An Application for Reconsideration

- by -

Brandt Tractor Ltd.
("Brandt")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2015A/63

DATE OF DECISION: April 19, 2017

DECISION

SUBMISSIONS

Jean Torrens	counsel for Brandt Tractor Ltd.
Todd Kerr	counsel for Shannon Claypool
Adele Adamic	counsel for the Director of Employment Standards

OVERVIEW

1. This is a reconsideration decision issued pursuant to section 116 of the *Employment Standards Act* (the "*Act*"). It follows an application by Brandt Tractor Ltd. ("Brandt") seeking a reconsideration of an appeal decision, BC EST # D066/13, issued by Tribunal Member Stevenson on August 8, 2013 (the "Appeal Decision").

2. The Appeal Decision confirmed a determination dated January 31, 2013 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") requiring Brandt to pay unpaid wages, interest, and administrative penalties totaling $10,039.91 in respect of a complaint filed by its former employee, Shannon Claypool ("Claypool").

3. This is the second occasion on which the Appeal Decision has been considered by the Tribunal. On November 20, 2013, the Tribunal issued its reconsideration decision, BC EST # RD091/13 (the "Original Reconsideration Decision"), confirming the Appeal Decision.

4. Brandt applied for judicial review of the Original Reconsideration Decision. In reasons for judgment issued on May 11, 2015, with a corrigendum added on November 20, 2015 (collectively, the "Judicial Review Decision"), Walker J. of the Supreme Court of British Columbia quashed the Original Reconsideration Decision and referred the matter back to the Tribunal for reconsideration afresh. The court also directed that the Tribunal "set out a complete and uniform statement of the applicable law" and "apply the applicable law to the facts."

5. The parties agree I should refrain from reviewing pages 150 – 166 of the record the Director delivered to the Tribunal pursuant to subsection 112(5) of the *Act*. Accordingly, I have not reviewed those pages in the record.

6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

7. Claypool's complaint alleged that Brandt had failed to pay him the commissions and vacation pay it owed him under the *Act*. Claypool had been employed by Brandt to sell industrial equipment, commencing in 2006. His compensation consisted of a base annual salary plus commissions. Claypool's employment with Brandt was terminated on June 28, 2010.

8. Clause 5.2 of Claypool's employment agreement with Brandt read as follows:

> The Employee will receive vacation pay as follows: (a) during his vacation, the continuance of his Base Salary as well as all commissions attributable to the Employee on sales by Brandt within his territory, and (b) on each commission payment, 6% vacation pay will be included on all commissions, in accordance with Schedule 'B'. For greater clarity, vacation pay on commissions shall be limited to 6% even if an Employee is entitled to annual vacation that exceeds the relevant provincial employment or labour standards legislation.

9. Schedule "B" stated, among other things, the following regarding payment of commissions:

> All Commission amounts set out in this Schedule "B" include 6% vacation pay...

10. The Determination ordered Brandt to pay Claypool vacation pay, but not the commission wages for which he had made claim. Regarding the former, the Delegate stated that the inclusion of vacation pay in Claypool's commission wages in his employment agreement had no effect because it resulted in a payment for vacation pay that failed to take into account the total wages on which the relevant percentage was required to be calculated. The rationale for this conclusion is found in the following statements in the Delegate's Reasons:

> Brandt's commission statements show a mathematical exercise to remove six percent of funds from commission wages and then add it back on to account for vacation pay. This approach fails to comply with section 58 of the Act as vacation pay must be calculated on "total wages", which includes all commission earnings.

11. The Delegate found, therefore, that the employment agreement was in contravention of section 4 of the *Act*, the important parts of which read:

> 4 The requirements of this Act...are minimum requirements and an agreement to waive any of those requirements...has no effect.

12. Brandt filed an appeal of the Determination with the Tribunal, pursuant to section 112 of the *Act*. The appeal raised four principal issues.

13. First, Brandt submitted that the Delegate fell into error in his interpretation and application of section 58 of the *Act*, which sets out the legal requirements for the payment of vacation pay. More specifically, Brandt alleged that the manner in which Claypool's employment agreement provided for the payment of vacation pay was entirely lawful, on a proper reading of the relevant jurisprudence.

14. Second, and in the alternative, Brandt asserted that if the Delegate was correct in deciding that the manner in which Claypool's employment agreement dealt with the payment of vacation pay was unlawful, the Delegate erred in his conclusion regarding the amount of vacation pay Brandt must pay, having regard to the six month wage recovery limitation periods established in section 80 of the *Act*.

15. Third, and again in the alternative, Brandt contended that if vacation pay was owed to Claypool, it should be paid at the statutory rate of 4% of his wages, and not at the rate of 6% as prescribed by clause 5.2 and Schedule "B" of Claypool's employment agreement, which the Delegate had decided were in contravention of section 4 of the *Act*.

16. Fourth, Brandt argued that the Delegate failed to observe the principles of natural justice because he disregarded evidence of vacation time taken by Claypool, and vacation pay received by him, which should have served to reduce the amount of vacation pay the Delegate decided Brandt was required to pay to him.

17. As I have stated, the Appeal Decision confirmed the Determination. In doing so, it approved the Delegate's interpretation of section 58 of the *Act*, which sets out the obligation of an employer to pay vacation pay. Section 58 reads 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
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> (a) at least 7 days before the beginning of the employee's annual vacation, or
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> (b) on the employee's scheduled paydays, if
>
> (i) agreed in writing by the employer and the employee, or
>
> (ii) provided by the collective agreement.
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> (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.

18. The Appeal Decision expressly agreed with the Delegate's conclusions that:

- Subsection 58(1) defines the conditions an employer must meet in order to comply with the statutory obligation to pay vacation pay;
- Subsection 58(2) identifies the two, and only two, methods by means of which an employer may satisfy the obligation created in subsection 58(1);
- Subsection 58(2) cannot be interpreted so as to permit vacation pay to be calculated in a manner that fails to comply with the conditions imposed in subsection 58(1).

19. For these reasons, the Appeal Decision also agreed with the statement in the Delegate's Reasons that "the inclusion of vacation pay in commission wages is not permitted by the Act." The Tribunal relied, in addition, on the following statements summarizing the relevant law contained in *Howard C. Chui operating as Label Express*, BC EST # D239/03:

> It is apparent that the correct interpretation of section 58, is that vacation pay may not be included in a commission structure: *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards) (1994), 99 B.C.L.R . (2d) 37 (S.C.).* The Tribunal's jurisprudence in *British Columbia (Director of Employment Standards),* BCEST #RD348/01 [the "*VCR Print Company Ltd.* reconsideration"], makes it plain that vacation pay cannot be included in a commission. By virtue of jurisprudence, section 58 of the Act, requires the Employer to "pay something extra" for the vacation.

20. The Appeal Decision declined to find that any of the authorities offered by Brandt served to refute these statements. To the extent there might be authorities that suggested a different interpretation, the Appeal Decision stated "they should not be considered sound law." Also, while "alternate forms of payment" of vacation pay might pass muster, a "restructuring" of entitlement under section 58 was impermissible.

21. In addition, the Appeal Decision declined to accept Brandt's argument relating to the proper application of section 80 of the *Act* on the facts of this case. The Tribunal said this:

> On the section 80 issue, I am not persuaded the Director made any error in calculating the recovery period. The difficulties with Brandt's submissions on this issue are manifold. First, the submissions presume the employment agreement provisions allowing Brandt to pay vacation pay on commissions monthly has effect. It does not. Second, the submissions presume the Director ought to be governed by those provisions in determining Claypool's statutory entitlement. They are wrong in that presumption. Third, the submissions invite the Tribunal to endorse a "set off", where annual vacation entitlements provided to Claypool by Brandt during his years of employment should be used to "set off" or reduce his statutory annual vacation pay entitlement. Section 21 does not allow this to happen. Fourth, the argument that the exact dates of Claypool's vacation time off in 2009 and 2010 would further reduce his annual vacation pay entitlement requires the Tribunal to accept in this appeal evidence that was not provided to the Director during the complaint investigation; Brandt failed to comply with a Demand made under section 85 which, had it been met, might have provided the Director with the information they now seek to provide. The apparent reason for not providing this information, which Brandt says was "inadvertent", was based on the assumption that it was not necessary. They were wrong on that and, in any event, such an assumption was not theirs to make. The evidence of the dates of Claypool's vacation time off in 2009 and 2010 will not be accepted or considered in the appeal. This conclusion is grounded in the Tribunal's approach to evidence sought to be introduced for the first time on appeal: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03.

22. In dismissing Brandt's argument that if Claypool was entitled to vacation pay it should be calculated at a rate of 4% of total wages, and not 6% as his employment agreement provided, the Member in the Appeal Decision reproduced section 4 of the *Act*, set out above, and then stated:

> The provision does not, on its wording, "void" any agreement affecting employment under the *Act*, but operates to give "no effect" to an agreement that seeks to waive any of the minimum requirements of the *Act* other than those specifically referred to. The Director was correct to give "no effect" to the agreement to include vacation pay in commission wages, as such a vacation pay structure does not comply with the annual vacation pay requirements of the *Act* and its inclusion in the employment agreement seeks to waive those requirements. The agreement to pay an annual vacation pay rate of 6% does not, however, stand on the same footing. There is no contravention of the *Act* in such an agreement. This argument is simply Brandt seeking to have the Tribunal rewrite the agreement for annual vacation pay on commissions because Brandt failed to comply with the requirements of the *Act*. Even if the Tribunal had authority to do so, there are sound reasons for not engaging in what is, essentially, speculation about what the terms of such an agreement would have been or ought to be.

23. Finally, the Appeal Decision rejected Brandt's claim that the Delegate failed to observe the principles of natural justice. On this point, the Member said:

> ...I adopt and apply the comments I made in dismissing the section 80 issue to this ground of appeal. As well, I agree entirely with the submission of counsel for Claypool on this issue: it is disingenuous for Brandt to allege the Director has "failed to consider" material facts in respect of which Brandt, inadvertently or otherwise, failed to provide any evidence during the investigation.

24. As I have noted above, Brandt sought reconsideration of the Appeal Decision pursuant to section 116 the *Act*. The Original Reconsideration Decision confirmed the Appeal Decision. Brandt then sought judicial review. The Judicial Review Decision ordered that the Original Reconsideration Decision be quashed and that Brandt's application for reconsideration be referred back to the Tribunal for reconsideration afresh. The Judicial Review Decision also directed me to set out a complete and uniform statement of the applicable law and to apply the applicable law to the facts.

ISSUES

25. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

26. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

27. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

28. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

29. In this instance, the Original Reconsideration Decision concluded that Brandt had met the requirements of the first stage of the Tribunal's analysis when considering applications for reconsideration. The Tribunal justified this conclusion on the ground that an examination of the Appeal Decision on the merits might produce more definitive guidance regarding an employer's obligation to pay vacation pay under a commission-based payroll system.

30. The Judicial Review Decision determined that the Tribunal's review of the Appeal Decision on the merits was patently unreasonable, and that the Tribunal should reconsider it afresh. It is clear to me, therefore, that it is the merits of the Appeal Decision which I must reconsider. There can be no question, at this stage, that Brandt has failed to show that the Appeal Decision does not warrant reconsideration at all.

31. I turn, then, to an analysis of the Appeal Decision on the merits.

32. Brandt offers three substantive reasons why the Appeal Decision should be set aside or, in the alternative, varied. They are similar to the legal challenges Brandt asserted in its appeal.

33. First, Brandt submits that the Appeal Decision reveals an error in law. It contends that the Tribunal misinterpreted, and therefore misapplied, previous decisions of the Tribunal and the courts regarding section 58 of the *Act*.

34. Second, and in the alternative, Brandt contends that the recovery period for which Claypool would be entitled to claim vacation pay is significantly shorter than the period contemplated in the Determination and the Appeal Decision, having regard to the interplay between sections 4, 57, 58 and 80 of the *Act*. It also argues that since Claypool took vacation time from the beginning of his employment, and received vacation pay in the form of salary continuance while on vacation, any amounts owed to him by way of vacation pay should be reduced accordingly.

35. Third, Brandt repeats its argument, submitted in its appeal, that if it owes Claypool vacation pay, a proper reading of section 4 of the *Act* means it should be paid at the rate of 4% of wages, and not 6%.

36. I find the Appeal Decision should be confirmed, for the reasons that follow.

37. The Appeal Decision accepted the position taken by the Delegate that subsection 58(2) of the *Act* cannot be read so as to alter the formula for calculating vacation pay set out in subsection 58(1). The agreement in writing contemplated by subsection 58(2)(b)(i) does not provide a discretion to employers and employees to opt out of the stipulations prescribed in subsection 58(1). To the contrary, such an agreement merely allows parties to establish that the amounts of vacation pay to which an employee becomes entitled by virtue of the operation of subsection 58(1) be paid on an employee's scheduled paydays, rather than at the time stipulated by subsection 58(2)(a). I agree with this analysis. To the extent that there are decisions of the Tribunal which take a contrary view, I decline to follow them.

38. It is axiomatic that the provisions of a statute should be construed, if possible, in a manner that results in harmony. Subsection 58(1) states that employers must pay stipulated percentages of an employee's "total wages" during the year of employment entitling the employee to vacation pay. If the legislature had intended to derogate from this formulation when it enacted subsection 58(2)(b)(i) it would, in my opinion, have said so expressly. Since it did not do so, I conclude that subsection 58(2)(b)(i) in no way modifies the way vacation pay is to be calculated as set out in subsection 58(1). Again, if there are Tribunal decisions which take a different view, I decline to follow them.

39. Section 1 of the *Act* defines "wages" to include, *inter alia*, "salaries, commissions or money, paid or payable by an employer to an employee for work...." The term "work" is defined broadly, and means "the labour or services an employee performs for an employer...."

40. It follows from this discussion that the amount an employee is entitled to receive as vacation pay pursuant to subsection 58(1) of the *Act* is exclusive of the "total wages" in respect of which the vacation pay must be calculated, including any wages constituting "commissions...paid or payable...for work" that are identified in the employee's employment agreement. If, therefore, an employment agreement, properly construed, provides that an employee's "commissions...paid or payable...for work" include amounts the employer is obliged to pay for vacation pay pursuant to subsection 58(1), such an agreement is in contravention of the *Act*. This, in my view is the over-riding principle established in *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)* (1994) 99, BCLR (2d) 37, where the court said:

> 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*.

41. While the *Atlas Travel Service* decision examined a previous version of the *Act*, the later decision in *VCR Print Company Ltd. v. Employment Standards Tribunal et al.,* 2003 BCSC 442 applied *Atlas Travel Service* in the context of

the new section 58, which the court said was identical, for all practical purposes, to the provision considered in the *Atlas Travel Service* case. The *VCR* court also concluded that commissions could not include vacation pay, because employers would be meeting their obligation to pay vacation pay out of a portion of their employees' total wages payable as commissions. The court stated, relying on *Atlas Travel Service*, that employers were obligated to pay their employees "something in addition" to their wages to satisfy the requirement to pay vacation pay.

42. I agree, then, with the statement of the law in the *Howard C. Chui* decision, and relied upon by the Tribunal in the Appeal Decision, that vacation pay cannot be included in a commission and that section 58 of the Act requires the employer to "pay something extra" for the vacation. It is a statement which is entirely consistent with the principles expressed in the *Atlas Travel Service* and *VCR* cases to which I have referred.

43. Brandt argues that the decision of the Tribunal in *National Signcorp Investments Ltd.*, BC EST # D163/98, and later decisions of the Tribunal it contends are consistent with it, establish a different approach, one that makes it lawful for employers and employees to agree that vacation pay may form part of "commissions" as defined in section 1 of the *Act* so long as certain pre-conditions relating to the "transparency" of such an agreement are satisfied.

44. In my view, the facts in the *National Signcorp* decision do not support the validity of such an interpretation. In that case, the compensation agreements at issue contained the following clause 4:

> 4) Commission/draw, commission/salary and straight commission earnings are 100th/104th of the amount paid. Four (4) 104ths are considered to be vacation pay which will be paid at each pay period.

45. This statement of the amounts to be paid to employees clearly distinguished their "commissions", by which I mean a component of their "wages" as defined in section 1 of the *Act*, from the amounts payable to them as vacation pay. In no way did the employees' employment agreements stipulate that their section 1 "wages" would include payments of vacation pay. This was true regardless of the fact that the total "amount paid" to each employee might, as the Tribunal Member remarked, be characterized as a "global commission". In substance, the sum expressed as a "global commission" was correctly interpreted to include "wages" as defined in section 1 of the *Act* and a separate amount for vacation pay. For these reasons, I believe that *National Signcorp* was correctly decided, and the result in the case operates in a manner that is consistent with the principles expressed in *Atlas Travel Service* and *VCR*.

46. Conversely, I do not accept an interpretation of *National Signcorp* which suggests that there are circumstances where the *Act* permits employers and employees to make agreements authorizing employers to pay employees vacation pay out of "wages" as defined in section 1. Like the Tribunal Member that wrote the Appeal Decision, I decline to consider as good law any decisions which support such a view.

47. The appellate jurisdiction of the Tribunal under section 112 of the *Act* does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that the error is palpable and overriding. Another way of characterizing this test is to say that the Tribunal must be satisfied that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

48. In the case before me, the Delegate noted that Claypool's employment agreement was ambiguous on its face because clause 5.2 stated that vacation pay would be paid "on" all commissions "in accordance with Schedule

B..." while Schedule B stated that all commission amounts were to "include" vacation pay. However, the Delegate concluded that Brandt's intention was to ensure that any vacation pay payable was to be included in the amounts to be paid to Claypool as commissions. Moreover, the Delegate found as a fact that Brandt had simply removed a percentage of the commissions earned as wages on Claypool's pay statements and then added those wages back in to account for Claypool's entitlement to vacation pay. The effect of this practice was to enable Brandt to pay Claypool his vacation pay out of Claypool's section 1 commission "wages". I see no palpable and overriding error in the Delegate's factual finding.

49. Having made this finding, the Delegate went on to say this:

> In conclusion, I am satisfied the reasoning provided by Mr. Justice Braidwood in *Atlas Travel Services Ltd*, supra is still valid under the current Act. Therefore, the inclusion of vacation pay in commission wages is not permitted by the Act. The agreement between Mr. Claypool and Brandt provides less than the minimum standards set out in section 58 of the Act. I find Clause 5.2 and Schedule "B" of the contract of employment (see Exhibit #1) with respect to the inclusion of vacation pay in commission wages has no effect pursuant to section 4 of the Act. I further find Brandt contravened section 58 of the Act by failing to pay vacation pay on "total wages". Accordingly, I find Brandt is liable to pay Mr. Claypool vacation pay on commission earnings.

50. I agree with these conclusions. Applying the law, that vacation pay cannot be included in a commission and that section 58 of the *Act* requires the employer to "pay something extra" for the vacation, to the facts of this case, I am not persuaded the Delegate committed an error of law either in the interpretation of section 58 of the *Act*, or its application to the facts as found. It also follows that I agree with, and adopt, the reasons set out in the Appeal Decision regarding the application of section 58 in the circumstances of this case.

51. Brandt argues that if it had simply reduced each commission rate in Claypool's employment contract by an amount equivalent to vacation pay and then added that later amount to Claypool's pay on each payday, there would be no reason to conclude that such an arrangement would contravene the *Act*. If Brandt and Claypool had, in fact, agreed to the latter's receiving lower wages in the form of commissions than were called for in the employment agreement the Delegate found the parties had actually entered into, I would agree with this statement. However, that is not the agreement the Delegate found the parties had made with each other.

52. Brandt submits that since its employment agreement with Claypool stipulated that his vacation pay rate would be 6%, and not the 4% the *Act* would have required in respect of a person with his seniority, there can be no question that Brandt received the minimum required amount of vacation pay. I disagree. What Brandt's assertion ignores is the Delegate's finding that the 6% in vacation pay contemplated in the employment agreement did not, in substance, represent payments of vacation pay, but rather a part of Claypool's commission wages as defined in section 1. That being so, the 6% in vacation pay Claypool's employment agreement contemplated represented no payment of vacation pay to him at all.

53. Brandt also asserts that while previous Tribunal decisions are not legally binding, the Tribunal should nevertheless strive for consistency when considering later cases that present similar facts. I concur with this statement, as a matter of general principle. However, if an interpretation ascribed to a previous Tribunal decision leads to error, any willingness to show deference will of necessity disappear. As I have stated earlier, I believe *National Signcorp* was rightly decided, on its facts, but it should not, as a matter of law, be employed to stand for the proposition that employers and employees may agree on a formula for paying vacation pay that stipulates it may be paid out of commission wages as defined in section 1 of the *Act*.

54. For the other reasons set out in the Appeal Decision, to which I have referred earlier, I also disagree with the submissions of Brandt that the Delegate erred in his identification of the appropriate recovery period for the

payment of vacation pay in this case, and that previous payments of sums Brandt characterizes as vacation pay should be deducted from any amounts of vacation pay that the Delegate found were properly payable. Brandt's position throughout has been that Claypool was actually paid vacation pay pursuant to his employment contract as part of his commissions. It also says that since Claypool received vacation time throughout his period of employment, and vacation pay in the form of salary continuance during those periods, the amount of vacation pay owed to Claypool must be reduced.

55. Regarding the issue of the proper recovery period, the Appeal Decision affirmed the analysis of the Delegate set out in his Reasons for the Determination, which I also adopt. A key factor for the Delegate was the failure on the part of Brandt to respond completely to a Demand for Employer Records issued pursuant to section 85 of the *Act*. The Delegate said this:

> There is no evidence with respect to the dates of the annual vacation taken by Mr. Claypool. Neither Brandt nor Mr. Claypool provided this evidence during the Hearing. Brandt was required by a Demand for Employer Records dated February 8, 2012 to provide the dates of the annual vacation taken by Mr. Claypool, but Brandt failed to comply with this part of the Demand. Without evidence of annual vacation dates I cannot determine precisely when vacation pay on commissions for March 13, 2008 to March 12, 2009 was "payable" in the following year.
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> In my view Brandt's failure to provide a precise record of annual vacation dates taken by Mr. Claypool, as required by the Demand, is a significant omission. Given that the Act is benefits conferring legislation, the absence of such record should not deny a remedy where a contravention of section 58 of the Act has been demonstrated. The Act should be interpreted to provide a broad scope of protection to employees, including the recovery of vacation pay for Mr. Claypool.
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> I find Mr. Claypool is entitled to vacation pay on commissions from March 13, 2008 to March 12, 2009. This finding is based on the fact that Brandt did not supply the required vacation records as per the Demand, and vacation pay on commission wages from March 13, 2008 to March 12, 2009, "became payable" between March 13, 2009 and March 12, 2010. The end of that period is within the recovery period of December 29, 2009 to June 28, 2010.
>
> I also find Mr. Claypool is entitled to vacation pay on commissions from March 13, 2009 onwards. Those wages were payable in accordance with section 58(3) of the Act, which requires that any vacation owing when employment terminates is payable at the time set by section 18 of the Act. In this case vacation pay on commissions from March 13, 2009 onwards was payable within 48 hours of Mr. Claypool's employment being terminated by Brandt, which was June 30, 2010.

56. As for Brandt's argument that any overpayments of vacation pay should be deducted, the Appeal Decision, at para. 51, also affirmed the Delegate's application of section 21 of the *Act*. I adopt that reasoning. The Delegate's comments on this point include the following:

> It is well settled that if an employer overpays an employee's wages, section 21 of the Act prohibits the employer from unilaterally deducting the overpayment from future wage payments. An employer can only deduct an overpayment from wages if an employee provides written consent through a written assignment of wages pursuant to section 22 of the Act. Should the employee not voluntarily consent to a repayment arrangement the employer cannot use a withholding of all or a portion of wages as a remedy...
>
> Brandt has not produced an assignment of wages written by Mr. Claypool for the purpose of deducting an overpayment of commissions from future wages. Consequently, I find that any overpayments to Mr. Claypool cannot be deducted from outstanding wages found in this Determination.

57. The same rationale would apply to any deductions Brandt asserts should be made in respect of alleged overpayments of vacation pay made by way of salary continuance during vacation time taken by Claypool.

58. Regarding Brandt's submission that the Delegate erred in concluding that the vacation pay owed should be paid at the rate of 6% of total wages as specified in Claypool's employment agreement, I have referred to the relevant comments of the Tribunal Member from the Appeal Decision earlier in these reasons, which I adopt for the purpose of disposing of this aspect of the application for reconsideration.

59. I do, however, wish to refer specifically to a further submission regarding this issue which Brandt made on appeal, and again in its application for reconsideration. Brandt submits that the decision in *Kenpo Greenhouses Ltd. V. British Columbia (Director of Employment Standards),* [1997] BCJ No. 541 supports a conclusion that any vacation pay payable to Claypool should be calculated at a rate of 4%, not 6% as provided for in his employment contract. *Kenpo* was a case where an employee's employment contract provided for the payment of vacation pay at a rate of 12% on base salary, but it was silent on the amount of vacation pay to be paid on bonuses. The court concluded that the employee was entitled to 6% vacation pay on his bonuses, the minimum amount prescribed by the *Act* in circumstances where, as in that case, the employee had been employed for at least five years.

60. The court rejected the employee's argument that he should receive 12% vacation pay on his bonuses, for the simple reason that his employment contract did not provide that he should receive that percentage, or any percentage for that matter, on that aspect of his remuneration. In the result, the minimum percentage mandated by the *Act* was required to be paid.

61. Brandt's argument on this point relies, in part, on the following comments of the court regarding the application of the *Act* as it relates to vacation pay:

> The failure of the employer here was to fail to pay any vacation pay on the bonuses whatever. Therefore, the *Employment Standards Act*, supra, steps in to correct this omission. However, it is inconsistent for the Respondent to then rely on the term of the contract to insist that 12% should be paid on the bonuses. The only reason that the Director was able to apply the *Employment Standards Act*, supra, in the first place was because it was clear that the 12% was not meant to and did not, in fact, apply to the bonuses.

62. Brandt submits that it would also be "inconsistent" for Claypool to rely on the term of his contract to insist that 6% should be paid by way of vacation pay. As in *Kenpo*, it contends that the only reason the Director has the authority to intercede and order that Claypool is entitled to vacation pay in the first place is because the wording in his employment contract relating to that matter "has no effect" for the purposes of section 4.

63. In my view, the flaw in this reasoning is that in *Kenpo* the facts were that there was no provision for the payment of any vacation pay on bonuses. Accordingly, the provisions of the *Act* were applied, and the employee recovered the minimum percentage of vacation pay on his bonus amounts that was mandated due to his tenure with the employer. It follows from this analysis that if the employment agreement in *Kenpo* had stated that the employee was to receive 12% vacation pay on his bonuses, that would have been the percentage rate that the employer would have been required to employ when it came time to calculating the amount of vacation pay which the employee was entitled to receive in respect of that aspect of his remuneration.

64. Unlike the circumstances in *Kenpo*, Claypool's employment agreement was not silent on the percentage to be paid on his commissions by way of vacation pay. Instead, his agreement stated that the applicable rate was 6%. Since his percentage rate was higher than the *Act* required as a minimum, given Claypool's seniority, there was no need to apply the provisions of the *Act* in order to establish the appropriate percentage rate.

65. *Kenpo* itself supports this conclusion. As I have said, the contract in that case provided that the employee would receive 12% vacation pay on his base salary. The employer argued that since the failure of the parties

to establish a rate of, and any payments for, vacation pay on bonuses was a contravention of the *Act*, it should render unenforceable the entire regime for the payment of vacation pay set out in the contract. For the employer, this meant that the applicable rate for payment of vacation pay on the employee's base salary should also be set at 6%, the minimum provided for by the *Act* in the circumstances, and not the 12% rate the contract expressly stipulated.

66. The court rejected this approach, stating that it would be "absurd" to apply the words of the then equivalent to section 4 of the *Act* to "strip" the employee of the 12% vacation pay benefit he had obtained from the contract. The court went on to say that if it were to decide that the vacation pay provisions of the contract were "totally void" it would mean that the employee would only be entitled to the statutory minimum on all aspects of his remuneration. The court stated that such a result would be "abhorrent" to the purpose of the *Act* and the policies underlying it identified in decisions like *Machtinger v. HOJ Industries Ltd.* [1992] 1 SCR 986 (SCC), where Iacobucci J., for the majority of the court, said this:

> If the only sanction which employers potentially face for failure to comply with the...Act is an order that they minimally comply with the Act, employers will have little incentive to make contracts with their employees that comply with the Act.

67. I have considered the reconsideration application afresh. Further to the direction of the court, I have set out a uniform statement of the applicable law – namely that vacation pay cannot be included in a commission and that section 58 of the *Act* requires the employer to "pay something extra" for the vacation - and I have applied that law to the facts. In so doing, I find no basis to set aside the appeal decision.

ORDER

68. Pursuant to section 116 of the *Act*, I order that the Tribunal's Appeal Decision, BC EST # D066/13, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal