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 -

V.C.R. Print Co. Ltd.
(“VCR” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR:	Ib S. Petersen
FILE No.:	2000/207
DATE OF HEARING:	June 29, 2000
DATE OF DECISION:	November 9, 2000

DECISION

SUBMISSIONS/APPEARANCES

Mr. Paul Pulver — on behalf of the Employer

Mr. William Cascaden — on behalf of Ken Jung, Scott Pelly and Drory Rozen

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on March 1, 2000. The Determination concluded that three employees, Jung, Pelly and Rozen, were owed $38,475.16 on account of unauthorized deductions, vacation pay and statutory holiday pay.

VCR operates a printing business. According to the Determination, Jung was employed by the Employer between October 1, 1991 and December 24, 1998. He was a commission sales representative. Pelly was also employed as a sales representative. He was employed from March 7, 1988 to May 7, 1999. Rozen was similarly employed between August 24, 1989 to December 24, 1998.

The delegate found that charges were deducted from gross commissions: including credit card charges (transaction fees), bad debts, warehousing and courier costs. The delegate also found that the Employer improperly deducted computer lease payments from Pelly's wages.

With respect to vacation pay, the delegate found that vacation pay was paid on each wage statement and calculated at 4% of gross commissions earned. In her view, the correct percentage should have been 6%. The delegate stated that commissions earned during an employee's absence due to vacation cannot be construed as vacation pay. She accepted that the sales persons had reciprocal arrangements whereby they received commissions earnings generated during their absences. Vacation pay was paid on top of these commissions at the rate of 4%.

Concerning statutory holiday pay, the delegate found that the complainants were not paid as required by the *Act*. She found that the commission statements did not record the date the commissions were earned. They were calculated and paid each month. She considered it reasonable to use the formula of 3.6% of annual wages to calculate the entitlement for statutory holidays.

ISSUES

VCR submits that the delegate erred in a number of respects:

1. The unauthorized deductions were, in fact, advances against future commissions. They constitute overpayments and are recoverable for the Employer.

2. VCR continued to pay regular wages and gave the employees a day off on statutory holidays. This meets the requirements of the *Act*. In the alternative, the calculations are incorrect.

3. VCR argues that the arrangement whereby commissions are generated by other sales representatives during absences for vacation constitute vacation pay. In addition, the employees were paid 4% on top of their commissions. The delegate failed to appreciate the distinction between commissions being "earned" and "falling due." Under the Employer's arrangement, the employees were paid more than they were entitled to under the Act. In the alternative, the Employer says that the calculations are incorrect.

FACTS

Gregory Durst, the president and owner of the Employer testified at the hearing. No witnesses were called on behalf of the employees, Rozen, Jung and Pelly.

Durst explained that the business of the Employer is that of a printing distributor, or broker. It performs warehousing, accounting and other functions on behalf of clients. It does not, however, actually print products. There are some 18 employees, including Durst. Of these seven are sales representatives.

Durst testified that he hired Rozen, Jung and Pelly. Durst explained that he did very little supervision of the sales representatives because they had been employed for many years. They were experienced and knew the processes and the vendors. He explained that their annual earnings were substantial: Jung made some $110,000-120,000, Rozen made around $180,000 and Pelly around $45,000 (though the previous year, Pelly made some $70,000). The remuneration earned by the sales representatives is set out and described in a policy and practice manual (the "Manual") which is published every 12-18 months, to take into account changes to benefits and other matters, though the commission structure has not changed. The commission rates are based on "gross profit" and the representatives are paid between 50 and 55% of "gross profit" on sales. Durst explained that all sales representatives are familiar with the Manual and all received a copy--they sign for the receipt.

Durst testified that the sales representatives are paid advances, a draw, an amount "agreed to by both parties" and "paid weekly." As well, the manual provides that "[a]dvances against future income are required to be paid back," in the case of commissioned sales representatives, generally at the end of the month. The sales representatives are paid a draw each Friday and at the end of each month–the last Friday of the month--receive their commission earnings for the month (subject to a 48 hour cut-off to allow for the calculation of the commission earnings).

Durst testified that sales representatives are responsible for their own clients. They have between 20 and 100 such clients. These clients "belong" to the sales representative. Durst explained that the Employer utilizes a computer system which is able to track sales orders in "real time." Once an order is received, it is inputted into the computer. The computer tracks the time and the date and who put in the order. Once an order is received, the sales representative is responsible for selecting the vendors who will be involved, *i.e.*, the selection of the printer, design and the purchase of the materials required for the products sold by the Employer. At the end of the process, an invoice is generated and the sales representative is paid the commission.

As mentioned earlier, the sales representatives are paid vacation pay at the rate of 4% added to the commission earnings. This amount is paid with their regular pay cheque. They pick their vacation time. When they go on vacation, others in the office, primarily salaried "inside" sales staff, process the orders from the sales representative's clients and he or she receives the full credit for the sales generated during his or her absence. As well, the sales representative receives his or her draw during the absence. Documents prepared for the delegate--and entered into evidence at the hearing--confirm that Jung, Rozen and Pelly were credited for sales during absences for vacation purposes in 1997, 1998 and 1999. Durst explained that the sales representatives received their regular draw during statutory holidays. On those days the office was closed. Durst also explained that none of the sales representatives ever made an issue of this. The amount of the draw did not change due to a statutory holiday.

Durst explained that the sales representatives have the authority to set the price of the product they sell. Cost is determined by the vendors. The commission earned by the sales representatives is based on the difference between the total costs and the selling price. In other words, if the order is for 100,000 envelopes, the total cost is determined by such things as the cost of printing, design, the price of the envelopes etc. The sales representative has the discretion to purchase the services from the vendors who will provide the services at the best price. On the other hand, she or he also has the discretion to sell the finished product at the best price she or he can obtain from the client. As such, the sales representative's earnings is determined to a large extent by his or her ability to select lower priced vendors and sell the finished product at the highest possible price. The sales representative receive between 50 and 55% of the gross profit, depending on the annual cumulative sales. Between $0 and $100,000 in sales, the sales representative receive 50%. If there is a loss on the job, the sales representative "take 50 of that loss." The Manual provides that, in the case of a delinquent or bankrupt client, the "expenses attached to this file will be charged back against the salesperson and shared at the current rate of commission."

Office expenses are born by the Employer. The Employer also pays for pagers, computers (desk tops), advertisement and authorized travel. Generally, "customer expenses" and "customer entertainment" are the sole responsibility of the sales representative, though in some cases, "special gifts," there may be a 50-50 split between the sales representative and the Employer. Warehousing, courier charges and VISA costs are taken into account when calculating the "gross profit." The wage statements provided to the sales representatives show deductions as "loans" or "miscellaneous." I understood, from Durst's evidence under cross-examination, that this primarily refers to credit card charges. Courier and warehouse charges were attached to the commission statements. With respect to warehousing, the Manual states that "[i]f goods are

warehoused there will be a charge added to the cost of the goods." The Manual then states that the sales representative have several options, including having the charge included or added.

Durst testified that credit card expenses were no different from other expenses attached to or associated with a job or project. He explained that expenses are attached to each job or project. The cost is not attached to penalize the sales representative. It is no different from courier charges. The agreement between the sales representative and the Employer is that all costs are identified and the Employer and the employee split the difference of the gross profit on the percentage basis set out above.

The Employer took issue with specific deductions awarded by the delegate in the Determination. In cross-examination, Durst agreed that the Employer did not have authorization in writing for the deductions. He stated that the matter was covered by the Manual.

With respect to Jung, the delegate found that the Employer had inappropriately deducted $30.63 in October 1997. This was the cost of a Costco Card. The delegate accepted that the Employer was entitled to deduct only $26.75. The cost of each card to Jung, Rozen and Pelly was $25.00 plus tax. However, the Employer says that the delegate erred because she failed to take into account the fact that the total costs of four Cards was $117.70 because she did not take into account the higher cost of the first Card. The Employer says that cost should be shared between all four employees. Other amounts--such as $1.21 in November 1997--represents VISA (or Mastercard) charges. The amount deducted was $33.00 in 1997 and $15.56 in 1998.

With respect to Rozen, apart from the Costco deduction, the Employer's evidence was that the deductions were on account of credit card charges. The amount deducted was some $51.42 plus $294.80 between January 1997 and December 1998.

In Pelly's case the circumstances were somewhat different. He had a $500 advance carried forward for a period when his draw was not met. This amount was recovered by the Employer. Durst explained in cross-examination that he did not have any documentation for this deduction. Other amounts represented credit card charges. In addition, there were a $200 charge for warehousing costs. This was, according to the Employer, a cost that Pelly had arranged with the client but did not want to pass on. Durst admitted in cross-examination that the basis for this was a "note" from the warehouse to that effect. He agreed that there was no document from Pelly in that regard. There was, as well, an amount of $220.75 on account of lease payments for a laptop computer that Pelly had personally leased. The employer had only become involved in the lease arrangement because Pelly could not get financing for the lease and the Employer stepped in and arranged the lease for him. Durst admitted that the Employer became liable for the payments. It turned out that the lap top computer was not suitable. I understood that Pelly made an arrangement with another employee and turned the computer over to him and that it subsequently disappeared. Durst admitted in cross-examination that he did not have anything in writing regarding the computer lease.

ANALYSIS

1. Deductions

The Employer argues that "fair treatment" is one of the purposes of the *Act* (see Section 2 (a)-(b)) and the employer should not have to pay more than what is owing. Jung, Rozen and Pelly should not be rewarded for their failure to bring their concerns with respect to these deductions to the Employer's attention. The Employer argues that an overpayment may be deducted. The Employer relies on *Kocis*, BCEST #D331/98, Reconsideration of BCEST #D114/98). The Employees were overpaid and the Employer is entitled to recover such payments. Section 21 does not prevent the Employer from this (see *Commercial Lighting Products Ltd.*, BCEST #D484/98 and *492695 Ltd. (c.o.b. as Paloma Polynesian Bar & Restaurant*), BCEST #D131/97). The employer argues that the employees accepted that charges and bed debts was deducted. The Employer points to the Manual which state that commissions are based on "gross profits." The costs of bad debts, warehousing and courier are costs to be taken into account. The employees set their own margin because they determine the sales price. Credit card charges are dealt with expressly in the Manual.

The Respondents argue that the *Act* permits deductions only in only limited circumstances. The *Act* does not permit the Appellant to deduct its cost of doing business or to pass on the cost of doing business to its employees (Section 21(2)). With respect to credit card charges, the Respondents say that they must be business expenses because the Employer pays half. These deductions are not authorized (Section 22). The Respondents also note that the Employer dictates what constitutes business expenses and can change that. On the Employer's argument, the Employer could decide that the employees should share the costs of telephone, copier, computers etc. Warehousing is listed as a deduction. Courier charges are taken off before gross commission is calculated. Both are business expenses. The Respondents also submit that the \$500 deduction from Pelly on account of a bad debt is inappropriate. This is a business expense. The amount with respect to Pelly's computer is simply a dispute over the obligation to pay. The Employer asserts that Pelly owed the money and simply took the money off his pay cheque. None of these deductions were authorized.

Turning to the first issue, deductions, Section 21(2) of the *Act* provides:

> *21. (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*

Did the Employer "require" the employees, Jung, Rozen and Pelly, to carry all or part of its business costs? I accept that the charges for credit cards, warehousing etc. can be considered costs of doing business. However, the Tribunal has held that not all participation by employees in the employer's cost of doing business is prohibited by the *Act*. In *Park Hotel (Edmonton) Ltd. (c.o.b. Dominion Hotel)*, BCEST #D257/99, Reconsideration of D55/98, the panel noted, with respect to Section 21(2):

> "We agree with the adjudicator that the touchstone of the term "require" implies some form of coercion. However, if the adjudicator has concluded that the term is limited to forms of coercion demonstrated by insistence or compelling, an order, a

> command, or an authoritative demand, to the exclusion of other more subtle, forms of coercion, and must be accompanied by consequences for non compliance, we do not agree. The Tribunal must be conscious of the fact that employee dependence on the employer and the opportunity this gives the employer to unduly influence an employee. What might seem like an innocuous request in most situations may, in an employer/employee context, take on a very different hue. Whether such a request contravenes the prohibition found in Section 21 of the *Act* will be a question of fact to be decided in all the circumstances. Additionally, the presence or absence of consequences for non compliance is not determinative of whether an employee has been "required" to pay all or part of an employer's business costs, but it is a factor which, along with others, must be considered when deciding that question.
>
> We do not accept the Director's position that any participation by an employee to an employer's cost of doing business is prohibited by Subsection 21(2). Purely voluntary payments to the employer's business costs would not be prohibited by Subsection 21(2). As above, issues about the "voluntariness" of such payments will be questions of fact to be decided in all the circumstances."

In this case there was a contractual arrangement, described in the employer's Manual, that the commissioned sales representatives were paid on "gross profit." The parties, partly in writing, through the Manual, and partly by conduct, had developed their understanding of "gross profit" and had acted in accordance with that understanding over a number of years. They had, in my view, given meaning to that term. There is nothing before me to suggest that this arrangement was developed in manner that was not voluntary or that there was any element of coercion. In my opinion the parties had developed an understanding over the years that such things as credit card charges (transaction fees) were split between the Employer and the employees. There were also some agreement with respect to the treatment of warehousing costs. Provided that arrangement is not otherwise in contravention of the *Act*, I am prepared to give effect to that agreement. It is clear, for example, that parties cannot contract out of the *Act* and *Regulations* (see Section 4)

The Employer relies on *Kocis*, *above*, where the Tribunal stated (para. 9 and 10):

> "When is a commission earned?
>
> The *Act* does not define when a commission is earned. The relationship between employee and employer is one of contract, and the effect of the *Act* is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law. The entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract."

In that case, the Adjudicator concluded that (para. 20):

> "the entitlement to a commission depends upon the completion of the sale by delivery of the property and payment of the purchase price."

In other words, I must have regard to the wage bargain struck between the parties. In this case, the commission is based on "gross profit." I agree generally with the Employer's argument that the Employees were overpaid and the Employer is entitled to recover such payments. Section 21 does not prevent the Employer from this (see *Commercial Lighting Products Ltd.*, *above*). In *492695 Ltd. (c.o.b. as Paloma Polynesian Bar & Restaurant)*, *above*, the Tribunal noted at para. 15:

> "The *Act* is remedial, not punitive. One of its purposes is to ensure that employees receive the full measure of wages to which they are entitled. Section 21 of the *Act* safeguards this purpose by restricting the circumstances in which an employer may deduct monies from an employee's pay. One of the exceptions as a matter of practice is with respect to overpayment of wages. The *Act* does not require the Company in these circumstances to satisfy the same wage entitlements twice. Accordingly, the Company is entitled to have any overpayment of vacation pay taken into account in determining the amount owing to the complainants."

In my view, while these comments were made in a different context, they are relevant here.

I agree that the purposes of the *Act* are important interpretive tools. Section 2 provides (in part):

> *2. The purposes of this Act are as follows:*
>
> *(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*
>
> *(b) to promote fair treatment of employees and employers;*

In my view, it is not unfair to hold the parties to their bargain with the--obvious--proviso that they cannot contract out of the *Act*. In this case, as well, the evidence was that the employees through their dealing exercised considerable discretion with respect to the margin between the costs of the product, which, in turn, depended on their ability to obtain the best prices for the services from vendors, and the selling price to their clients.

Turning to the specific deductions, I am of the view that the delegate erred when she failed to take into account the charges for credit cards. It follows from the wage bargain struck between the parties, that such charges were split between them.

I do not accept, however, in view of the burden on appeal, that the Employer is entitled to deduct the amount of $500 on account of advances, the amount of $200 on account of warehousing, and the amount of $220.75 on account of lease payments for a laptop computer. In my opinion, the Employer did not discharge the burden on appeal on these deductions.

In the circumstances, I refer the calculation of amounts owed back to the director. In my opinion, that is the appropriate remedy.

2. Statutory Holidays

With respect to the second issue, statutory holidays, the Employer takes the position that its manner of paying for statutory holidays was correct. In the alternative, the Employer takes issue with the delegate's assessment of the amount owed.

The Respondents rely on *Model Holdings (1997) Ltd.*, BCEST #D029/98 and *Monday Publications Ltd.*, BCEST #D296/98, Reconsideration of BCEST #D059/98. In *Model Holdings* the Tribunal stated that the inclusion of statutory holiday pay in commissions does not meet the requirements of the Act. The Respondents argue that the circumstances are similar to those in *Monday Publication*. Draws are not wages, they are advances on wages. In months where there is a statutory holiday, the commissions will ultimately reflect that the sales representatives worked one day less. The Respondents submit that the delegate's calculations were essentially correct. The Respondents submit that the delegate did not have any alternative and suggests that the Appellant has not met the burden on appeal.

In my view, the Employer's argument ignores the clear language of the statute. Section 44 of the *Act* provides for entitlement to a statutory holiday:

> *44. After 30 calendar days of employment, an employer must either:*
>
> *(a) give an employee a day off with pay on each statutory holiday, or*
>
> *(b) comply with section 46.*

Section 46 provides for overtime wages where the employee works on the statutory holiday and for an additional day off with pay according to Section 45. In those circumstances, employees who work must be paid 1 ½ times or double the "regular wage", depending on the hours worked. "Regular wage" means "if an employee is paid on a ... commission ... basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period" (see Section 1). Similarly, where the employee is paid on some other basis, for example, a monthly basis, the employees regular wage is "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".

In the instant case, there is no dispute that the employees did not work on the statutory holidays. In other words, they must be given the statutory holiday off with pay. Section 45 of the *Act* provides for the calculation of the amount to be paid to an employee who is given the day off:

> *45. An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:*
>
> *(a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;*
>
> *(b) in any other case, an amount calculated in accordance with the regulations.*

Section 45 cannot be read in isolation from the other provisions of the *Act*, Part 5 (Statutory Holidays) in particular. If an employee has a regular schedule of hours and has worked for at least 15 of the last 30 days before the statutory holiday, the employee is entitled to the same amount as if the employee had worked regular hours. Logically, it follows from the Employer's method that the employee is paid less in a month where she or he has a statutory holiday. In other words, the employee would not be receiving "the same amount as if the employee had worked regular hours on the day off." Moreover, under the Employer's method, one cannot with any certainty ascertain what "the same amount" in Section 45 means. The fact that the employees, as here, receive their draws, does not alter the situation. The draws are, as noted by the Respondents, advances against future commissions. In my view, it follows from the Employer's method that the employee either does not get paid at all for the statutory holiday or, if he or she is paid, it is from the earnings of the days worked. In either case, the method contravenes the *Act*.

In *W.M. Schultz Trucking Ltd*. (BCEST #D127/97), the Adjudicator dealt with a situation where employees were paid a commission, including statutory holiday pay and vacation pay, which was a percentage of the gross earnings of the truck driven. In that case, the employees did work on the statutory holidays. The Adjudicator concluded:

> "... For the requirement of the *Act* to be met for those statutory holidays, not only is an employee to 1 (sic) times their regular wage for the time worked, but they are also entitled to a regular day off with pay, which must be scheduled as set out in subsection 44(4) (sic). The argument of the employer, statutory holiday is included in the 28 % paid on the gross earnings of the truck driven, leads to the curious result that the regular wage of the employee when he works the statutory holiday is less than the regular wage when he takes the day off with pay. This inconsistency becomes even more pronounced if I am being asked to accept that the payment for the additional day is also included in the 28% figure. The result is an employee would have his regular wage adjusted up or down depending on whether the pay period for which they received wages included a statutory holiday, whether the statutory holiday was worked or not worked and whether the statutorily required day off with pay is part of the 28%. This would be an absurd result and the *Act* cannot be interpreted to cause a reduction in an employees (sic) regular wage in order to receive a statutory benefit. The inclusion of statutory holiday pay does not comply with the requirements of the *Act*...."

I agree with the Adjudicator in *W.M. Schultz* (see also *Model Holdings (1997) Ltd*. (BCEST #D029/98) with respect to the inclusion of statutory holiday pay in commission earnings.

In brief, I dismiss the appeal with respect to statutory holiday pay. In my opinion, the employees did not receive, and could not--logically--receive under the Employer's arrangement, a day off with "the same amount as if the employee had worked regular hours on the day off."

I also dismiss the alternative argument, that the delegate erred in assessing compensation for the statutory holidays. In my view, given the fact that the employees did not work on the days, the assessment is a reasonable one. The delegate noted that commission earnings fluctuated and stated that she was unable to determine the actual commissions earned in the 30 days prior to the

statutory holiday. While the Employer argues that the calculation is not correct, there is nothing before me to challenge the basis of her calculations. In the circumstances, I agree with her approach and I accept that 3.6% is a reasonable measure of the earnings on the statutory holidays.

This aspect of the Determination is confirmed.

3. Vacation Pay

With respect to the third issue, that of vacation pay, the Employer argues that there is no case on point. In one case, *Pro Fasteners Inc.*, BCEST #D556/97, the Adjudicator found that there was no evidence on the point that the employer serviced the employee's clients while the latter was on vacation. In this case, there was "plenty of evidence," "uncontradicted" and "accepted by the delegate." The Employer relies on *Hewitt Rand Corp*., BCEST #D271/99, for the proposition that the amounts paid on account of commissions by the Employer must be taken into account in calculating the amount owed. In that case commissions were generated while the employee was on vacation. Vacation pay entitlement is based on last years earnings (*LaPorte*, BCEST #D151/97, Reconsideration of BCEST #D245/96). In this case the delegate erred when she concluded in the Determination that commissions earned during the employee's absence cannot be construed as vacation pay. Here the employees continued to generate commissions while they were away. The Employer says that in some weeks the employees generated more commissions while they were away than when they were at work. The Employer says that this is the same situation as where salaried employees are paid salary continuance while they are on vacation. In this case, as well, the employees were paid an additional 4% on top. In short, they were more than paid their vacation entitlement.

The Respondent argues that the Employer's method of including vacation pay and statutory holiday pay in commissions is not supported by the case law (*Pro Fasteners Inc.*, BCEST #D556/97). The Respondents also argue that the method of calculating vacation pay is set out in the *Act*. Section 58(1) states that vacation pay is based on the employee's "total wages." In order to determine that "wages" is defined in Section 1 as including "salaries, commissions or money, paid or payable by an employer to an employee for work." The correct approach is simply the gross wages multiplied by the correct percentage, here 6%. The Employer's method contravenes the *Act*. The Respondent also note that the salaried staff who service the clients while the commissioned sales representatives are on vacation do not go out and make sales calls. They work from the office, doing administrative work. The sales would have come to fruition anyway. Wages cannot be converted into vacation pay. The commissions generated during their absence were worked for while they were working. The Respondents say that the fact that the Employer has, in fact, paid 4% vacation pay is an acknowledgement of the employees' entitlement. In the result, the employees are entitled to the additional 2%.

The *Act* provides for entitlement to annual vacation (Section 57) and vacation pay (Section 58). Section 58 provides (in part) as follows:

> *58. (1) Am employer must pay an employee the following amount of vacation pay:*

> (a) *after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;*
>
> (b) *after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay;*

In this case, the employees had all worked for the Employer for more than 5 years. They are entitled to vacation pay at the rate of 6%. The vacation pay they are entitled to is clearly provided for in the *Act*, namely "at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay."

Vacation pay may be paid to an employee on regular paydays by agreement between the employer and the employee (Section 58(2)(b)). In this case, 4% vacation pay was paid with the regular pay cheques. Mathematically, this should work out to 4% of the total wages " total wages during the year of employment." What about amounts paid on account of advances and commissions generated during absences for vacation purposes? How do they fit into the scheme of the legislation? "Wages" is defined in Section 1 of the Act to include "salaries, commissions or money, paid or payable by an employer to an employee for work." "Work" is defined as "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere." In my view, the appeal raises two issues: first, is the Employer's arrangement in compliance with the Act and, second, if it is not, what is the appropriate remedy?

I start my analysis from the Tribunal's decision in *Monday Publications*, *above*, which, as noted, came before the Tribunal by way of an application for reconsideration. In the decision the judgement of 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.) was cited:

> "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*"

In my view, it is clear, therefore, that an arrangement whereby vacation pay is *included* in commissions does not comply with the *Act*: see also *Hewitt Rand*, *above*. In that case, the Tribunal stated that "[s]alary and commissions cannot be inclusive of vacation pay." In my view, logically, that is the correct approach.

In this case, the determination states:

> "Commissions earned during an employee's absence due to vacation can not be construed as vacation pay. Each sales person had a reciprocal arrangement whereby they may complete a sale for another sales person on vacation and not receive the commission on that particular sale; yet receive commission while on vacation for a sale completed by another person in their absence."

In my view, the vacation pay arrangement contravenes the *Act*. In this case, vacation pay is included in the commission *structure* as follows. The sales representatives continued to receive their weekly draws while on vacation. In my view, draws are not wages. They are advances against future commissions. Importantly, however, they also receive commissions generated from their clients during their absence. Those sales are generated, or administered, by other staff of the Employer. While the Respondents seek to make much of the more active role of the commissioned sales representatives and the salaried staff, I do not accept that is a relevant distinction. It is clear, that the sales representatives are paid commissions generated from "their" clients while they are on vacation. In some instances, these commissions exceeded the commissions earned while the sales representatives were working. In other instances, the commissions generated appear to have been less than what they would normally have generated. Over and above this, the sales representatives also receive 4% on their earnings with their regular pay cheque. I agree with the Employer that--to an extent--the arrangement in place at this Employer is akin to continuing to pay salaried employees during their vacation, a type of arrangement that is not uncommon. In one sense, the employees continue to receive their normal or regular earnings. However, while the analogy may be appropriate, it cannot be taken to far. There are significant differences between salaried and commission employees. The former are generally paid a fixed amount and the latter's compensation varies with their sales. As well, it is important that there may well be difficulties when salaried employees, for example, work overtime hours or irregular hours. Moreover, the remuneration of commission sales persons may fluctuate. For those reasons, in my view, the arrangement falls short of the requirements of Section 58, namely that vacation pay is "at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay."

In any event, I accept the Employer's argument in this sense that while the arrangement may not be in compliance with the *Act*, because the employee may--or may not--be paid 6% of his or her "total wages," from a remedial standpoint, it is appropriate to take into account amounts already paid by the Employer when calculating the amount owed (*Hewitt Rand*, *above*). An application for reconsideration of the decision in Hewitt Rand was dismissed by the Tribunal (see *Director of Employment Standards (Hewitt Rand)*, BCEST #D366, reconsideration of BCEST #D271/99). It was dismissed not on the basis of the merits of the decision but on the basis that the Director's application was not timely. Moreover, the reconsideration panel noted that the Director's application mis-stated a key factual finding in the original decision, namely that the employer's obligation to pay commissions while the employee was on vacation arose form the employee's

earlier work. The reconsideration panel stated the facts in the original decision as follows (Para. 17):

> "[The complainant's] wages were comprised of a base salary and commissions. The original decision indicates that the commission pay was based on the performance of the branch in which Park worked (the "branch commission"). In other words, the commission at issue was not earned exclusively by Park."

In any event, the reconsideration panel noted (Para. 19):

> "Based on the articular circumstances, the original panel says nothing more than the commission payable for the 10 days Park was on vacation should have been credited to Hewitt Rand's vacation pay obligation to Park. It should be noted that the determination credited the base salary paid to Park for those 10 days from Hewitt Rand's vacation pay obligation and deducted that amount from the annual vacation pay owed to Park. While we make no final decision about it, in the circumstances, it is difficult to see any difference between what the determination accepted as appropriate and what the Director says in this application is wrong."

In my view, these principles are applicable here.

In my view, the amounts paid by the Employer during the absences by commissioned sales representatives pursuant to their employment contract, or wage bargain, are not "wages" under the *Act* because the commissions are generated by the Employer's staff and are, therefore, not "money, paid or payable by an employer to an employee for *work*" (emphasis added). "Work," as mentioned above, is defined as "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere." The commissions generated by the Employer's staff during the absences of the commissioned sales representatives for vacation purposes do not flow from their "work."

In my view, the delegate erred when she concluded that the sales representatives were entitled to an additional 2% on the total wages. The delegate should have taken into account amounts paid to the commissioned sales representatives for commissions generated during their absences for vacation purposes. The appropriate remedy is to refer this back to the Director.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated March 1, 2000, be referred back to the Director in accordance with the above.

Ib Skov Petersen

Adjudicator
Employment Standards Tribunal