred in law in holding that InterCity was not entitled to deduct a pro-rated share of the employee's liability insurance premiums and in awarding the employees statutory holiday pay (section 45), vacation pay (section 58) and severance pay (section 63).

At the conclusion of the appeal hearing, Mr. Crawford, on behalf of the appellant InterCity, conceded that in light of section 21 of the Act, he was no longer contesting the Director's Determination with respect to the deduction of the insurance premiums from the employees' final paycheques ($409.39 from each employee's cheque).

The appeal hearing was conducted in Surrey, B.C. on October 1, 1996 at which time I heard sworn testimony from Richard Sieb and Dale Hooker on behalf on InterCity, and from the two employees

and their witness, Ronald Dingwall. Due to a lack of time, I was unable to hear final submissions from the Director and, accordingly, Ms. Hunt, kindly agreed to deliver her final submission in writing, on or before October 4th; Mr. Crawford's written Reply was to be delivered by October 11th. On October 4th I received an eight-page submission from Ms. Hunt; Mr. Crawford's six-page Reply was delivered on October 11th. I also received a two-page joint submission from the employees on October 11th.

Having considered the evidence and submissions of the parties I am of the view that the Determination must be varied. My reasons for so doing are set out below. I propose to deal with each of the employees' three claims (statutory holiday pay, vacation pay and severance pay) in turn. However, prior to turning to the merits of the three monetary claims I must first consider Mr. Crawford's contention that certain aspects of the employees' claims, as set out in the Determination, were statute-barred.

ANALYSIS

The Limitation Period Issue

Mr. Crawford submits that the employees' claims for statutory holiday pay and vacation pay ought to be limited to that owed in the six-month period prior to the filing of the complaints [which were filed on November 7 (Niemi) and 8 (LaPorte), 1995]. Mr. Crawford submits that there is a "gap" in the transitional provision of the Act (section 128). Specifically, Mr. Crawford asserts that although the circumstances giving rise to the employees' complaints occurred prior to November 1, 1995 (and thus arose under the "old" Act), the employees' complaints were filed under the current Act. As the present complaints would have been statute-barred, at least in part, under the old Act [see section 80(1) of the "old" Act which provided for a six-month limitation period] and because the transitional provision in the new Act does not specifically address the present situation, Mr. Crawford asserts "that the Director should have adopted the judicial presumption against retroactivity and resolved this ambiguity in favour of the Employer" (letter to Tribunal dated August 20, 1996).

Mr. Crawford's submission is an attempt to by-pass section 80 of the current Act which provides that once a complaint has been filed, the Director may order the payment of all wages earned in the 24 month period prior to the earlier of the date of complaint or termination. In the instant case, the statutory holiday pay and the vacation pay claims both extend beyond the six-month limit provided for under the "old" Act. In his Reply of October 11th, Mr. Crawford submits (at p. 4) that "on October 31, 1995, the day before the repeal of the old Act, the Employer had an accrued right to plead a time-bar against all claims for wages which were to be paid to an employee prior to April 30, 1995."

First, I do not see that there is any legislative "gap". The two complaints in this case were filed in a timely manner under section 74 of the current Act. The transitional provision is irrelevant in this case as there was no pending decision under the "old" Act; indeed, neither complaint was filed under the "old" Act. The instant complaints were both filed under, and are therefore governed by, the new Act.

Second, I do not agree that the employer "had an accrued right to plead a time-bar against all claims for wages which were to be paid to an employee prior to April 30, 1995." If the new Act had never been brought into force, the most that can be said is that a portion of the employees' wage claims could not be adjudicated under the old Act's complaint procedure. However, even under the old Act, wage claims that extended beyond the six-month complaint limit were not extinguished. In such a case, an employee would merely pursue the unpaid wage claim by way of a civil action (governed by the usual limitation period for contract claims)--this right to pursue a separate civil action was expressly preserved by section 3 of the "old" Act and continues to be preserved by section 118 of the current Act.

Finally, in my view, the thrust of Mr. Crawford's submission runs counter to the "purposes" expressed in section 2 of the current Act, and in particular, the desire for fair and efficient dispute resolution procedures. To give effect to Mr. Crawford's submission would, in effect, truncate these proceedings and force the parties into two separate adjudicative forums--the Tribunal (for all wage claims within the six-month limit under the old Act) and the civil courts (with respect to the balance).

I am of the view that the Director did not err in applying the provisions of the current Act to the employees' complaints.

Statutory Holiday Pay and Vacation Pay

Sieb testified that the employees' agreed in January 1994 to a compensation plan whereby they would receive a 50% commission on their gross billings and that the commissions payable would be deemed to include both statutory holiday pay and vacation pay. The employees testified that a new commission structure was put into place in December 1993 whereby their 50% commission would include 4% vacation pay but not statutory holiday pay. There are no documents to corroborate either the position of Sieb or the two employees.

Dale Hooker, who is an experienced appraiser, testified that so far as he knew, the common industry practice was for employee appraisers to be paid on a "straight commission" basis and that their commission earnings would be deemed to include such things as mileage, photography costs and statutory holiday pay but not vacation pay. While I accept that Mr. Hooker is generally knowledgeable about compensation practices in the real estate appraisal industry, I cannot draw any conclusions from his general testimony about the specific contractual terms that were in place between InterCity and the two employees.

The Director's delegate concluded that the employees had never specifically agreed to any proposal whereby their statutory holiday pay would be included in their general commission earnings. I would reiterate that there is no written evidence of any such agreement. InterCity has not produced *any* payroll records to show that statutory holiday pay was, in fact, paid to the employees. InterCity has not satisfied me, on a balance of probabilities, that the agreement regarding holiday pay alleged by Mr. Sieb was, in fact, entered into. Leaving aside the question of whether or not it was even permissible for these employees to agree to "roll" their statutory holiday pay into their general commission earnings (Q: Would such an agreement be void under section 4?), the employer has simply not met its burden of satisfying me that such an agreement was reached in this case. I would not disturb the Determination insofar as statutory holiday pay is

concerned. I find the approach taken in the Determination and accompanying schedules to be reasonable insofar as the calculation of the amounts owed on account of holiday pay is concerned. I do not, however, agree with the approach taken with respect to the calculation of vacation pay, either in general, or with respect to vacation pay accruing on statutory holiday pay. I will deal with this latter issue in greater detail below.

As noted above, the employees agree that in December 1993 they reached an agreement with Sieb whereby they would received a 50% commission on their gross billings which included 4% vacation pay. InterCity says that this agreement was reached in January 1994 was not only with respect to the then accruing obligation to pay 4% vacation pay, but also to any future obligation to pay 6% vacation pay. It is common ground that LaPorte reached his fifth anniversary with InterCity in November 1994 and Niemi in January 1995 and thus, pursuant to section 58(1)(b) of the Act, were then entitled to 6% vacation pay.

I am not satisfied that any agreement was reached in late 1993 or early 1994 regarding the payment of 6% vacation pay. There is no documentary evidence of such an agreement, nor can I see any logical reason why the employees would agree, in effect, to take a pay cut commencing on their respective fifth anniversary dates.

In this case the employees agreed, as they were entitled to do under section 58(2)(b) of the Act, to have their vacation pay included in their regular paycheque. Thus, vacation pay was paid by InterCity as it accrued due.

However, as I have found above, the employees only received 4% vacation pay after their respective fifth anniversaries when they were in fact entitled to 6%. Accordingly, I find their entitlement to additional vacation pay to be as follows (I am relying on Ex. 9 for the gross commission figures):

LaPorte:	November 1994 earnings	= $ 4,593.43
	December 1994 earnings	= $ 3,478.00
	1995 earnings	= $44,845.52
	Total	= $52,916.95
	Vacation Pay = [$52,916.95÷1.04] x .02	= $1,017.64
Niemi:	1995 earnings = [$42,618.02÷1.04] x .02	= $819.58

Over and above the additional vacation pay accruing on the employee's commission earnings set out above, the employees are also entitled to vacation pay on their statutory holiday pay. Section 58 of the Act provides that vacation pay is to be paid at a rate of 4% of wages for the first five years of employment and at a rate of 6% of wages thereafter. Thus, based on the holiday pay calculations set out in the Determination, I would add additional vacation pay to each employee's statutory holiday pay as follows:

LaPorte:	$2,729.94 x .04	=	$109.20

	$1,972.26 x .06	=	$118.34
	Total	=	$227.54
Niemi:	$3,042.50 x .04	=	$121.70
	$1,470.39 x .06	=	$ 88.22
	Total	=	$209.92

Severance Pay

As was noted above, on September 6, 1995, both employees gave two weeks' notice of their intent to terminate their employment with InterCity. The Director's delegate found that the employer initially accepted this notice but on September 13, 1995 terminated the employees. Accordingly, the two employees were awarded, in the Determination, one week's severance pay as compensation for having been denied the opportunity to work out the second week of the two week notice period.

InterCity argues, however, that it had just cause to terminate the employees on September 13, 1995 and, in light of section 63(3)(c) of the Act, the employees were not entitled to work out the second week of their notice period. I am satisfied that InterCity had just cause to terminate the employees and, therefore, was not obliged to continue the employees on the payroll during the second week of the notice period. In my view, the evidence clearly shows that the employees breached their employment obligations to InterCity because, for several months while they continued in InterCity's employ, they were in a conflict of interest.

While I am prepared to accept that the employees did not, while they were employed by InterCity, solicit InterCity clients for their new firm, I am nonetheless of the view that, by incorporating a firm which would directly compete with InterCity (in early May 1995), and by proceeding to take all the ordinary steps to establish that competing business during the next three months (including arranging office space, the printing of business cards and letterhead, securing telephone service and listing their new firm in a local local directory), they were in breach of their employment obligations vis-à-vis InterCity (see *Empey v. Coastal Towing Ltd.* [1977] 1 W.W.R. 673).

Summary

The employees' respective claims, exclusive of interest pursuant to section 88 of the Act, are as follows:

LaPorte:	
Unauthorized payroll deduction	$ 409.39
Statutory holiday pay	$4,702.20
Vacation pay	$1,245.18
Total	$6,356.77

Niemi:	
Unauthorized payroll deduction	$ 409.39
Statutory holiday pay	$4,512.89
Vacation pay	$1,029.50
Total	$5,951.78

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003048 be varied and that a new Determination be issued as against InterCity Appraisals Ltd. in the amount of $12,308.55 together with interest to be calculated by the Director in accordance with section 88 of the Act.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal