

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- By -

Monday Publications Ltd.
(the "Employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	Ib S. Petersen
FILE No.:	98/225
DATE OF DECISION:	July 2, 1998

APPEARANCES

Mr. Les Jamieson	on behalf of the "Employer"
Mr. David Oliver	on behalf of the Director

OVERVIEW

This is an application for reconsideration by the Employer pursuant to Section 116 of the *Employment Standards Act* (the "Act"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on February 3, 1998 (BC EST#D059/98). Following a hearing on December 16, 1997, the Adjudicator found that the Employer did not pay statutory holiday pay to a number of employees in accordance with the *Act*. The Employer included statutory holiday pay in their commissions. The Decision confirmed a Determination dated September 19, 1997 which held that the Complainant employees were entitled to payments on account of statutory holiday pay, for a total of \$16,810.83 plus interest.

ISSUES TO BE DECIDED

The issue to be decided in this reconsideration application is whether the Adjudicator made a fundamental error of fact or law when he decided that statutory holiday pay could not be included in the commission of the Complainant employees?

FACTS

The Adjudicator found the following salient facts in this matter:

- The Employer, a publisher of magazines, including the weekly Monday Magazine, employed a number of commissioned sales persons.
- All employees were initially on a draw for three months after which time an individualized pattern was established, sometimes consisting of straight commission, salary plus commission, or draw against commission.
- The Employer was closed on statutory holidays and there was no evidence that any employee worked on a statutory holiday.
- The Employer intended that the commission structure, which was put in place in 1987, would include statutory holiday pay and vacation pay. The commission amount was higher than that paid by other publishers in Victoria.

- The employees, as well, believed that their commissions included statutory holiday pay and vacation pay.

The Adjudicator concluded that including statutory holiday pay in the commission contravened the *Act* and that he was bound by Mr. Justice Braidwood's decision in *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)* (1994), 99 B.C.L.R. (2d) 37 (S.C.) referred to in the original Decision, at page 8:

“The argument fails on a logical basis. By the Employment Standards Act, s. 36(1)(b), after five years of employment, an employee shall be entitled to three weeks of vacation. By the contracts the travel agent signed with Atlas Travel, after two weeks of employment, an employee would be entitled to three weeks of vacation. Assuming a base commission of 50 percent, the Employment Standards Act provides for 2 per cent vacation pay per week. Therefore, with 2 weeks of vacation the employee is receiving 46 per cent commission. With 3 weeks of vacation, that commission drops down to 44 per cent. This is an absurd result, for an employee's “total wages” ought not to decline with seniority in order to fund a statutory obligation which rests with the employer.

The *Employment Standards Act* sets up a scheme whereby an employer is obligated to pay an employee something in addition to their wages for annual vacations and general holidays. Section 37(1) states that the annual vacation pay shall be calculated on the employee's total wages. Therefore the appellant's attempt to have the employee's commission include their vacation and holiday pay does not comply with the *Employment Standards Act*’

The Adjudicator also recent decisions of this Tribunal at page 8-9:

“I note that this Tribunal has considered this issue in *W.M. Schultz Trucking Ltd.* (BCEST #D127/97, in the context of a pay structure that was based on a percentage of revenues generated by trucks, inclusive of statutory holiday and vacation pay. The inclusion of statutory holiday pay in a piecework structure does not comply with the requirements of the *Act*: *Foresil Enterprises Ltd.*, BCEST #201/96. While the parties apparently did agree that the commission structure included holiday pay, it appears that it is an agreement which is void, because it breaches the provisions of s. 4 of the *Act*.

The purpose of the statutory holiday provisions of the *Act* is to ensure that employees are able to take their statutory holidays, with pay, or alternatively receive compensation if they are directed by

the employer to work their holiday. The Act characterizes commission or hourly payments as wages (s. 1). In pay periods when statutory holidays fell, there was no opportunity for an employee to work and generate commissions. While regular employees would be paid for the day they didn't work, the commissioned sales person would not have the opportunity to generate commissions because of the closure of the business. While hourly employees would be paid wages for that same day, the opportunity to generate commissions would be lost because of the holiday.”

In the result, the Adjudicator upheld the Determination.

ARGUMENTS

The Employer's argument on reconsideration may be summarized as follows. The Employer argues that the reasoning in the decision by Mr. Justice Braidwood in *Atlas Travel* (quoted above) applies to vacation pay only. While the *Act* provides for vacation entitlement increasing with length of employment, the number of statutory holidays is fixed by statute and is not related to seniority. The Tribunal decisions referred to by the Adjudicator relied in the reasoning in *Atlas Travel*. There is no provision in the *Act* which precludes the inclusion of statutory holiday pay in any commission rate. Section 4 of the *Act* is inapplicable where the pay arrangements meet or exceed the minimum requirements of the *Act*. In this case, says the Employer, there was no loss to the employees because they did not work on statutory holidays. The evidence was that the employees did not earn less during months when a statutory holiday occurred. In the result, the Adjudicator erred in holding that the agreement to include statutory holiday pay was void as it contravened Section 4 of the *Act*.

The Director argues that the Employer ignores the express language of the statute. Section 44 creates an entitlement to a statutory holiday. Under that provision an employer must either give the employee a day off with pay or pay an employee, who is required to work on the statutory holiday, at the overtime rate and give the employee a day off with pay (Section 46 of the *Act*). Section 45 of the *Act* (or *Regulation 24*, in the case of pro-rated statutory holiday pay) provides for the calculation of the amount to be paid to an employee who is given the day off:

45. An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:
 - (a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount

- as if the employee had worked regular hours on the day off;
- (b) in any other case, an amount calculated in accordance with the regulations.”

The Employer’s agreement with the employees is void because it contravenes the minimum standards. Employees on commission must be paid for a statutory holiday in addition to their commission earnings which reflect what they earned on the days when they worked.

In reply, the Employer argues that the Director incorrectly assumes that the employees earned their statutory holiday pay on the days worked. The language of Section 44 and 45 of the Act does not support the Director’s proposition that statutory holiday pay cannot be included in commissions. The commission rate included a component for statutory holidays. The Employer notes that not all of the employees concerned were paid straight commission, some were paid draws and commissions. The Employer argues that the Act requires only that employees be given a day off with pay. The Employer says it complied with Section 45 in that the employees were paid the same amount as if the employee had worked on the day off. Where no commissions were earned, the rate paid was the same rate paid in the prior period. The Employer points to the base draw not changing whether or not statutory holidays occurred in the pay period. Finally, the Employer argues that the Director’s argument would only apply if the employees were paid purely on a commission basis which was not the case here.

ANALYSIS

Section 116 of the *Act* provides (in part):

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

An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BCEST #D122/96), and other decisions, the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal’s decisions and efficiency and fairness of the system. In my view, the scheme contemplated by the *Act* emphasizes expeditious resolution of disputes based on the principles of natural justice. As noted in *Zoltan Kiss*, an application for reconsideration does not provide an opportunity to re-argue the merits, but provide for an appeal on much narrower grounds.

In my view the application for reconsideration amounts to little more than an attempt to re-argue the merits of the matters disposed of in the original decision. In the result, I am not satisfied that the Employer as met the requirements for reconsideration.

In any event, the Employer's argument ignores the clear language of the statute.

Section 44 of the *Act* provides for entitlement to a statutory holiday:

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

Section 46 provides for overtime wages where the employee works on the statutory holiday and for an additional day off with pay according to Section 45. In those circumstances, employees who work must be paid 1 1/2 times or double the "regular wage", depending on the hours worked. "Regular wage" means "if an employee is paid on a ... commission ... basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period" (see Section 1). Similarly, where the employee is paid on some other basis, for example, a monthly basis, the employees regular wage is "the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work".

In this case, it is common ground that the employees did not work on the statutory holidays. In other words, they must be given the statutory holiday off with pay. Section 45 of the *Act* (or *Regulation 24*, in the case of pro-rated statutory holiday pay) provides for the calculation of the amount to be paid to an employee who is given the day off:

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

Section 45 cannot be read in isolation from the other provisions of the *Act*, Part 5 (Statutory Holidays) in particular. If an employee has a regular schedule of hours and has worked for at least 15 of the last 30 days before the statutory holiday, the employee is entitled to the same amount as if the employee had worked regular hours. Logically, it follows from the Employer's method that the

employee are paid less in a month where he or she has a statutory holiday. For example, if the employee earned, say, \$100.00 in daily commissions, and there are 22 working days in a month the amount the employee is entitled to is \$2,200.00 for the month. On the other hand, if there is a statutory holiday in a month, and the same number of working days, the pay would be \$2,100.00, or \$100.00 less. In other words, the employee would not be receiving “the same amount as if the employee had worked regular hours on the day off”.

Moreover, under the Employer’s method, one cannot with any certainty ascertain what “the same amount”--referred to in Section 45--means.

In my view, it follows from the Employer’s method that the employee either does not get paid at all for the statutory holiday or, if he or she is paid, it is from the earnings of the days worked. In either case, the method contravenes the *Act*.

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

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

I agree with the Adjudicator in *W.M. Schultz* (see also *Model Holdings (1997) Ltd.* (BCEST #D029/98)).

I find support for this interpretation in *Regulation 24* which provides:

24. For the purposes of Section 45(b) of the Act, statutory holiday pay is calculated as follows:
- (a) for an employee who does not have a regular schedule of hours and who has worked at least 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the 30 day period by the number of days worked;
 - (b) for an employee who has worked less than 15 of the last 30 days before a statutory holiday, by dividing the employee's wages, excluding overtime wages, for the 30 day period by 15.

Whether the employees worked regular hours does not appear to have been an issue before the Adjudicator. I am, therefore, assuming that they did. However, as mentioned above, I am fortified in my view that in the case at hand the Employer could not include statutory holiday pay in commissions by the language of the *Regulation*. If an employee did not work regular hours, his or her statutory holiday pay can be arrived at by taking the total wages, excluding overtime, and dividing by the number of days worked in the 30 day period. That cannot be done following the Employer's argument.

In my view, moreover, it does not matter whether the employees are paid by a combination of salary and commissions. The same result follows, though the liability of the Employer might be less as the employees paid a regular salary or regular draw will have been paid in part for the statutory holiday.

In short, I agree with the Adjudicator's conclusion that statutory holiday pay cannot be included in commissions.

ORDER

Pursuant to Section 116 of the *Act*, I order that the Decision (D#059/98), dated February 3, 1998 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal