

**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 -

National Leasing Group Inc.  
("National")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE No:** 1999/539

**DATE OF HEARING:** November 3, 1999

**DATE OF DECISION:** December 24, 1999

## DECISION

### APPEARANCES

Andrea L. Zwack	Counsel for National
Guy Gadbois	On his own behalf
Bernie Gifford	For the Director

### OVERVIEW

National Leasing Group Inc. (“National”, also, “the employer”) appeals a Determination of the Director of Employment Standards (the “Director”). The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The Determination is dated August 13, 1999 and it orders National to pay Guy Gadbois vacation pay and statutory holiday pay totalling \$7,603.67 with interest, a total of \$8,067.44. The decision reflects an underlying conclusion that the employer did not pay Gadbois any statutory holiday pay or any vacation pay.

The Determination imposes a penalty of \$0.00. The penalty is said to be for the following reasons:

The Director recognizes that contraventions may occur unintentionally as a result of misinterpretation or misapplication of the *Act*. The exercise of discretion is not arbitrary, rather it is predicated on an assessment of the corrective nature of a penalty on the behaviour and conduct of an employer. In this instance, because:

- the facts are similar to those of a previous contravention;
- there is a pattern of non-contravention;

the Director is of the view that a disincentive is needed to promote compliance with the *Act* and to prevent a repeat contravention.

National, on appeal, claims that the Determination is wrong both in respect to the decision to award vacation and statutory holiday pay and the decision to impose a penalty. In regard to the penalty, National’s claim is that there has not been a previous contravention. On the matter of vacation pay and statutory holiday pay, National accepts that Gadbois is entitled to statutory holiday pay which is 3.6 percent of earnings and vacation pay which is 4 percent of earnings. But National argues that the order to pay vacation and statutory holiday pay is wrong for three reasons. One, Gadbois continued to receive a salary when on vacation or not at work for reason of a statutory holiday. Two, he received commissions for work done by others while he was on vacation. And three, the delegate’s calculations

fail to take into account what National has already paid in the way of vacation and statutory holiday pay.

**ISSUES TO BE DECIDED**

Is Gadbois owed vacation pay as set out in the Determination?

Is Gadbois owed statutory holiday pay as set out in the Determination?

**FACTS**

Gadbois began working for National in March of 1997. The employment was severed in September, 1998.

Terms of the employment were never written down. But all parties accept that National guaranteed Gadbois an income. He was to be paid a minimum of \$3,750 in the first month. In the period April to and including October, 1997, he was guaranteed income of \$3,000 a month. After October, the guarantee was \$2,000 per month.

National calls the amount of the income guarantee a “salary”. National’s payroll register records show that Gadbois was paid an amount called “salary” that is equal to the income guarantee, and that he received commissions beyond that. But National’s “commission reports” reveal that in fact Gadbois earned more in commissions than is shown by the register, significantly more. The register understates commissions by an amount which is equal to the amount of commissions earned in the previous month or, more commonly, the amount of the income guarantee for the month: Whichever is the lesser of the two. To explain what National did by way of an example, the payroll register for April of 1998 indicates that Gadbois was paid \$8,408.42, \$6,408.42 in commissions and a ‘salary’ of \$2,000. But the March commission report, which lists the commissions which were due to be paid in April, shows that Gadbois did not earn \$6,408.42 in commissions but in fact \$8,408.42 in commissions. National kept \$2,000, the amount of the income guarantee, and paid that amount to Gadbois as “salary”.

For the greater part of the employment, Gadbois’ commissions exceeded what he had been guaranteed. But there are 6 months in 1997 when the reverse was true. National made up for the shortfall as follows:

Month	Income Guarantee	Commissions	Shortfall
March	\$3,750	\$0.00	\$3,750.00
April	3,000	0.00	3,000.00
May	3,000	1,031.83	1,968.17
June	3,000	1,113.22	1,886.78
August	3,000	1,616.79	1,383.21
October	3,000	2,537.00	462.24
		Total	12,450.40

While the Determination is that no amount of statutory holiday pay or vacation pay was paid, the payroll register is to the contrary. Neither the delegate, nor Gadbois for that matter, give any reason why the register should not be accepted as correct in respect to gross pay and the payment of statutory holiday and vacation pay. It certainly appears aboveboard in those respects. Moreover, the register and the commission reports are consistent with one another. That leads me to conclude that Gadbois had earnings and was paid statutory holiday and vacation pay as is set out in the payroll register.

The register shows that Gadbois was paid \$43,554.70 in salary and commissions in 1997. Gadbois earned \$54,285.25 in commissions in 1998. Over the course of the employment, Gadbois earned more in commissions than what National calls "salary".

The payroll register shows that National in 1997 paid Gadbois \$270 in vacation pay in May and nothing specifically as statutory holiday pay. It shows that in 1998 he was paid \$1,960.07 in vacation pay (\$2,415.77 in May, a deduction of \$1,486.60 in June, and a final payment of \$1,030.90) and another \$1,415.77 in statutory holiday pay.

National claims that Gadbois received vacation pay in the form of commissions. More specifically, it is said that other salespersons took over work in Gadbois' area when he was on vacation and that they generated commissions which were then turned over to Gadbois. That he actually received any such commissions is by no means shown to me. National has not provided clear evidence of that.

In 1997, there was a statutory holiday in March, May, August and October. Gadbois was given the day off on each of the holidays.

## **ANALYSIS**

What I must decide in this case is whether the appellant has or has not met the burden for persuading the Tribunal that the Determination ought to be varied, cancelled, or referred back to the Director for reason of an error in fact or in law.

National claims that the Determination is wrong in that it does not account for what was paid in the way of vacation pay and statutory holiday pay. I have found that National in fact paid \$2,230.07 in vacation pay and \$1,415.77 in statutory holiday pay. The Determination must at least be varied so as to account for those payments.

National claims that additional vacation moneys were paid to Gadbois in that he received commissions for work by others when he was on vacation. It has not shown me that commissions were actually paid to Gadbois as alleged. But even more importantly, it has not explained how a transfer of commissions from one employee to another is vacation pay under the *Act*. The obligation to pay vacation pay lies with National, not its employees.

The delegate treats all of what National calls "salary" as nothing more than commissions. As National presents matters, it argues that Gadbois was paid a base salary with commissions as a

sort of bonus if sales went beyond a certain point. I would describe the system by which National paid Gadbois as “commissions with guaranteed monthly income” but I agree with National that part of what it calls “salary” is salary. The salary is what National paid over and above the commissions which were earned, namely, \$12,450.40 as set out above.

I am not persuaded that more of what National calls “salary” may be considered salary for the purpose of calculating statutory holiday and vacation pay entitlements. It is not obviously salary. There is no written contract, nor other evidence showing that Gadbois agreed to receiving the full amount of the income guarantee as salary. As National went about paying Gadbois, it is as if all but \$12,450.40 of what it describes as salary was clawed back from commissions, commissions that were, of course, not earned on statutory holidays and during vacations. Moreover, it is not apparent to me that there is any reason for keeping commissions, and paying the same amount out as “salary”, other than avoiding the need to pay vacation and statutory holiday pay on commissions, it being on top of commissions but included in salary.

According to the Determination, Gadbois had earnings of \$98,186.42. National accepts that Gadbois earned \$43,554.70 in 1997 but it claims that Gadbois’ 1998 earnings are less than what is shown by the Determination. The Determination and the payroll register are inconsistent with one another but Gadbois accepted the Determination, warts and all, on the basis of the money that it awarded. All considered, I have decided that it is necessary to recalculate what National owes in the way of statutory holiday and vacation pay. And, rather than referring the matter back to the Director, I have decided for reason of the need to be efficient, efficiency being a purpose of the *Act*, that I should undertake that recalculation myself.

#### Statutory Holiday Pay

Section 45 of the *Act* requires that when an employee is given the day off on a statutory holiday off, as Gadbois was, that the employee must be paid for the statutory holidays as follows:

**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.

(my emphasis)

March, May, August and October of 1997 each contained a statutory holiday. Gadbois received part of the \$12,450.40 that he was paid in salary in those months. The salary is a residual, the difference between income guaranteed for the month and commissions due in the month, and as such it varies from month to month. An extra day off might well have had a negative effect on commissions but that would only serve to increase the amount of salary that had to be paid. As such, I am satisfied that Gadbois received at least as much in salary as he would have been paid if he had he worked statutory holidays, and that section 45 of the *Act* is satisfied.

The fact that salary varied from month to month greatly complicates the calculations that are required. It requires expression of the salary as a daily rate of pay. I have done that for the each of the months and find that \$363.05 in statutory holiday pay was paid through the payment of salary  $[(.004 \times \$3,750 \times 12) + (.004 \times \$1,968.17 \times 12) + (.004 \times \$1,383.21 \times 12) + (.004 \times \$462.24 \times 12)]$ . The figure of .004 is employed for the purpose of the calculations because there are 9 statutory holidays and  $1/9^{\text{th}}$  of 3.6 percent is .004.

In that Gadbois was paid salary and commissions of \$43,554.70 in 1997, he was entitled to statutory holiday pay which is 3.6% of that amount, \$1,567.97. National paid \$363.05 through salary payments. As such, the amount which it owed at the start of 1998 is \$1,204.92.

Gadbois is entitled to statutory holiday pay of \$1,954.27 for 1998 [3.6% of \$54,285.25]. National paid \$1,415.77 out as statutory holiday pay in 1998, leaving \$538.50 yet to be paid.

National at this point owes Gadbois statutory holiday pay totalling \$1,743.42 (\$1,204.92 plus \$538.50).

#### The Calculation of Vacation Pay

Section 58 of the *Act* sets out the minimum that an employer must pay as vacation pay. It is as follows:

- 58 (1) An 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.
- (2) Vacation pay must be paid to an employee
- (a) at least 7 days before the beginning of the employee's annual vacation, or
  - (b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.
- (3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

(my emphasis)

Gadbois' entitlement to vacation pay is 4 percent of total wages. The entitlement for 1997 is 4 percent of \$43,554.70 or \$1,742.19.

Gadbois was paid \$270 in vacation pay in May of 1997. That payment was for some reason. I believe that, most likely, it is because Gadbois in that May took a couple of days off. A person that earned \$3,000 a month, the amount of the income guarantee for that month, would end up being paid close to \$270 for a two day vacation.

Gadbois' salary in May of 1997 was not \$3,000 a month but only \$1,968.17. On that basis, I find that National paid \$188.94 in vacation pay through the payment of the salary in the month of May, 1997 [2/10<sup>ths</sup> of 4% of (\$1,968.17 x 12)].

The total amount of vacation pay paid in 1997 is \$458.94 (\$270 plus \$188.94). \$1,742.19 - \$458.94 = \$1,283.25. As the employment entered 1998, it is that latter amount of vacation pay that National had yet to pay.

The term "wages" is defined by the *Act*.

"wages" includes

- (a) salaries, commissions or money paid or payable by an employer to an employee for work,
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
- (d) money required to be paid in accordance with a determination or an order of the Tribunal, and
- (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person ... (my emphasis)

Moreover, vacation and statutory holiday pay are to be considered part of total wages in that both are a form of compensation paid or payable by an employer to the employee for services or labour [*Pay Less Gas Co. (1972) v. British Columbia (Director of Employment Standards)* (1991) 38 CCEL at 117 (BCSC)].

In 1998, Gadbois received \$54,285.25 in commissions. But National had yet to pay Gadbois statutory holiday pay for 1997, \$1,204.92 and vacation pay of \$1,283.25. And Gadbois is entitled to another \$1,954.27 in statutory holiday pay for 1998 [3.6 percent of \$54,285.25]. That statutory holiday and vacation pay forms part of total wages. It follows that 1998 vacation pay is \$2,349.11 [4 % of (\$54,285.25 + \$1,204.92 + \$1,283.25 + \$1,954.27)]. And 4 percent must also be paid on \$2,349.11 as it is also part of total wages. That is another \$93.96.

National paid Gadbois \$1,960.07 in vacation pay in 1998. The total amount of vacation pay owed is therefore \$1,766.25 [\$1,283.25 + \$2,349.11 + \$93.96 - \$1,960.07].

In summary, the Determination fails to take into account the payroll register which shows that vacation pay and statutory holiday pay was paid to an extent, and it incorrectly treats salary as commissions. For reason of that, the failure to take into account the payments shown by the payroll register in the main, I must reduce the amount of the Determination. National does not owe \$7,603.67 in statutory holiday and vacation pay but only \$3,509.67 [\$1,743.42 + \$1,766.25]. It must pay interest on top of that.

**ISSUE TO BE DECIDED**

Is the penalty in error?

**FACTS**

All parties are aware that there was a second complaint against National, one filed by a Mr. Ferguson. That complaint was not, however, settled with a Determination but through agreement.

National tells me that, until the Determination, it had not been found to have contravened the *Act*. The delegate does not draw my attention to any other Determination or decision which is against National.

**ANALYSIS**

Any decision by the director under section 98 of the *Act* is a “determination” as that term is defined by the *Act* (section 1). The reasons for each determination must be explained. Section 81 (1)(a) of the *Act* requires it.

In assessing whether a delegate has complied with section 81 of the *Act*, the Tribunal has in the past said that there must be explanation of why the Director’s power to impose a penalty has been exercised in the specific circumstances (*Randy Chamberlin and Sandy Chamberlin*, BCEST No. D374/97). In this case, it is said that the penalty is for reason of a previous contravention but I find no evidence of any previous contravention.

The penalty is also said to be for reason of a “pattern of non-contravention”. The Director may not impose a penalty for reason of that. The Director must mean “non-compliance” and must not have meant to use the term “non-contravention”. What can possibly be wrong with not contravening the *Act*. That is what the Director seeks to achieve.

It is either that the penalty is for reasons other than those stated in the Determination, or it is for the stated reasons and in error. I am therefore cancelling the \$Nil penalty. National should understand, however, that the Director need not impose the penalty before imposing one of the greater penalties of section 29 of the *Employment Standards Regulation*. All that is required is that there be a previous contravention(s).

29 (1) In this section, “**specified provision**” means a provision or requirement listed in Appendix 2.

(2) The penalty for contravening a specified provision of a Part of the act or of a Part of this regulation is the following amount:

(a) \$0, if the person contravening the provision has not previously contravened any specified provision of that Part;

(b) \$150 multiplied by the number of employees affected by the contravention, if the



person contravening the provision has **contravened a specified provision of that Part on one previous occasion;**

(c) \$250 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 2 previous occasions;

(d) \$500 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 3 or more previous occasions.

(my emphasis)

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated August 13, 1999 be varied. National does not owe Guy Gadbois vacation pay and statutory holiday pay totalling \$7,603.67 with interest but only \$3,509.67 plus whatever interest has accrued pursuant to section 88 of the *Act*.

The penalty is cancelled.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**