Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Brandt Tractor Ltd.
(the "Applicant")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2013A/67

DATE OF DECISION: November 20, 2013

DECISION

SUBMISSIONS

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

INTRODUCTION

1. This is an application filed by Brandt Tractor Ltd. (the "Applicant") pursuant to section 116 of the *Employment Standards Act* (the "*Act*"). The Applicant is applying for reconsideration of Tribunal Decision Number BC EST # D066/13 issued by Tribunal Member Stevenson on August 8, 2013 (the "Appeal Decision"). Member Stevenson confirmed a Determination, issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on January 31, 2013, ordering the Applicant to pay $9,039.91 on account of unpaid wages and section 88 interest to its former employee, Shannon L. Claypool ("Claypool"). In addition, the Determination also ordered the Applicant to pay $1,000 representing two $500 monetary penalties levied under section 98 of the *Act*.

2. I am adjudicating this application based on the parties' written submissions. In addition, I have also reviewed the entire record that was before Member Stevenson (which, in turn, includes the record that was before the delegate when he was making the Determination).

3. Applications for reconsideration are reviewed under the two-stage *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc. et al.*, BC EST # D313/98). Under the *Milan Holdings* test, the Tribunal first reviews the application to determine if, on its face, it raises a sufficiently important matter of, for example, statutory interpretation or a compelling argument that the appeal decision was wrongly decided or otherwise tainted by a breach of the rules of natural justice, so as to justify a full inquiry into the merits of the application. If the application does not pass this first threshold, it is summarily dismissed. If the application passes the first stage, the Tribunal will then undertake a full review of the merits of the application.

4. I propose to first set out the adjudicative history of this matter and then I will proceed to examine the application in light of the *Milan Holdings* test and, finally, and only if the application passes the first stage of the *Milan Holdings* test, will consider the application on its merits.

FACTUAL BACKGROUND AND RELEVANT *ACT* PROVISIONS

5. On September 7, 2010, Mr. Claypool filed an unpaid wage complaint under section 74 of the *Act* against his former employer, the present Applicant. Mr. Claypool alleged he was owed unpaid commissions and vacation pay. Subsequently, the complaint was the subject of a complaint hearing and on September 2, 2011, a Determination was issued. The Applicant appealed the September 2, 2011, Determination but before the appeal was heard, the Director cancelled the Determination, assigned the matter to a different delegate and ordered that a new complaint hearing be conducted.

6. This second complaint hearing, at which both parties were represented by legal counsel, took place over three days on April 19, August 16, and October 2, 2012. The parties both presented oral testimony from witnesses and submitted various documents. The delegate issued the present Determination, and accompanying "Reasons for the Determination" (the "delegate's reasons") on January 31, 2013. As noted at the outset of these reasons, the delegate ultimately ordered the Applicant to pay a total sum of $10,039.91 on account of unpaid wages and two administrative penalties. The delegate issued detailed reasons (33 single-spaced pages) setting out the parties' evidence, his legal analysis and ultimate findings.

7. Briefly, the delegate's findings may be summarized as follows. Mr. Claypool was formerly employed with the Applicant as a sales representative selling industrial equipment in a designated sales territory. He was headquartered in Surrey and his compensation consisted of a base annual salary plus commissions. Mr. Claypool resigned his employment on June 28, 2010, in order to take up employment with another firm in the same industry. Although Mr. Claypool filed separate claims for both unpaid commissions and vacation pay, only the latter claim succeeded.

8. The Applicant appealed the Determination under subsections 112(1)(a) and (b) of the *Act* – the delegate erred in law and failed to observe the principles of natural justice in making the Determination. The Applicant argued that the delegate misinterpreted and misapplied the *Act's* provisions regarding vacation pay and also argued that the delegate did not correctly apply the "wage recovery" limitation set out in section 80 of the *Act*. In addition, the Applicant asserted that the delegate "fail[ed] to observe the principles of natural justice by disregarding [evidence relating to Mr. Claypool having taken vacation leave during his first year of employment]". Mr. Claypool did not appeal the Determination as it related to the dismissal of his claim for unpaid commissions.

9. Tribunal Member Stevenson adjudicated the appeal based on his review of the section 112(5) record that was before the delegate and the written submissions filed by legal counsel for the Applicant, Mr. Claypool, and the Director of Employment Standards.

10. The Applicant's counsel argued that the delegate erred in awarding Mr. Claypool vacation pay based on 6%, rather than 4%, of his earnings and failed to take into account certain evidence tendered by the Applicant relating to Mr. Claypool's vacation pay entitlement. In addition, Member Stevenson noted that the Applicant's appeal submission apparently contained new evidence that was not before the delegate thus raising the possible application of subsection 112(1)(c) of the *Act* – "evidence has become available that was not available when the determination was being made".

11. Member Stevenson's decision with respect to the Applicant's reasons for appeal may be summarized as follows. First, with respect to the vacation pay issue, Member Stevenson reproduced, at paras. 11 and 12 of his reasons for decision, the relevant provisions of the parties' employment contract. These provisions state, in essence, that while on vacation leave Mr. Claypool would continue to receive his base salary and that his commission payments included an allowance reflecting 6% for vacation pay and 4% for statutory holiday pay. Member Stevenson noted, at para. 16 of his reasons, that the delegate determined Mr. Claypool was entitled to additional vacation because, first, there is no provision in the *Act* allowing employers to simply declare that vacation pay is included in the overall commission otherwise payable; second, the employment contract's vacation pay provisions amounted to an unlawful attempt to "contract out" of the *Act* contrary to section 4; and, third, the Applicant was obliged to pay vacation pay on Mr. Claypool's total wages, not simply his commission earnings.

12. Member Stevenson agreed with the delegate's approach to the interpretation of section 58 (vacation pay) of the *Act*. He rejected the Applicant's submission that the employment contract provision stating that

Mr. Claypool's paid commissions included his statutory entitlement to vacation pay, was a lawful provision. Member Stevenson found this provision was inconsistent with the *Act* as interpreted by both Tribunal and judicial authorities (paras. 47 and 48).

13. As noted above, the Applicant argued in its appeal that the delegate misinterpreted and/or misapplied subsection 80(1) of the *Act*. This provision is a "wage recovery limitation" period and it states:

> 80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
>
> (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment, and
>
> (b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination,
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> plus interest on those wages.

14. The Applicant argued on appeal that the delegate could only award Mr. Claypool unpaid vacation pay relating to commissions earned beginning November 1, 2010. The delegate's finding regarding the "wage recovery period, set out at page R32 of his reasons, was as follows:

> 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 [for payroll records – a failure that resulted in one of the two $500 administrative penalties], 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. [Mr. Claypool's employment ended as of this latter date]
>
> 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 pay owing when employment terminates is payable at the time set by section 18 of the Act. In this case vacation pay on commission from March 13, 2009 onwards was payable within 48 hours of Mr. Claypool's employment being terminated by Brandt, which was June 30, 2010.

15. As previously noted, the Applicant argued on appeal that the delegate's decisions regarding the scope of the wage recovery period constituted an error in law. Member Stevenson unequivocally rejected that argument (at para. 51):

> 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 provision 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 it was not necessary. They were wrong on that and, in any event, such an assumption is 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.

16. With respect to the appropriate vacation pay "percentage" – 6% or 4% – the Applicant argued on appeal that the lower rate should apply because that was the applicable rate fixed by the *Act* rather than the 6% rate set out in the employment contract. The statutory provisions relating to the amount of vacation pay to which an employee is entitled are set out in subsections 58(1)(a) and (b) of the *Act*: "(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" and "(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". The Applicant argued on appeal that "there is no case law that allows the Director, or the Tribunal, to void one aspect of a contractual provision while upholding another" and that since the employment contract was void as it related to the payment of vacation pay, Mr. Claypool should only have been awarded vacation pay at the statutory minimum rate, namely, 4%.

17. Member Stevenson noted, at para. 54, that the section 4 "no contracting out" provision does not, on its face, "void" a non-compliant agreement but, rather, only states that such an agreement is to be given "no effect". Section 4 states: "The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4) [relating to collective bargaining agreements], has no effect." Member Stevenson then concluded:

> ...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.

18. Finally, with respect the "natural justice" argument, the Applicant argued that the delegate "failed to consider that Claypool received vacation pay time off (and vacation pay) from his first day of employment" and it asserted the final vacation pay award should have reflected that circumstance. Member Stevenson dismissed this argument (at para. 56):

> On the natural justice argument, 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.

19. Having found against the Applicant with respect to each of its reasons for appeal, Member Stevenson dismissed the appeal and confirmed the Determination.

THE APPLICATION FOR RECONSIDERATION

20. The Applicant's legal counsel says that the Appeal Decision, as it relates to the determination of Mr. Claypool's vacation pay entitlement, reflects "a serious mistake in applying the law by failing to understand and consider the critical facts [of prior Tribunal decisions] in comparison to the facts of the

present case". Counsel also says that "the methods of payment of vacation pay allowed under the *Act* raise questions of law that are significant to these parties as well as also other employers and employees in determining how future cases will be adjudicated. "

21. The Applicant seeks the following order: "...that [the Appeal Decision] be set aside and that the portion of the Determination awarding additional vacation pay to Claypool be dismissed." Alternatively, the Applicant seeks an order varying the Determination by reducing the amount of vacation pay payable to Mr. Claypool on the ground that both the delegate and Member Stevenson misinterpreted section 80 of the *Act* (the unpaid wage "recovery period" provision).

MILAN HOLDINGS: THE FIRST STAGE

22. The *Milan Holdings* test was promulgated in the interests of both administrative justice and administrative efficiency. If a section 116 applicant is simply rearguing their position without providing any cogent arguments that the original decision is incorrect, the Tribunal will not allow the matter to be further delayed, and impose further costs on the parties, by engaging in yet another thorough canvassing of the matter. On the other hand, where there is a credible argument that the original appeal decision is tainted in some way – say, due to a legal error or a breach of the rules of natural justice – it is appropriate for the Tribunal to review the matter more fully.

23. In the instant case, the Applicant says that the Appeal Decision is inconsistent with prior Tribunal decisions and that this application will afford the Tribunal an opportunity to clarify an employer's obligations with respect to the payment of vacation pay, especially when there is a commission-based pay system.

24. Mr. Claypool's legal counsel submits that this application does not pass the first stage of the *Milan Holdings* test. Counsel notes that this matter has been ongoing for over two years since an original determination was cancelled by the Director thus necessitating a new hearing resulting in the Determination and Appeal Decision now before me. Counsel says that that the legal question regarding the proper interpretation of section 58 of the *Act* is clear and is reflected in a statement contained in a "factsheet" published by the Employment Standards Branch – "Vacation pay cannot be incorporated into the commission rate". Further, counsel says that the prior cases relied on by the Applicant are clearly distinguishable and thus the application is wholly unmeritorious.

25. The Director's legal counsel asserts that the principal decision relied on by the Applicant, *National Signcorp Investments Ltd.*, BC EST # D163/98, is a "flawed" decision and not consistent with other Tribunal and judicial decisions. Nevertheless, the Director's counsel says that the application should be addressed on its merits because "it may be valuable to conclusively disabuse this employer, and others, who may fall into the same error, of the provisions of the *ESA*, and of the expertise and interpretation of the Tribunal and of learned publications on employment standards" and that "a definitive statement of the correct application of the *ESA* may prevent this sort of process in the future by this, or other employers".

26. The application is timely. Although I am concerned that this application appears to be, at least to a degree, a simple attempt to reargue the position advanced (and rejected) both before the delegate and Member Stevenson, I am persuaded that there is at least some merit to the notion advanced by both the Applicant's and the Director's legal counsel, namely, that *National Signcorp* may not be wholly consistent with the position espoused in other Tribunal and judicial decisions (or, at the very least, that it has been misinterpreted and misapplied). Accordingly I think it appropriate to review the matter more fully in an effort to provide more definitive guidance regarding an employer's obligations regarding the payment of vacation pay under a

commission-based payroll system. On that basis, I am satisfied that this application passes the first stage of the *Milan Holding*s test and, accordingly, the application will be reviewed on its merits.

VACATION PAY & COMMISSIONED EMPLOYEES: A REVIEW OF THE CASELAW

27. Section 58(1) of the *Act* states that an employer must pay vacation pay at a rate of 4% (after 5 calendar days of employment) or 6% (after 5 consecutive years of employment) "of the employee's total wages during the year of employment entitling the employee to the vacation pay". In addition, under section 57 of the *Act*, an employee is entitled to vacation leave of at least 2 weeks (after 12 consecutive months of employment), or at least 3 weeks (after 5 consecutive years of employment). Thus, while an employee has an almost immediate (after 5 days of employment) vested right to vacation pay, an employee's vacation leave entitlement does not crystallize until the employee has completed 12 consecutive months of employment.

28. Vacation pay must be paid to a non-union employee "at least 7 days before the beginning of the employee's annual vacation" or "on the employee's scheduled paydays if agreed to in writing by the employer and employee" (subsection 58(2)). Subsection 58(3) states that any earned, but unpaid, vacation pay must be paid to the employee within either 48 hours (employer termination) or 6 days (employee resignation) after the termination of employment.

29. "Wages" include "commission" earnings (section 1) and the fundamental question raised by this application is whether an employer and employee can make a written agreement (recall that under subsection 58(2)(b), a written agreement is required if vacation pay is paid "on the employee's scheduled paydays) to include vacation pay in the "commission rate".

30. The starting point for this discussion is Mr. Justice Braidwood's decision in Court's decision in *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)*, 1994 CanLII 2331 (B.C.S.C.), a decision rendered before he was appointed to the British Columbia Court of Appeal. *Atlas Travel* was decided under the former *Employment Standards Act* (that contained similar, but certainly not identical, vacation pay provisions as compared to the current *Act*; see below) which provided that vacation pay be paid "at least 7 days before the beginning of [the employee's] annual vacation". Although the employer conceded that it did not comply with the statute's procedural requirements (for example, it did not maintain proper payroll records regarding the payment of vacation pay), it nonetheless asserted that it complied with its vacation pay obligations. The four complainants each signed a "commission agents' contract" that stated, in part: "Payment of vacation, which is included in your commission earnings, is as prescribed by the Employment Standards Act of British Columbia". *Atlas Travel* relied on an Ontario Supreme Court decision that reviewed an arbitration award under a collective agreement. The collective agreement stated that 12% of part-time nurses' pay was to be allocated "in lieu of all fringe benefits". Justice Braidwood rejected this decision as a persuasive precedent since the contract before him did not allocate a specific sum on account of vacation pay:

> ...Here, there is no designated sum; rather the appellant is arguing that the travel agent's [sic] wages *included* their holiday pay and annual vacation pay. (my underlining; *italics* in original text)
>
> This 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 contract the travel agents signed with Atlas Travel, after two years of employment, an employee would be entitled to three weeks of vacation. Assuming a base commission of 50%, 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*.

31. I am aware of two other judicial decisions addressing the issue of vacation pay within a commission-based compensation structure. The first is a judicial review of the Tribunal's reconsideration decision in *Director of Employment Standards (VCR Print Company)*, BC EST # RD348/01. The reconsideration panel noted, at page 10 of its reasons: "It is clear that an employer cannot incorporate vacation pay or statutory holiday pay within the commission structure, as an all inclusive amount." The issue in the B.C. Supreme Court concerned whether the reconsideration panel erred in finding that commissions earned while an employee was on vacation constituted "wages" and thus attracted additional vacation pay (6% in this case). The court ultimately concluded that the reconsideration panel's decision was not patently unreasonable: *VCR Print Company Ltd. v. Employment Standards Tribunal*, 2003 BCSC 442. The employer *was* paying vacation pay but erred in that it only paid it at a 4% rate and, as previously noted, was not paying any vacation pay on commissions earned while the employees were on vacation leave. Justice Romilly observed, at para. 66:

> In *Atlas*, the Court notes that using an employee's commission to satisfy the vacation pay requirements of the *Act* produces an "absurd result". That result, by mathematical analysis, is the more senior the employee and therefore the longer vacation they are entitled to, the lesser the rate of commission they are entitled to. This is because the employer is satisfying the requirement to pay vacation pay under s. 58 of the *Act* with the employees' own commissions, and as the Court in *Atlas* notes at para. 10, "an employer is obligated to pay an employee something in addition to their wages for annual vacation".

32. The second case I have found applying *Atlas* is a B.C. Provincial Court (Small Claims) decision, *Naidu v. Hare Motors Ltd.*, 2013 BCPC 165. The claimant was a commissioned salesperson and the parties' employment contract provided, in part: "vehicles that are sold with a gross profit that is commissionable is paid at the commission rate...which includes holiday pay". The employer argued that it did not owe any vacation pay since "it was factored into [the claimant's] commission structure" (para. 4). Judge Skilnick held (at paras. 8 *et seq.*):

> The Defendant says that its agreement with the Claimant wasn't an agreement asking him to waive his vacation pay. To the contrary, in the agreement the Defendant was expressly agreeing to pay vacation pay, but was including that amount as part of the commission payable. There are two problems with this argument. Firstly, the contract doesn't specify what portion of the commission was vacation pay and therefore there is no way of knowing what rate of vacation pay is actually being paid to the employee and if that rate meets the minimum requirements of the *Employment Standards Act*.
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> Secondly, the rate of commission should have increased after five years because the amount of vacation pay was required by law to increase. But in the contact made between the parties, no increase in the rate of commission is set out for year five. What this means is that at the end of year five, either the Claimant's commission dropped by the amount of the increase in his vacation pay, or he wasn't being given any increase in his vacation pay.
>
> ... The contract is an effort by the Defendant to have the Claimant pay for the Defendant employer's obligation to pay vacation pay by a reduction in the Claimant's commission. Section 4 of the *Employment Standards Act* prohibits this. Accordingly, this portion of the contract has no effect and is unenforceable against the Claimant.

33. The Tribunal has addressed, in a number of separate decisions, the payment of vacation pay in a commission-based compensation structure. One of the earliest decisions is *Coquihalla Towing Co. Ltd.*, BC EST # D285/96, where I held that a 30% commission that, by the parties' written agreement, included "holiday pay"

satisfied the employer's obligations under section 58 of the *Act*. Although the Director of Employment Standards never applied for reconsideration of *Coquihalla Towing*, this decision cannot be easily reconciled with *Atlas Travel* (it should be noted that *Atlas Travel* was not cited by either party or referred to in my reasons in *Coquihalla Towing*). I am now of the view that this decision was wrongly decided.

34. The Applicant principally relies on my decision in *National Signcorp*, *supra*. In *National Signcorp*, the employees signed employment agreements that provided, in part: "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." I found that the employer did not contravene section 58 of the *Act* (at pages 4 – 6):

> ...the employer's approach to compensation was to agree to pay a "global commission" (which was based on the individual's sales and leasing volume) to each representative and then allocate the commission between "regular earnings" and "vacation pay". This allocation was specifically set out on each employee's pay stub for each pay period – in other words, the dollar amount shown as "commissions" was something less than the full commission payable with the balance due being recorded as "holiday pay paid" (i.e., vacation pay)...
>
> In my view, the system that the employer has put in place with respect to the payment of vacation pay is in full compliance with the *Act*. This system is completely transparent; it was agreed (in writing) between the employer and the employee at the outset of the employment relationship; and it separately identifies "regular" commission earnings and vacation pay on each payday wage statement. The Director's delegate concedes that if the employer had, from the outset, simply reduced the global commission rate by an amount equivalent to vacation pay and then added that latter amount to each employee's pay on each payday, the requirements of the *Act* would have been satisfied. For my part, I cannot fathom why the same result cannot be lawfully accomplished by simply paying a global commission rate and then allocating a portion of that commission to vacation pay so long as that system is clearly explained to the employee at the outset of the employment relationship and the vacation pay portion is clearly identified and accounted for on the employee's wage statement...
>
> The Director's delegate submitted that the employer's approach to the payment of vacation pay would inevitably lead to an absurd result, namely, that after five consecutive years of service the employee would then absorb, in effect, a decrease in pay. A similar argument was advanced, and accepted by the court, in *Atlas Travel*...
>
> The fact that a presently lawful agreement might, given the effluxion of time, offend the *Act* does not justify finding that otherwise lawful agreement to be void. For example, section 63 of the *Act* provides for compensation for length of service to increase with consecutive years of service. An initial agreement to pay, say, the equivalent of four weeks' wages as termination pay is not void merely because, at some future point, the minimum provisions of the Act will mandate a payment equivalent to 5 to 8 weeks' wages.

35. *National Signcorp* is distinguishable from *Atlas Travel* in that the agreement did not simply state that the commission rate "included" any vacation pay but, rather fixed a designated sum as the commission rate, namely, 100/104ths of total amount paid (*not* of the total *commission*) and then *separately* provided for an *additional* 4/100ths to be paid over and above this commission rate as vacation pay. In other words, assuming a 10% commission on a $1,000 sale, the *commission* paid would be $100 and a further 4% of the commission ($4) would be paid as *vacation pay*. Thus, the total amount payable would be $104 ($100 commission + $4 vacation pay) or 10.4% of the sale amount. The system was transparent and the commission and vacation pay amounts were separately itemized in the employees' wage statements. The Director did not apply to have *National Signcorp* reconsidered and it was followed by two separate Tribunal Members in *Monarch Beauty Supply*, BC EST # D062/00 and *Monarch Beauty Supply Co. Ltd.*, BC EST # D090/02. The Director did not apply to have either decision reconsidered.

36. *National Signcorp* was referred to, and seemingly endorsed, by yet another Tribunal Member in *Urness and Urness operating as L & L Water Hauling*, BC EST # D107/01, but ultimately not applied because "there was no agreement in writing...the system the employer is using is not transparent and although vacation pay is shown as a separate item on the apy [sic, "pay"] stub there is no indication as to how it was calculated...nor does analysis of the pay stubs provide any evidence on how L&L was calculating vacation pay owing" (page 5).

37. Another Tribunal Member, in two companion decisions (*Advantage Plumbing and Drainage Inc.*, BC EST # D047/05 and D053/04 – *sic*, the latter decision is listed incorrectly and should read D053/05), endorsed *National Signcorp* as it concerned vacation pay (but not to its extension, in other decisions, to statutory holiday pay). In *Advantage Plumbing* the employer paid vacation pay pursuant to agreements that had not been signed by either employee. These agreements provided, in part, for a 35% total *payment* (the actual *commission* was 32.61%) that was allocated as follows:

> The 35% is expressly made up as follows:
>
> | | | |
> |---|---|---|
> | The commission shall be: | base rate | 32.61% |
> | | + vacation pay | 1.31% |
> | | + statutory holiday pay | 1.08% |
>
> (my underlining)

38. It should be noted that 1.31% vacation pay amount is approximately 4.02% of the commission rate. The employer argued that this arrangement was not contrary to section 58 of the *Act*. Tribunal Member Lawson rejected the employer's position but in each case, and in virtually identical language, he made the following comments regarding the above provision (D047/05 at page 4):

> The *Act* therefore allows for an employer and employee to agree in writing to alternate forms of payment of vacation pay, and in principle there seems no reason to think Advantage's percentage formula, if expressed in a written agreement, would be contrary to the *Act* (assuming the formula resulted in employees receiving at least the minimum vacation pay required by section 58). In this case, however, there is simply no such agreement. While Advantage clearly believed Brown had agreed to its customary method of paying vacation pay, it can only be Brown's written agreement that allows Advantage to depart from its obligation to pay vacation pay as prescribed in section 58. I therefore find the delegate made no error in finding Advantage had not complied with section 58. (underlining in original text)

39. The foregoing review indicates that at least four separate Tribunal Members, in six separate decisions (none of which the Director challenged by way of a reconsideration application) endorsed, either expressly or by reasonable implication, the view that vacation pay could be paid as a portion of an employee's total compensation attributable to a sale provided: i) there is a formal written agreement that clearly provides for an allocation of a portion of the global sum payable to vacation pay; ii) the agreement does not simply state that a commission otherwise payable "includes" vacation pay; iii) the agreement provides for the proper amount of vacation pay; and iv) the vacation pay actually paid is clearly and separately identified in the employee's wage statements.

40. It should be noted that the vacation pay provision in the current *Act* is somewhat different from the provision under the former statute that was at issue in *Atlas Travel*. For convenience, I have set out the two provisions, below. The key distinction between the former and current vacation pay provisions is that the latter now provides for payment "on the employee's scheduled paydays" but only if there is a *written* agreement in place. The Tribunal has consistently held that an employer cannot satisfy its obligation to pay

vacation pay by simply stating that any vacation pay otherwise payable is simply included within a particular commission rate. The employer must specify a commission rate and then must pay an *additional* 4% or 6%, depending on the employee's tenure, as vacation pay. This latter amount may be paid by way of an *additional* "top up" to the commission rate provided for in the enabling written agreement between the parties so long as the "top up" meets the employer's statutory obligation and the additional payment is separately identified as vacation pay on the employee's wage statements.

***Employment Standards Act*, SBC 1980, c. 10**	***Employment Standards Act*, RSBC 1996, c. 113**
Annual vacation 36.(1) An employer shall give to each of his employees, after the completion of each year of employment, an annual vacation of at least (a) 2 weeks, and (b) one additional week where the employee has completed 5 continuous years of employment with the employer... Vacation pay 37.(1) An employer shall pay annual vacation pay to each employee calculated on the employee's total wages for the year in respect of which the employee becomes entitled to an annual vacation at a rate at least equal to 2% for each week of annual vacation to which the employee is entitled under section 36. (2) An employer shall pay to an employee the annual vacation pay to which he is entitled in one payment (a) at least 7 days before the beginning of his annual vacation, or (b) where the employment of the employee ceases before he takes his annual vacation, at the time established by this Act for payment of wages.	Entitlement to annual vacation 57.(1) An employer must give an employee an annual vacation of (a) at least 2 weeks, after 12 consecutive months of employment, or (b) at least 3 weeks, after 5 consecutive years of employment. (2) An employer must ensure an employee takes an annual vacation within 12 months after completing the year of employment entitling the employee to the vacation. (3) An employer must allow an employee who is entitled to an annual vacation to take it in periods of one or more weeks. (4) An annual vacation is exclusive of statutory holidays that an employee is entitled to. Vacation pay 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 paydays, if (i) agreed in writing by the employer and the employee, or (ii) provided by the 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.

41. In *Howard C. Chui, operation as Label Express*, BC EST # D239/03, a decision cited by Tribunal Member Stevenson in the Appeal Decision (at para. 47), the complainant salesperson was paid a minimum hourly wage plus a 2% commission on her daily sales. The employer claimed that this 2% included her vacation pay but there was no written agreement to this effect and, apparently, vacation pay was not separately itemized on her wage statements. The Tribunal Member observed, absolutely correctly in my view, that the employer was obliged to pay 4% vacation pay on the employee's total wages including both her hourly wage and her 2% commission. Since the employer failed to do so, the delegate property awarded an additional 4% as vacation pay. I do not see any inconsistency with this decision and the *National Signcorp* line of authorities.

42. Tribunal Member Stevenson also referred to *VCR Print Company Ltd.*, BC EST # RD348/01, in his reasons for decision (the judicial review of this decision is discussed, above). In *VCR Print Company*, the employer paid the commissioned employees 4%, rather than 6%, of their commission earnings but failed to pay any vacation pay with respect to commissions earned while the employees were on vacation leave (the employer took the position that these payments constituted "vacation pay"). On appeal, the Tribunal Member concluded (at page 14 of BC EST # D498/00):

> 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.

43. The Director applied for reconsideration and a 3-person panel concluded (at page 10 of BC EST # RD348/01): "In our view, the Adjudicator erred in permitting a 'set off or deduction' of the commissions received by the employees while on vacation, from the vacation pay entitlement. It is clear that an employer cannot incorporate vacation pay or statutory holiday pay within the commission structure, as an all inclusive amount". In *VCR Print Company*, the employer simply (and erroneously) took the view that since the employees continued to receive payment for commissions generated while on vacation, they had no further entitlement to vacation pay. The reconsideration panel found that the employer was not permitted to characterize these commissions as vacation pay since their true character was "wages" that, in turn, attracted an *additional* 6% vacation pay. The panel rejected the employer's position that its policy was essentially identical to one where the employer continues to pay the employee their salary while they are on vacation leave (and thus not "working"). The panel concluded that the employees were entitled to vacation pay at 6% of their entire year's earnings (which included commissions earned when they were away on vacation leave) and that the original adjudicator erred when he held that these latter commissions constituted vacation pay rather than regular wages. It is important to note that the sort of commission/vacation pay structure set out in *National Signcorp* was simply not present in this case and therefore was not under review. As noted above, on judicial review, the court held that the reconsideration panel's decision was not patently unreasonable since the employer obviously failed to pay vacation pay in accordance with the provisions of the *Act*.

THE RECONSIDERSATION APPLICATION: VACATION PAY

44. Mr. Claypool was engaged as a full-time sales representative with his compensation based on a base salary plus commission arrangement. The Applicant and Mr. Claypool entered into a written employment contract dated March 1, 2010, that was signed by both parties. As I understand the situation, the parties executed several employment contracts during the course of Mr. Claypool's employment from March 2006 until June 2010 (Mr. Claypool put the number at "four or five" – delegate's reasons, page R3) but this was the agreement that was in force when his employment ended. By paragraph 3.2 of the agreement, the Applicant agreed to certain compensation "together with all statutory benefits" and it states, contrary to section 17 of the *Act*, that the compensation payments "shall be made monthly, unless otherwise provided in this

Agreement" (the *Act* minimum is semi-monthly payment of all wages – including commissions – earned and payable).

45. Mr. Claypool's compensation package was set out as Schedule "B" ("Remuneration and Benefits") to the agreement and it provided for a "BASE salary of $21,000 per ANNUM" as well a variety of separate commission payments (for example, the commissions range from 3% to 20% depending on the particulars of the sale). It bears repeating that "commissions" are included in the statutory definition of "wages" and thus attract vacation pay under section 58 of the *Act* – any attempt by an employer to avoid its obligation to pay vacation pay on earned wages is of "no effect" under section 4 of the *Act*.

46. Schedule "B" also contained, among other things, the following additional provisions:

- Payment shall be made semi-monthly: ½ of the base payable in the middle of the month and the remainder of the base + commissions payable at month-end. Brandt shall make all payroll deductions as required by law.
- Commissions shall not be earned until funds have been settled in full and received by the company.
- All Commission amounts set out in this Schedule "B" include 6% vacation pay and 4% statutory holiday pay.

47. I note that the provision regarding the payment of commissions contravenes section 17 of the *Act* in that there must be at least two pay periods in a month and an employer must pay all wages *earned* in each pay period within 8 days after the end of the pay period. Further, since commissions are "wages", any attempt to simply declare that this component of earned wages "includes vacation pay" is of no effect. In the same way, an employer cannot lawfully mandate that an employee's annual $50,000 salary includes vacation pay.

48. Paragraph 5 of the March 1, 2010, agreement addresses "Annual Vacation, Vacation Pay, and Statutory Holiday Pay". Paragraphs 5.2 provides as follows:

> 5.2 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.

49. In my view, and as previously expressed, the agreement as it relates to the payment of vacation pay contravenes the *Act* and, accordingly, under section 4 "has no effect". The commissions earned and payable under the agreement are "wages" within section 1 of the *Act* and, as such, attract vacation pay under section 58. In my view, the agreement does not fall within the parameters of the *National Signcorp* line of authorities. Under section 58, vacation pay must be paid on *all* earned wages and that would include, in this case, not only all commissions earned but also the base salary and statutory holiday pay.

50. Paragraph 5.2 of the agreement states that 6% vacation pay will be paid "on each commission". However, Brandt simply purported to effectively reduce Mr. Claypool's earned and payable commissions by an amount equivalent to the vacation pay that would otherwise be payable to Mr. Claypool. Brandt failed to pay vacation pay as mandated by the *Act* and the parties' employment agreement, on its face, contravenes section 58. Further, the wage statements issued to Mr. Claypool do not comply with section 27 of the *Act* regarding the separate itemization of vacation pay amounts earned and paid in each pay period. If the Applicant intended

rely on subsection 58(2)(b) regarding its obligation to pay vacation pay, then it was required to pay vacation pay in each pay period and properly identify the amount of vacation pay (on all earned wages in the pay period) on Mr. Claypool's wage statements – it clearly did not do so (see *B & C List (1982) Ltd.*, BC EST # D001/09, at para. 16).

51. If the parties had agreed to a lower commission rate and then also agreed to pay a separate and additional 6% on all earned commissions as vacation pay, that would have satisfied section 58 provided that 6% vacation pay was also paid in regard to other wages that were earned and payable (for example, the base salary, statutory holiday pay and any other bonuses or other forms of monetary compensation paid to Mr. Claypool for "work"). But that is not what this agreement mandates. Rather, it is simply an attempt by the Applicant to contract out of its vacation pay obligations under the *Act* and, as noted above, is thus of "no effect" under section 4.

52. The Applicant maintains that its system wholly complies with the principles espoused in the *National Signcorp* line of authorities but a simple example will, I believe, demonstrate the fallacy of the Applicant's assertion. Under the parties' March 1, 2010, agreement, a 20% commission is payable on the "gross margin" for sales of "New John Deere 'Commercial Worksite Products' and Ditch Witch Skid Steers". Assuming a $10,000 gross margin, Mr. Claypool would have reasonably expected a $2,000 commission (i.e., a "wage" payment of $2,000) and, in addition, would have been entitled to an additional 6% vacation pay over and above the commission (i.e., $120). However, the Applicant says that the $2,000 commission is really only $1,880 since 6% of the $2,000 total commission entitlement represents vacation pay. In other words, the commission is not 20% but rather 18.8% – in effect, the Applicant is taking a $120 deduction (contrary to section 21 of the *Act*) from the employee's regular wages and crediting it as "vacation pay". In the end result, the commission rate is not 20% as stated in the agreement but only 18.8% and this cannot, in my view, be characterized as a wholly transparent system. Indeed, it is highly misleading. Of course, there is nothing in the *Act* prohibiting the parties from agreeing to an 18.8% commission rate but that was not the bargain struck here. If the parties *had agreed* to an 18.8% commission rate and if the employer had, in addition, paid a further 6% of the total commission as vacation pay (and itemized this amount on the employee's wage statement), this approach would have complied with section 58 of the *Act* provided the employer paid 6% of all of the employee's earned wages as vacation pay and itemized these payments on the employee's wage statements. But that is simply not what the employer did in this case.

53. In my view, Tribunal Member Stevenson correctly held that Mr. Claypool was entitled to additional vacation pay.

THE VACATION PAY RATE

54. Brandt argues that even if Mr. Claypool is entitled to vacation pay, both the delegate and Tribunal Member Stevenson erred in fixing the rate at 6% rather than 4%. While Brandt correctly notes that given Mr. Claypool's years of consecutive service, his minimum statutory entitlement would be 4% rather than 6%, it must also be noted that subsection 58(1)(a) states that an employee with less than 5 years service must be given "at least 4%" – there is nothing in the *Act* prohibiting the parties from agreeing to an amount more than the statutory minimum. The parties clearly agreed that Mr. Claypool would be paid vacation pay at the rate of 6% (and, Brandt purported to pay at this rate, further corroborating the parties' agreement on this score). The Applicant's failure to comply with that agreement does not permit it to avoid its contractual obligation.

THE RECOVERY PERIOD

55. Finally, Brandt says that the delegate and Tribunal Member Stevenson erred with respect to the interpretation and application of section 80 of the *Act*. I set out the relevant excerpts regarding this matter, from both the Determination and the Appeal Decision, above (under the heading "Factual Background and Relevant *Act* Provisions"), and for my part, I consider the Applicant's argument on the section 80 issue to lack merit for the reasons given by Tribunal Member Stevenson.

ORDER

56. The Applicant's section 116 application to cancel or, alternatively, vary the Appeal Decision is refused. Pursuant to subsection 116(1)(a) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal