Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

The Director of Employment Standards
("Director" or "appellant")

- 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

ADJUDICATOR: Paul E. Love
Alison Narod
Fern Jeffries

FILE No.: 2001/045

DATE OF DECISION: June 27, 2001

DECISION

OVERVIEW

This is an application by the Director of Employment Standards under Section 116 of the *Employment Standards Act* (the *"Act"*) for a reconsideration of Decision BCEST #D498/00 (the "Original Decision") which was issued by the Tribunal on November 9, 2000.

The Delegate issued a determination, dated March 1, 2000, which was appealed on a number of grounds. In the Original Decisions, the Adjudicator affirmed and reversed the Determination on a number of points, and referred the matter back to the Delegate for calculation of the entitlement of the employees in accordance with the principles expressed in the Decision.

The issues of concern in this reconsideration application are the issues of whether the employer may deduct one-half of the credit card charges from commissions, and whether the employer may deduct amounts received by the employee, while on vacation from the vacation pay entitlement of the employee.

This reconsideration panel found that the Adjudicator in the Original Decision did not err in giving effect to the wage bargain of the parties, as it was a matter of agreement or understanding that “gross profit” did not include visa charges which were referable directly to a “project” or “client”. This reconsideration panel found that the Adjudicator in the Original Decision erred in permitting commissions received while on vacation to be deducted from vacation pay to which the employee was otherwise entitled. The commissions, whether or not the entitlement crystallized while the employees were on vacation, were attributable to the employee’s work related to developing and furthering the business relationship of the employer and customer. Amounts paid as advances on account of commissions earned was a proper amount to deduct from “total wages payable in a year” for the purpose of the vacation pay calculation.

ISSUES TO BE DECIDED

Are the deductions for credit card charges from the pay cheques of the employees a contravention of s. 21(2) of the *Act*?

Are amounts received by an employee, while on vacation, considered payment of vacation pay for the purposes of the *Act*?

FACTS

This reconsideration application is decided upon written submissions of the Director of Employment Standards and VCR Print Co. Ltd. ("VCR" or "respondent"). The Decision in this matter was rendered by the Adjudicator on November 9, 2000 ("original decision"). We note that the appeal of the Director was filed January 10, 2001. We note that this is a matter of some complexity and the original decision was issued almost six months after the hearing date.

VCR operates a printing business. The Determination concluded that three employees, Jung, Pelly and Rozen were owed $38,475.16 on account of unauthorized deductions, vacation pay and statutory holiday pay. Jung was employed by VCR between October 1, 1991 and December 24, 1998. Pelly was employed by VCR between May 7, 1988 to May 7, 1999. Rozen was employed between August 24, 1989 to December 24, 1998. All these employees were employed as commissioned sales persons. The annual earnings of the employees were substantial: Jung made $110,000 - 120,000, Rozen made around $180,000 and Pelly around $45,000 (but in a previous year made $70,000). The wages and benefits are described in a policy and practice manual ("manual"), which is published every 12 to 18 months, and takes into account changes in benefits and other matters. The commission rates remain unchanged, and are based on "gross profit" and the representatives are paid between 50 to 55 % of "gross profit" on sales. Each employee must sign for a receipt of the manual.

There is no issue in this case that employees were not receiving at least the minimum wage in each pay period. These employees can all be considered high end commissioned sales employees. The *Act* does not distinguish between commissioned sales employees based on whether the pay is close to or a significant departure from minimum wage.

If there is a loss on a sales job the sales representatives take 50 % of that loss, and expenses for delinquent or bankrupt clients are charged back against the salesperson and shared at the current commission rate. This is set out in the manual.

Warehousing, courier charges and visa costs are taken into account when calculating the "gross profit". Office expenses, including costs for pages, computers, advertisement and authorized travel are borne by the employer. Customer expenses and customer entertainment are expenses borne by the employees, although in the case of "special gifts" there is a 50 - 50 split.

The agreement between the employer and employee is that all costs, attached to a "job" or a "project", are identified and the employer and employee split the difference of the gross profit on the percentage basis.

In the Original Decision, the Adjudicator upheld portions of the Determination, and reversed portions of the Determination and referred the matter back to the Delegate to calculate the entitlement of each employee in accordance with the principles expressed in the Decision.

In this case the employees had considerable latitude in setting the price for print jobs, and therefore to a large extent were able to control the level of profit. The Adjudicator applied the decisions of the Tribunal in *The Director of Employment Standards* BC EST # D257/99 (reconsideration of both *Park Hotel (Edmonton) Ltd. and Hunters Grill Ltd. Associated Corporations operating as Dominion Hotel* BC EST # 539/98 and *Park Hotel (Edmonton) Ltd. and Hunters Grill Ltd. Associated Corporation operating as Dominion Hotel* BC EST # D557/98), and in particular that there was no "requirement" in the sense of employer coercion demonstrated by insistent or compelling conduct, for the employees to pay the Visa charge backs. The Adjudicator recognized that the wage bargain expressed in the manual, and by an understanding over a number of years, that "gross profit" was defined to include warehousing, credit card charges (transaction fees). The Adjudicator held that:

> Provided the agreement is not otherwise in contravention of the *Act*, I am prepared to give effect to that agreement. It is clear, for example, that parties cannot contract out of the *Act* and *Regulations* (see Section 4).
>
> The Employer relies on Kocis, above, where the Tribunal stated (para. 9 and 10):
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> > The *Act* does not define when a commission is earned. The relationship between employee and employer is one of contract, and the effect of the *Act* is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law. The entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract."

The Adjudicator held that he must have regard to the wage bargain struck between the parties, and that the commission was based on "gross profit" and that credit card charges were an item to be taken properly into account, in assessing gross profit.

Vacation Pay:

The Delegate found that the employer paid vacation pay at the rate of 4 %. The Delegate found that the employees should have been paid at the rate of 6% since the employees had worked more than 5 years. The Delegate found that commissions earned during the employee's absence due to vacation could not be construed as vacation pay. Each salesman had a reciprocal arrangement whereby the salesperson on vacation received the commission, from a sale relating to that salesperson's client.

The Delegate found that VCR paid the commission regardless of whether the employee was at work or on vacation. The Delegate considered the commissions paid while on vacation were wages, and that the employer was obliged to pay vacation pay at the rate of 6 % on all wages including the commissions received while on vacation.

It is apparent from a review of the written submissions at the hearing before the original Adjudicator, the employer argued that commissions generated by "other sales representatives" from the "vacationing employees' clients" during a vacation period constitute vacation pay. At the hearing before the original Adjudicator, the employer argued that the Delegate erred in failing to appreciate the difference between commissions being earned and commissions falling due.

Exhibits at the hearing, and information provided to the Delegate revealed that the employees were credited for sales during absences for vacation purposes in 1997, 1998 and 1999. The employer's representative testified at the hearing that the sales representatives are responsible for their own clients, and each representative has between 20 and 100 clients. The original Adjudicator found that the employer had the ability to track orders to clients belonging to the representative.

The original Adjudicator found that while a salesperson was on vacation, the vacationing employee received full credit for sales generated during the employee's absence and that the sales representative received his or her draw during the absence. Sales representatives are paid vacation pay at the rate of 4 % added to their commission earnings. Sales representatives received their regular draw during statutory holidays, and on those dates, the office was closed.

The original Adjudicator held that the employees were entitled to 6 % vacation pay, but that the commissions received while on vacation, should be taken into account or "credited" against the vacation pay entitlement of the employee. The original Adjudicator held that the payments received during the vacation period were not "wages" as they were not amounts recovered in respect of "work", but were in the nature of a salary continuance. The original Adjudicator applied the definition of work set out in the *Act* as "the labour or services an employee performs". The original Adjudicator stated that

> The commissions generated by the Employer's staff during the absences of the commissioned sales representatives for vacation purposes do not flow from their work.

The original Adjudicator found that 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 the amounts paid for commissions generated during their absences for vacation purposes.

Director's Argument:

The Director appealed on issues related to the treatment of deductions for credit card expenses. The Director argued that this was a business expense of the employer and was a deduction contrary to section 21 (2) of the *Act*. The Director argues that Park Hotel is an aberration that was narrowed significantly in the reconsideration decision. The Director also

appealed on the issue of vacation pay. The Director argued that vacation pay should be issued at a rate of 6 % not 4 %. The Director also argued that vacation pay should be calculated on commissions paid during a vacation period, and commissions received during vacation periods should not be taken into account in the assessment of vacation pay entitlement.

Employer's Argument:

The employer supports the decision made by the original Adjudicator. The employer argued that this is a unique decision in respect of the credit card deductions, and vacation pay issues. The employer argues that the original Adjudicator made findings of fact at a hearing, in which much of the evidence was uncontradicted, and at a hearing that the Delegate did not attend and make argument. The employer argues that this application should not survive the first branch of the Milan Holdings Ltd, test for reconsideration.

Employees' Position:

The employees did not take a position on this reconsideration application.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the Director, to show that this is a proper case for reconsideration, and that the Adjudicator erred such that we should vary, cancel or affirm the Decision. An application for reconsideration of a Tribunal' s decision involves a two stage analysis, as set out in *The Director of Employment Standards* BC EST # D313/98 (reconsideration of *Milan Holdings Inc.*, BCEST # D559/97):

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: Re British Columbia (Director of Employment Standards), BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.* BC EST #D522/97 (Reconsideration of BCEST #D007/97).

(b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): Re Image House Inc., BCEST #D075/98 (Reconsideration of BCEST #D418/97); Alexander (c.o.b. Pereguine Consulting) BCEST #D095/98 (Reconsideration of BCEST #D574/97); 323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub), BC EST #D478/97 (Reconsideration of BCEST #D186/97);

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": World Project Management Inc., BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": Zoltan Kiss, supra. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": Khalsa Diwan Society (BCEST #D199/96, reconsideration of BCEST #D114/96).

After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a

> decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.
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> The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration –particularly questions of law - should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

> a) a failure by the adjudicator to comply with the principles of natural justice;
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> b) a mistake of fact;
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> c) inconsistency with other decisions which cannot be distinguished;
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> d) significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;
>
> e) misunderstanding or failing to deal with an issue;
>
> f) clerical error.
>
> *Zoltan T. Kiss* BC EST # D122/96 (reconsideration of *Burnaby Select Taxi Ltd. and Zoltan Kiss*, BC EST # D091/96)

We turn now, to the grounds for reconsideration advanced by the Director. The Director has characterized the basis for reconsideration as errors of law, and inconsistency with prior decisions of the Tribunal with regard to unauthorized deductions for employer's business expenses and vacation pay. While we do not necessarily agree with how the Director has characterized the issues, the issues have important implications for future cases. We find that these are matters that fall properly within the scope of a reconsideration application, and therefore consider the merits of the arguments presented.

As a procedural matter, we note that the failure of a Delegate or counsel for the Director to attend at a hearing is not a bar to a reconsideration application by the Director. In this case, while the Director did not attend the hearing that resulted in the original decision, counsel for the Director has chosen to file an application for reconsideration. An application for reconsideration is an application that considers the record or the evidence before the original Adjudicator and the original Decision rendered. While the tribunal's processes resolve an employment dispute, which is primarily a dispute between the employer and the employee,

the Director has a role to play in ensuring that there is consistency in the application and interpretation of the *Act*. The test used in *The Director of Employment Standards* BC EST # D313/98 (reconsideration of *Milan Holdings Inc.* BC EST # D559/97) provides ample scope to allow the Tribunal, to exercise appropriate discretion with regard to reconsideration cases.

Section 21:Deduction of Business Expenses:

In this case, when a client chose to pay the employer by credit card, the credit card company charged the employer a transaction fee of 3% to 3.25% per transaction. The employer in turn charged the credit card transaction fees to the salesperson and deducted half this amount from the wage statement.

The Director alleges that the Adjudicator erred in law by deducting one half of the credit card company charges from the paycheques. The Director says that was a business expense that is not deductible. Section 21(2) reads as follows:

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

The employer supplied a lengthy list of cases that deal with s. 21(2) of the *Act*; however, none of these authorities deal with the issue before us, which is whether a credit card expense is an item which is captured in the commission structure. It is clear that for an hourly or salaried employee, the employer cannot recoup the costs of the employee's mistakes, liabilities to the employer, or other business costs of the employer. The acquiescence of an employee in a deduction is of no consequence, because s. 4 of the *Act* provides that the parties cannot contract out of the *Act*.

The Adjudicator applied *The Director of Employment Standards* BC EST # D257/99, and the notion that the employer did not require the employee to pay the costs. We note that *The Director of Employment Standards* BC EST # D257/99 stands for the proposition that the Adjudicator must examine the facts and determine as a matter of fact whether there was coercion or compulsion by the employer, bearing in mind that the employment relationship is one often dominated by the employer. In this case the Adjudicator heard the witnesses and examined the evidence and determined that the employees were not required to pay the business costs.

In our view, this case does not rest primarily on the definition of "require". The very nature of the commission structure, as a method of compensation, implies some element of profit sharing. This is a question of what is included and what is excluded from the calculation of the percentage is part of the wage bargain of the parties. The parties in this case have decided or applied the notion that credit card charges, related to a transaction, would be borne by the parties in proportion to the commission structure. While the wage bargain of the parties is not necessarily the determinative factor, it is an important factor to consider. The Adjudicator did not err on this point. We note that this situation is very different from

the hourly rate employee, who has no control over the method of remuneration, and whose wages the employer seeks to reduce because of employee error, or other reason. Here the employees had a great deal of control over "gross profit". There was no compulsion on the employee, such as in *Pacific Shores Nature Resort Ltd.* BCEST #D309/00, to use credit cards to "cement a deal".

We appreciate the argument of the Director that the Tribunal has declared deductions from paycheques for an employer's business costs a violation of s. 21 and the fact that an employee acquiesces in the deduction is of no consequence. One has, however, to view the facts of the case which includes the wage bargain between the parties. This is a unique case, and as pointed out by the employer's counsel, there is no authority directly on point.

Vacation Pay:

In the Determination, the Delegate indicated that:

> Each salesperson had a reciprocal arrangement whereby they may complete a sale for another salesperson on vacation and not receive the commission on that particular sale; yet receive commission while on vacation for a sale completed in their absence. It is also noted that vacation pay was paid on gross commissions earned while an employee was absent due to vacation.

The employer was, however, paying vacation pay at the rate of 4 %. The correct rate for vacation pay for these employees was 6 %, given their years of service. The *Act* provides for escalation in vacation pay based on seniority. Vacation pay is calculated on "total wages during the year of employment". The question in this appeal is whether commissions received during a vacation period, or commissions generated from the clients of the vacationing employee during a vacation period are included in the definition of "total wages during the year of employment". This is an issue of law, and not an issue of fact. We note that if an employee did not take any time off work for vacation, the issue would be academic because the employee would receive all the commissions generated from the employee's clients during the year. The vacation pay would then be calculated on the known amount. As a starting point, in the absence of vacation time, all commissions generated during the year are part of "total wages during the year of employment".

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: *Atlas Travel Services Ltd. v. British Columbia (Director of Employment Standards)* (1994), 99 B.C.L.R. (2d) 37 (S.C.), *Monday Publications Ltd.*, BCEST # D296/98 (Reconsideration of BCEST # D059/98). A number of these cases comment on the absurdity that ensues where the employee takes time off and the wages are reduced when the employer does not calculate vacation pay correctly.

The Delegate found that commissions generated from the employee's clients, while the employee was on vacation, were wages. The Adjudicator found that commissions generated while on vacation were vacation pay. Vacation pay is calculated on the total earnings in a year - see s. 58(1)(a)(b). In our view there is no distinction between commissions paid while an employee is on vacation, or commissions generated from the employee's clients, while that employee is on vacation. In our view the legal character of the payments made was "wages", as it is commission or money paid for work. If the commissions generated from the vacation employee's "clients" by the working employee are not considered "wages", then the vacationing employee suffers a penalty for taking a vacation. The vacationing employee would earn less by taking a vacation, than by remaining at the workplace. We note that there was a reciprocal arrangement in place. The non-vacationing employees covered the vacation of the absent employee, without pay. The absent employee would, when he was at work, perform the same functions for his colleagues, when they were absent, also without pay. The reciprocal arrangement included that each would continue to receive commissions from their own clients while on vacation in return for being available to perform and for performing reciprocal work. The absent employee should have received full credit for the receipts as wages, with vacation pay calculated on the total amount received in a year. This reciprocal arrangement ensured that there was no loss of income during the vacation period, but did not pay the vacationing employee vacation pay.

The employer, referred to *Hewitt Rand Corporation* BCEST #D271/99 in its submission. The Adjudicator also referred to *Hewitt Rand Corporation* in the original decision. In *Hewitt Rand Corporation,* the Adjudicator determined that it was appropriate to deduct the monies received on vacation, from the vacation pay entitlement. We note that the "wage bargain" in *Hewitt Rand Corporation* was substantially different than the wage bargain in this case. In *Hewitt Rand Corporation* the commissions were based on "performance of the branch" in which the employee worked, and were not as is evident in this case based solely on sales or commissions received from the "employee's clients". In *Hewitt Rand Corporation,* the matter went to reconsideration, but was dismissed on an issue of timeliness. The merits of the issue of "deduction of monies received" while on vacation, from vacation pay, was not considered by the Tribunal in *Hewitt Rand Corporation* on reconsideration.

The commissions would have been earned if the employee was present or absent from work due to a vacation. A commissioned sales person performs a variety of services for a client. In this case, the salespersons were responsible for developing, maintaining or "nurturing" the business relationship with clients. Some of these costs were borne directly by the employees, no doubt in expectation of future earnings. A customer order or payment relates to that relationship, and therefore is as a result of the work of the employee. The fact that an order was taken, or payment crystallized while the employee was away on vacation, did not change the nature of the commission, which is payment for work performed.

We note that there is some indication that the employer believed vacation pay to be an item separate and apart from commissions because it was paying 4 %. The employer must top up

the commission by paying the additional 2 %, without deducting the commissions earned while on vacation.

We agree with the Adjudicator that a "draw" paid or continued while an employee is on vacation is not "wages". A draw or advance can be reconciled against wages, where that draw or advance is simply a method of ensuring payment of wages. The employer can deduct the amount of the draw, paid during an absence due to vacation, from the total wages for the purpose of calculating the vacation pay entitlement of the employees.

In summary we find:

1. The employees are entitled to vacation pay calculated at a rate of 6 %.

2. Vacation pay is calculated on the total wages in a year, which includes commissions paid during the year, and orders made, regardless of whether the employee is on vacation at the time of the payment is made or an order is taken, where the payment or order is referable to the "employees clients".

3. The employer may deduct from the vacation pay calculation amounts paid as a draw during a vacation period, where an employee is on a commission structure, and where the minimum wage requirements of the *Act*, are otherwise satisfied. The employer cannot deduct commissions received while an employee is on vacation.

For all the above reasons, we dismiss the application for reconsideration on the s. 21(2) issue relating to credit card expenses, and we refer this issue back to the Delegate for a calculation of the vacation pay entitlement in accordance with the principles expressed in this decision.

ORDER

Pursuant to section 116 of the *Act*, we order that this matter be referred back to the Delegate for calculation of the vacation pay entitlements of the employees in accordance with this Decision. We otherwise confirm the Decision.

Paul E. Love	Alison Narod	Fern Jeffries
Adjudicator	Adjudicator	Chair
Employment Standards Tribunal	Employment Standards Tribunal	Employment Standards Tribunal