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 -

Hewitt rand Corporation
("Hewitt Rand" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/52 and 1999/53
HEARING DATE:	May 31, 1999
DECISION DATE:	July 21, 1999

DECISION

APPEARANCES

Mr. Barry N. Horn — on behalf of the Employer

Mr. Thomas J.M. Park — on behalf of himself

OVERVIEW

This is an appeal by Hewitt Rand pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director of Employment Standards (the "Director") issued on January 15, 1999 which determined that Hewitt Rand was liable for unauthorized deductions from commissions, overtime wages and vacation pay to Thomas Park ("Park" or the "Employee") (Sections 18, 21, 40 and 58 of the *Act*). In one determination, the delegate found that Park is entitled to in excess of $3,970.57 (the "Park Determination"); in another, the delegate found that Hewitt Rand had contravened Section 46 of the *Employment Standards Regulation* (the "*Regulation*") for failure to produce records of hours worked and vacation pay in a timely fashion (the "Penalty Determination"). Moreover, as noted by the delegate, the records produced did not meet the requirements of Section 28 of the *Act*.

The central findings of the Park Determination may be summarized as follows:

1. When Park left the employ of the Employer, the latter deducted or withheld $552.36 from his final pay cheque on account of a camera returned from a customer which, the Employer says, Park agreed to purchase. The Determination concluded that the Employer was not entitled under the *Act* (Section 20 and 21) to withhold this amount.

2. The Employer required Park, a salesman, remunerated partly by salary and partly by commissions, to work four hours of overtime per month for which he was not remunerated. The delegate calculated the amount owing on account of overtime for 1996 and 1997 to be $2,509.16 (Section 40).

3. Park did not receive the correct amount of vacation pay.

ISSUES

The issues before me are:

1. Is the Employer entitled under the *Act* to withhold the $552.16 on account of the alleged agreement to purchase?

2. Did Park work overtime? In the alternative, if he did, what is the correct amount owing?

3. Did Park receive the correct amount of vacation pay?

4. Was it appropriate to issue penalties in the circumstances?

I propose to deal with these issues in that order.

ANALYSIS

The burden rests with the appellant to show that the Determination is wrong.

1. Withholding from Wages

The Employer's appeal submission argues that there was a verbal agreement between it and Park to the effect that he would purchase a camera which had been returned from a customer. He did not take possession of the camera. Park disputes the existence of an agreement. At the hearing, the Employer acknowledged that, even if it could establish the existence of such an agreement, Section 20 and 21 of the *Act* would prohibit the withholding of money for that purpose. I agree and, in the result, I uphold that part of the Determination: the Employer must pay the $552.16 to Park.

2. Overtime

The delegate found that employees, including Park (a salesman), was required to assist in the warehouse on a regular basis, one, two or three days a month. The duties consisted of building computers, making, moving and stacking boxes, and using the forklift. Based on her investigation, which included interviews with a number of ex-employees, the delegate accepted that "four hours each month end is a very low estimate of actual overtime worked".

The Employer does not dispute that Park participated in this work and admits that it did not keep records of his hours worked. The Employer does dispute that overtime hours were worked.

Essentially, the Employer argues that it had a flexible and casual relationship with the sales employees who were "not expected to clock in or out". The extra work--sales people "helping in the back"--was "voluntary, informal and casual". The Employer also says that the commission earnings compensated for the extra hours.

In my opinion, the Employer has not discharged the burden to show that this aspect of the Determination is wrong. As mentioned by the delegate, Section 40(2) of the Act provides:

> 40.(2) An employer must pay an employee who works 40 hours a week and is not on a flexible work schedule adopted under section 37 and 38
>
> > (a) 1 1/2 times the employee's regular wages for the time over 40 hours, and
> > (b) double times the employee's regular wage for any time over 48 hours.

The Employer did not argue that the flexible work schedule--for employees not covered by a collective agreement, as is the case here--met the requirements of the *Act* and the *Regulation* (Section 37). It was, in any event, clear on the facts that the "flexible work" arrangement in this case was a more informal arrangement than that provided for in Section 37 and that there was some dispute between the Employee and the Employer as to how "flexible" and "voluntary" the arrangement really was. In short, where employee work hours in excess of the hours provided for in Section 40, they are entitled to overtime wages.

Hewitt Rand's evidence as to the hours worked is at best impressionistic and provide no details as to dates or hours actually worked. This evidence is not, in my view, reliable. Had the Employer kept the records required by the Act, it would obviously have been in a better position to dispute the delegate's findings. In this case, the delegate interviewed other former employees to estimate the hours worked and, in her view, it was a "low estimate". I dismiss this ground of appeal.

Hewitt Rand also says--in the alternative--that the delegate's calculation of wages owing is incorrect.

Section 1 of the *Act* defines "regular wage" as follows:

> (d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work

The delegate based her calculation on 40 hours as the "normal or average weekly hours of work". The Employer says that "normal or average weekly hours of work" should be 41, that overtime hours multiplied by .5 and not 1.5 and, therefore, the amount owing is substantially smaller. There was no evidence to support the Employer argument that the "normal or average weekly hours of work" should be 41 rather than 40. In fact, the Employer seems to have added the approximately 4 hours of overtime per month to the "normal or average weekly hours of work".

The evidence, however, was that the overtime usually took place at month end. There is, therefore, in my view, no basis for adding these hours to the weekly hours. Moreover, I do not agree that .5, as suggested by the Employer, is the correct multiplier. As mentioned above, overtime is payable at 1.5 times the regular wage.

In the result, I am not persuaded that the delegate's calculations are wrong and I dismiss this ground of appeal.

3. Vacation Pay

The delegate calculated outstanding vacation pay as follows: 4% of Park's 1997 earnings of $32,844.07 is $1,313.76, less $772.73 paid, results in a balance of $541.03.

The Employer argues that it did pay vacation pay. Park was paid by salary and commissions. The commissions, I understand, was based on the performance of the branch in which Park worked. I further understand that he was paid 1/2 of the monthly base salary *and* the commissions generated while he was away on vacation. The delegate did not take into account the commission earnings. The Employer argues that an amount on account of the commissions generated and paid should be deducted from the amount owing.

In my view, the Employer's scheme is contrary to the *Act*. Salary and commissions cannot be inclusive of vacation pay. In that regard, I refer to the comments in *Monday Publications Ltd.*, BCEST #D296/98, reconsideration of #D059/97, at pages 3-4:

> The Adjudicator concluded that including statutory holiday pay in the commission contravened the *Act* and that he was bound by Mr. Justice Braidwood's decision in *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)* (1994), 99 B.C.L.R. (2d) 37 (S.C.) referred to in the original Decision, at page 8:
>
> > "The argument fails on a logical basis. By the Employment Standards Act, s. 36(1)(b), after five years of employment, an employee shall be entitled to three weeks of vacation. By the contracts the travel agent signed with Atlas Travel, after two weeks of employment, an employee would be entitled to three weeks of vacation. Assuming a base commission of 50 percent, the Employment Standards Act provides for 2 per cent vacation pay per week. Therefore, with 2 weeks of vacation the employee is receiving 46 per cent commission. With 3 weeks of vacation, that commission drops down to 44 per cent. This is

> an absurd result, for an employee's "total wages" ought not to decline with seniority in order to fund a statutory obligation which rests with the employer.
>
> The *Employment Standards Act* sets up a scheme whereby an employer is obligated to pay an employee something in addition to their wages for annual vacations and general holidays. Section 37(1) states that the annual vacation pay shall be calculated on the employee's total wages. Therefore the appellant's attempt to have the employee's commission include their vacation and holiday pay does not comply with the *Employment Standards Act*"

Having found that the Employer's scheme contravenes the Act, what remedy is Park entitled to? An employee is entitled to 4% of his "total wages during the year of employment entitling the employee the employee to the vacation pay" (Section 58(1). Where the employment of an employee terminates, the vacation pay must be paid in accordance with Section 18 (Section 58(3).

In this case, the delegate calculated the amount Park would be entitled to, namely 4% of his total wages and then deducted the amount already paid to him. This amount was approximately 1/2 of the monthly base salary, reflecting vacation time of 10 working days. She found that Hewitt Rand owed him the balance. In my view, she ought to have deducted--as well--the commissions paid to Park while he was on vacation. I understand from the Employer's appeal that it paid $440.59 for the month of May 1997 (when Park was away on vacation). There is no dispute between the parties that the commissions were earned and paid for the period. There were 22 working days in May 1997. Hewitt rand argues that 1/2 of the commissions should be deducted. In the circumstances, I am agreeable to reducing the amount owing by the Employer by $200.30 ($440.59 for the month, divided by 22 working days, multiplied by 10 vacation days).

In the result, I reduce the amount owing by the Employer on this account from $541.03 to $340.73

4. Penalty Determinations

In *Narang Farms and Processors Ltd.*, BCEST #D482/98, page 2, the panel stated:

> "In my view, penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation.* Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the

> Director is of that view, the penalty must be determined in accordance with the *Regulation*."

The Determination appears to provide a reason for the "$0.00" penalty:

> "In this instance, the Director is of the view that a penalty will create a disincentive against repeat of a contravention of Sections 18, 21, 40 and, 58 and that such a disincentive is needed to promote compliance with the *Act*."

In my view, this is insufficient. The apparent explanation is simply a general and generic statement which could be attached to any determination. There is nothing to explain why in these circumstances, a penalty will create a disincentive (see, for example, *Paul Skalenda operating as Fine Line Traffic Marking et al.*, BCEST #D196/99, at page 7-8). In the result, I set aside the "$0.00" penalty.

The Penalty Determination arises out of a Demand for Employer Records issued by the delegate following receipt of Park's complaint. On July 15, 1998, the delegate asked the Employer to respond to Park's allegations by providing payroll records. Hewitt Rand responded on July 24, 1998, but without providing the requested records. On October 6, 1998, the delegate faxed a Demand for Employer Records to the Employer. As well, the delegate forwarded the original by certified mail. The Demand for Employer Records states that the records must be produced by 2:30 p.m., October 19, 1998. The Employer did not produce the records until October 23, 1998.

The Penalty Determination states that the delegate:

> "reviewed the records and determined that the records failed to meet the requirement of Section 28(1) of the Act, because they did not contain the following information:
>
> > (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis
> >
> > (l) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing."

According to the Penalty Determination, the Employer took issue with wages claimed to be owing to the employee. The Employer did, however, as confirmed in the Penalty Determination, forward payroll records (though these were not in compliance with Section 28 of the *Act*), albeit some date later than the date and time specified in the Demand for Employer records. It does not appear that

there was any explanation for the delay. In the result, the delegate found that Hewitt Rand had contravened Section 46 of the *Regulation*.

I am concerned about the general and generic nature of the statement setting out the reason for the delegate's exercise of discretion (see, for example, *Paul Skalenda*, *above*):

> "Section 2(d) of the Act states that one of its purposes is to provide fair and efficient procedures for resolving disputes over the application of the *Act*. The merits of a complaint can often only be determined through an inspection of records the *Act* requires employers to keep and to deliver to the delegate when a request for production is made. Failure to deliver a record, at the very least, delays investigation. It may deny an employee a minimum employment standard. The records demanded were relevant to an investigation, the employer was aware of the demand for production of records, and the records were not delivered. *No reasonable explanation for the failure to deliver was given. If one had been given, the Director would have exercised her discretion and not issued a penalty.* If there are no disincentives against employers who fail to participate in an investigation, then such conduct may be repeated. The Director issues a penalty in order to create a disincentive against employers who frustrate investigation through failure to provide records." (Emphasis added)

In this case, however, the Penalty Determination provides that "*no reasonable explanation for the failure to deliver was given*". It is not in dispute that the records were delivered after the time and date indicated on the Demand for Employer Records. In the circumstances, the fact that there was "no reasonable explanation" for the failure to deliver is sufficient reason to impose a penalty. It is, in my opinion, not unreasonable to require employers (and others) to provide a reasonable explanation to the delegate if they are unable to provide records by the date and time specified in a properly served Demand for Employer Records. As noted by the delegate, the failure to provide records in a timely fashion may delay the investigation and resolution of a matter before the Director. As noted in *Narang Farms and Processors Ltd.*, BCEST #D482/98, at page 6-7:

> "..... In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director's exercise of discretionary power in the context of an administrative function in a number of cases. In *Takarabe et al.* (BCEST #D160/98), the Tribunal reviewed the case law and noted at page 14-15:

> "...
> In *Boulis v. Minister of manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations."

Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. *It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention*. In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient." (Emphasis added)

In summary, the Employer did not produce the records "as and when required" (Section 46, *Regulation*). The Director exercised her discretion to issue a penalty. The amount of the penalty was the amount provided for by Section 28(b) of the *Regulation*. In the result, I am of the view that the Penalty Determination must confirmed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Park Determination, dated January 15, 1999 be confirmed except to the extent that the amount owing to Park on account vacation pay is reduced by $200.30.

Pursuant to Section 115 of the *Act*, I order that the Penalty Determination, dated January 15, 1999 be confirmed.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal