

An appeal

- by -

MBCI Holdings Corp.
carrying on business as Kitchen Craft of Canada
("Kitchen Craft")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2015A/102

DATE OF DECISION: January 8, 2016

DECISION

SUBMISSIONS

Rohan Hill	counsel for MBCI Holdings Corp. carrying on business as Kitchen Craft of Canada
Evangelos Vallianatos	on his own behalf
Micah Carmody	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) MBCI Holdings Corp. carrying on business as Kitchen Craft of Canada (“Kitchen Craft”) has filed an appeal.
2. Kitchen Craft challenges a determination issued by a delegate of the Director of Employment of Employment Standards (the “Delegate”) dated June 16, 2015 (the “Determination”).
3. The Determination disposed of a complaint filed under section 74 of the *Act* by Evangelos Vallianatos (the “Complainant”), one of Kitchen Craft’s employees.
4. The Complainant alleged that Kitchen Craft had contravened the *Act* by withholding wages in a pay period to meet its minimum payment obligations in another pay period, and by failing to pay him overtime and statutory holiday pay.
5. The Delegate conducted a hearing of the complaint on January 8, 2015. The Determination which followed stated that Kitchen Craft had contravened sections 16, 40 and 45 of the *Act*, and that it owed the Complainant minimum wages, overtime pay, statutory holiday pay and interest in the amount of \$4,458.08. The Delegate also imposed three \$500.00 administrative penalties. The total found to be owed by Kitchen Craft was, therefore, \$5,958.08.
6. Kitchen Craft’s appeal asserts that the Delegate erred in law.
7. I have before me Kitchen Craft’s Appeal Form and submissions, the Determination and the Delegate’s Reasons for the Determination, submissions from the Delegate and the Complainant, and the record the Director has delivered pursuant to section 112(5) of the *Act*.
8. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this appeal can be decided on the basis of a review and consideration of the materials now before me.

FACTS

9. Kitchen Craft operates a business manufacturing and supplying kitchen cabinets. It employed the Complainant as a designer and salesperson during the period that was the subject of his complaint.

10. During that period the Complainant's employment was governed by an agreement (the "Compensation Plan") which declared that his remuneration would be "100% commission-based". The Compensation Plan also provided, *inter alia*, that Kitchen Craft would pay to the Complainant, in each pay period, the greater of \$1,000.00 or the commissions earned during the pay period. However, the amount by which a \$1,000.00 payment exceeded the commissions earned by the Complainant in a pay period was stated to be an advance against future commissions, and Kitchen Craft was expressly permitted to deduct an amount equal to any negative balance of advances made during prior pay periods from commissions in excess of \$1,000.00 earned by the Complainant in a subsequent pay period.
11. The \$1,000.00 figure was chosen by Kitchen Craft to ensure that its employees were always paid an amount that would exceed the sums to which they would be entitled if they had been paid for all hours worked at the rate of the minimum wage, plus any additional sums that might be required to be paid from time to time for overtime and statutory holiday pay. To that end, Kitchen Craft paid close attention to the hours worked by its employees. In the case of the Complainant, Kitchen Craft sometimes paid him sums in excess of the \$1,000.00 so as to bring itself into compliance with what it understood to be its minimum obligations to pay wages under the *Act*.
12. The substance of the disagreement which emerged between Kitchen Craft and the Complainant related to the term of the Compensation Plan which entitled Kitchen Craft to deduct from commissions earned in excess of \$1,000.00 in a pay period the advances made in previous pay periods where the Complainant earned less than \$1,000.00 in commissions. The Complainant's position was that he should receive all the commissions he earns, and that no deductions should be made to account for advances paid in those pay periods where he did not earn in excess of \$1,000.00 or minimum wage. Kitchen Craft argued that the Compensation Plan permitted it to deduct accrued negative balances from the Complainant's commissions so long as he was paid \$1,000.00 in each pay period.
13. Before the Delegate, Kitchen Craft relied heavily on a line of Tribunal authority following its decision in *Wen-Di Interiors Ltd.*, BC EST # D481/99, which held that it is lawful for an employer and an employee to expressly agree that minimum wage payments will be treated as advances which may be set off against an employee's future commission earnings, so long as the employee is paid at least minimum wages for all hours worked. However, the Delegate noted that *Wen-Di* preceded the 2003 repeal and re-enactment of section 16 of the *Act*, with the addition of an entirely new subsection 16(2). The new section 16 reads as follows:
 - 16 (1) An employer must pay an employee at least the minimum wage as prescribed in the regulations.
 - (2) An employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages in a pay period to comply with subsection (1) in relation to any other pay period.
14. Notwithstanding a reference in a 2012 decision of the Tribunal (see *Metasoft*, BC EST # D056/12) suggesting that the formulation in *Wen-Di* expressed above might still be the law, the Delegate was of the view that the new section 16(2), implying by its implementation a change to the pre-existing legal landscape, precluded the application of Kitchen Craft's position that it was entitled to deduct all advances paid to the Complainant in one pay period from commissions over \$1,000.00 payable to the Complainant in a subsequent pay period.

15. The Delegate's rationale for this approach is captured in the following passage from his Reasons for the Determination, at R10 – R11:

...Section 16(2) indicates that an employer cannot retain all or part of an employee's wages to comply with its obligation in section 16(1) to pay at least the minimum wage. The use of the words "at least" in section 16(1) establishes that minimum wage is a "floor" and not a "ceiling" – that is, employers and employees are free to agree to any rate of pay so long as it is not below the minimum wage as prescribed in the regulation. Section 16(2) is structured on a pay-period-by-pay-period basis, and therefore when the minimum pay requirements have been met for a given pay period, based on either minimum wage or contractual obligation, the value of the payment cannot be deducted from the employee's wages in another pay period.

In my view, section 16(2) makes plain that an employer cannot hold back part of an employee's commission income in a pay period simply because the employee did not generate enough commission income to meet the minimum pay requirements in a previous pay period. Accordingly, an employer cannot establish a commission plan whereby employees whose commission earnings amount to less than minimum wage or their contractual entitlement in a pay period begin to accumulate a deficit that is later recovered when the employees generate commissions in excess of their baseline amount.

16. That said, the Delegate took pains to point out that section 16(2) of the *Act* does not prohibit employers from recouping every advance paid on future commissions. At R12, he said this:

I am not suggesting that Section 16(2) creates a blanket prohibition that prevents employers from issuing and later recovering advances. I see nothing in the Act that prevents an employer from recovering the portion of its advances *exceeding* the earned minimum entitlement for all hours worked in the pay period, provided there is express contractual agreement, but section 16(2) provides employees with a protection of their earned minimum entitlement in each pay period...

...The Employer can only claw back the advances from commissions that are in excess of the contractual minimum payments. The Employer cannot claw back any of the amounts that were paid to satisfy the minimum payment obligations, as doing so would contravene section 16(2).

17. The fact that the Complainant had signed the Compensation Plan was of no moment. The Delegate stated, and I agree, that requirements in the *Act* are minimum requirements, and section 4 mandates that any agreement to waive those requirements has no effect.

18. The Delegate then considered what sum the evidence showed the parties had established as the minimum payment requirement Kitchen Craft was obligated to meet in each pay period in respect of the Complainant so as to comply with section 16(1) of the *Act*. The Delegate acknowledged that two interpretations of the parties' agreement were possible. The first was that the Compensation Plan established for the Complainant a contractual minimum entitlement of at least \$1,000.00 per pay period. The second interpretation was that the Complainant had no contractual entitlement to a set sum per pay period, as the \$1,000.00 payments were to be treated as advances only. Application of the second interpretation meant that the Complainant would only be entitled to minimum wages for the hours worked in a pay period.

19. I infer that, for the Delegate, the effect of the application of the first interpretation was that section 16(2) of the *Act* precluded Kitchen Craft from deducting in a future pay period, where commissions over \$1,000.00 were payable to the Complainant, any advances paid to the Complainant in order to make up the difference between commissions earned by the Complainant in another pay period and the \$1,000.00 threshold. The effect of the application of the second interpretation was that Kitchen Craft could not lawfully deduct from commissions over \$1,000.00 any sums advanced to the Complainant to fill the gap between commissions earned by the Complainant and his minimum wage entitlement in an earlier pay period.

20. The Delegate decided that the evidence supported a finding that the parties had agreed to implement the first interpretation, which provided the Complainant with a contractual entitlement to \$1,000.00 every pay period, even if that sum represented a payment greater than what the Complainant would have been entitled to receive had he been working for minimum wage alone. There were several reasons given by the Delegate in support of this conclusion. Apart from the Compensation Plan, there was no written employment agreement governing the terms and conditions of the Complainant's employment. There was no reference in the Compensation Plan to the Complainant's only receiving minimum wage, and the presentation that Kitchen Craft conducted to familiarize employees with the Compensation Plan contained no stipulation to that effect. To the contrary, it stated that employees would receive a minimum of \$1,000.00 in each pay period, and that was the amount that the Complainant was always paid, regardless of the number of hours he worked.
21. Applying his conclusions to the evidence of the remuneration received by the Complainant during the six-month period contemplated in the complaint, the Delegate determined that Kitchen Craft had unlawfully retained commissions to which the Complainant was entitled, in the amount I have noted earlier.

ISSUES

22. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director, on the basis that the Delegate erred in law?

ANALYSIS

23. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
24. Section 115(1) of the *Act* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.
25. Kitchen Craft's appeal challenges the Delegate's conclusions regarding the application of section 16 of the *Act*. It does not contest that the Complainant was owed overtime and statutory holiday pay.
26. Kitchen Craft asserts that the Delegate erred in law when he decided that:
- the *Act* prohibits an employer and employee from expressly agreeing to treat all payments in excess of commissions earned in a given pay period as advances against future commissions, provided that the employee always receives, in each pay period, an amount equal to or greater than what he would have received if he were earning minimum wage; and

- the Compensation Plan entitled the Complainant to a minimum payment of \$1,000.00 in each biweekly pay period.

27. For the reasons I will give, I have decided that Kitchen Craft’s appeal must be dismissed.
28. Kitchen Craft was careful to ensure that the Complainant was paid a sum in each pay period that was at least equal to his entitlement to minimum wages for his hours worked, or \$1,000.00, whichever was greater. Kitchen Craft is, therefore, correct when it asserts that it complied with the requirements of section 16(1) of the *Act* when dealing with the Complainant.
29. The difficulty for Kitchen Craft arises as a result of the application of section 16(2) of the *Act*.
30. As I have noted, Kitchen Craft relied on the *Wen-Di Interiors* line of authority before the Delegate, and it continues to urge the acceptance of the analytical approach identified in those cases in this appeal. In *Wen-Di*, the Tribunal reviewed the wording of section 16 of the *Act*, as it then read (identical to the current section 16(1)) in the context of an employment contract where the employee was paid on a 100% commission basis. The Tribunal said this at page 8, in part:

In my opinion, under the *Act*, an employer must pay an employee at least minimum wage for all hours worked in a particular pay period. If the employer fails to do so, it contravenes section 16 of the *Act*. To repeat, an employee must be paid at least minimum wage for all hours worked during the pay period. However, if an employee is paid at least minimum wage for the first pay period of a month because, for example, her commissions fell below the minimum wage threshold, the employer is entitled, *provided there is an express contractual agreement*, to a “credit” at the end of the month should the employee’s total commission earnings for the month actually exceed the minimum wage threshold. In other words, the wages paid for the first pay period may be treated – *provided the employment contract is specific on the point* – as an “advance” against commissions earned for the month as a whole.

Under the *Act*, employers and employees are free to agree on *any* commission structure they choose so long as, in its operation, *the employee is paid at least the minimum wage for all hours worked in each pay period*. As previously observed, the *Act* permits employers to establish commission-based compensation systems. On the other hand, a commission-based system cannot be used as an instrument to pay employees less than the minimum wage for each hour worked in a given pay period. Neither section 16 nor 17 is contravened so long as employees are paid, for each pay period, not less than the minimum wage for each hour worked during the pay period.

As I conceive the *Act*, however, employees are not entitled – unless their contract so provides – to the full amount of their commissions *as well as an additional amount* reflecting minimum wage for those pay periods where there were no commission earnings or where the commissions earned amounted to less than the minimum wage. One purpose of the *Act* is to ensure that employees receive at least basic standards of compensation [section 2(a)]; another is to promote fair treatment of both employees and employers [section 2(b)]. These two purposes can be fully satisfied in a compensation system whereby employees are paid not more than their contractual bargain, so long as employees are paid at least the minimum wage for each hour worked in each and every pay period.

...[N]o provision of the *Act* outlaws the practice of treating monies paid over and above actual commission earnings as an advance against future commission earnings. This advance may be set off, in accordance with the employment contract, against earnings in a future pay period provided that in each and every pay period the employee is paid at least the minimum wage for all hours worked.

31. *Wen-Di* was followed and applied in subsequent decisions of the Tribunal (see *Athlone*, BC EST # D210/00, and *Park Lane*, BC EST # D211/03).

32. However, as noted by the Delegate, section 16 was repealed and re-enacted after these cases were decided. The addition of the new section 16(2) must be interpreted in accordance with the admonition contained in section 8 of the *Interpretation Act* RSBC 1996 c.238, which reads:
- 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
33. Given that the addition of section 16(2) must be presumed to have been the result of a desire to effect a legal change, the issue becomes one of establishing what, precisely, it was intended the ambit of that change should be.
34. Kitchen Craft argues that the ambit of section 16(2) should be construed narrowly. It submits that the provision, read in its grammatical and ordinary sense, only prohibits an employer from withholding, deducting, or requiring the payment of all or part of an employee's wages in a pay period if the purpose of doing so is to comply with section 16(1) in relation to any other pay period in the *future*. For Kitchen Craft, the "other" pay period must be in the future because an employer cannot be said to be withholding, deducting or requiring the payment of wages in order to comply with section 16(1) if it has already paid the employee the minimum requirement for the previous pay period, and is merely attempting to recoup what then amounts to an advance on earnings from the employee in a later pay period where wages to be paid exceed the minimum amount payable.
35. It is on this interpretation of section 16(2) of the *Act* that Kitchen Craft asserts the provision can be rendered compatible with 100% commission based compensation systems of the type agreed to by the Complainant, and considered in the *Wen-Di* line of cases to which I have referred. Again, the reason Kitchen Craft gives for this is that its deductions from the Complainant's commission earnings were not made in order to comply at some point in future with its obligation under section 16(1). Instead, the deductions were made to reimburse itself for advances to the Complainant made at a point in the past in order to comply at that time with section 16(1).
36. The Delegate argues for a broad interpretation of section 16(2) of the *Act*. He submits that the section does not limit itself to *future* pay periods. Rather, the section refers to "any other pay period". He points out further that no part of the language of the section draws a distinction between an employer's withholding, deducting, or requiring payment of wages in anticipation of shortfalls in future periods, and an employer's doing so to account for shortfalls that have occurred in prior periods.
37. In my view, the interpretation offered by the Delegate, affirmed in the Determination, is to be preferred. In coming to this conclusion, I take guidance from the comments of the Supreme Court of Canada in *Rizzolo & Rizzolo Shoes Ltd.* [1998] 1 SCR 27 at paragraph 36 to the effect that employment standards statutes like the *Act* are intended to act as a mechanism for providing minimum benefits and standards to protect the interests of employees. As benefits-conferring legislation, the *Act* should not be interpreted narrowly, but rather in a broad and generous manner. Most importantly, the court stated that any doubt arising from "difficulties of language" should be resolved in favour of employees.
38. It strikes me as artificial to suggest, as Kitchen Craft does, that the *Act* precludes an employer from withholding wages in advance, in anticipation of having to use them to comply with its section 16(1) obligation in a later pay period, but that it is permissible to recover minimum payments from excess earnings later. If that had been the intention of the legislature in enacting section 16(2), it could have made it explicit. In my view, it did not do so. At best, the wording of section 16(2) may be said to reveal an element of ambiguity. If so, in keeping with the statements in *Rizzolo*, I am of the opinion that any ambiguity in the

language of the section should be resolved in favour of vindicating the minimum benefit it appears to provide for employees. Like the Delegate, I see no compelling policy reason to endorse Kitchen Craft's more restrictive view.

39. Apart from its analysis of the wording of section 16(2), Kitchen Craft also refers in its submissions to authorities following the repeal and re-enactment of section 16 in 2003. It argues that these authorities reveal a disposition on the part of the Tribunal, and the British Columbia Court of Appeal, to interpret section 16 of the *Act* in a manner consistent with the formulation set out in *Wen-Di*, despite the addition of subsection 16(2).
40. In my view, none of the authorities relied upon by Kitchen Craft can be said to contain definitive statements regarding the proper interpretation of section 16(2) in circumstances of the sort that are presented here.
41. In *Metasoft, supra*, the issue was whether an employer had paid the complainant minimum wages for a portion of the work performed by her in the last month of her employment. The case was not about advances that were deducted from subsequent earnings.
42. The complainant was a commission salesperson. Her contract of employment did not require that she be paid base salary, but the employer did pay her minimum wages for her hours of work in the event that her commissions for a month fell short. The complainant's remuneration was agreed to consist of commissions on revenue from sales received monthly, less the value of any returns in the month.
43. The complaint in the case arose out of the complainant's last month of work. She earned no commissions that month, but she did work hours for which she was not paid, and so she alleged that she should be paid for those hours at minimum wage. The complainant did receive remuneration from the employer in that final month, but the monies paid consisted of commissions earned by her in previous months. They were not payments in respect of work the complainant performed in her final month of employment.
44. The delegate who issued the determination in the case found as a fact that the commission payments made in the complainant's final month of employment were not advances, but payments of income earned previously. The Tribunal affirmed that finding of fact. The *ratio* of the case is captured in paragraph 39 of the Tribunal's decision, where it is stated that since the complainant received no remuneration for her last month of employment the delegate was right to find that the employer must pay the complainant minimum wages for her hours of work during that month.
45. Kitchen Craft relies on a reference to *Wen-Di* made by the Tribunal in the immediately preceding paragraph 38. The reference, however, was based on the hypothetical, and in the result, inapplicable, alternative that the delegate was wrong in deciding that the commission payments made to the complainant in her last month of employment were not an advance. In that context, the Tribunal stated:
- There are circumstances where a payment of minimum wages can act as an advance against the payment of future commissions (see *Wen-Di Interiors Ltd.*, BC EST # D481/99). However, an advance payment of commissions, subject to an adjustment for returns that might occur later, cannot act so as to reduce an employer's obligation under the *Act* to pay minimum wages for work performed in each pay period.
46. In the circumstances, this statement by the Tribunal must be construed to be *obiter dictum*. Section 16(2) of the *Act* was not directly engaged in the case. Therefore, I am not persuaded that the statement carries the weight ascribed to it by Kitchen Craft in its submissions. It does not, in my view, amount to an affirmation on the part of the Tribunal that the *Wen-Di* approach survived the enactment of section 16(2) intact. Indeed, on reflection, it is my view that it did not.

47. Kitchen Craft also relies on another decision of the Tribunal in *LNS Enterprises Ltd.*, BC EST # D009/09. *LNS* was a case where the complainant commissioned sales employee alleged, after her resignation, that she was owed wages. Her employer asserted she had been paid advances in excess of any commissions owed.
48. The employer testified that the complainant's employment contract provided that she would receive \$2,500.00 per month by way of draw against future commissions, on the understanding that the draws would be deducted from future commissions earned. The problem in the case was that the employer's method of calculating commissions was opaque, and so the delegate did his own calculation, which resulted in a finding that commissions were owed to the complainant for the relevant time period.
49. As in *Metasoft*, *supra*, the Tribunal in *LNS* does endorse the formula set out in *Wen-Di*. However, the case does not turn on the application of the *Wen-Di* approach, as the Tribunal referred the matter back to the delegate to determine whether the employment contract in effect enabled the employer to treat the complainant's draws as advances against commissions. Again, the Tribunal did not specifically address the application of section 16(2) to the facts of the case, and so it cannot be said that the decision stands for the proposition that the *Wen-Di* approach remains the law. However, if I am wrong in my interpretation of the legal import of the decision in *LNS*, I must say, with respect, that I decline to follow it, for the reasons I have stated earlier.
50. Kitchen Craft also relies on a decision of the Tribunal in *Lazauskas*, BC EST # D068/12. There, the complainant employee was also a commission salesperson, although he received a "draw against commissions" of \$5,000.00 monthly, paid on the first and fifteenth of each month. The employer paid the complainant's commissions every four months, less what he had been paid in draws.
51. The issue before the Tribunal was whether section 80 of the *Act*, which sets six month time limited periods within which wages that become payable may be claimed under the *Act*, was applied correctly, and whether the subtraction of an "inventory write down" from commissions earned was a violation of section 21 of the *Act*. There appears to have been no issue raised in questioning whether the subtractions of the draws from commissions earned were in violation of section 16(2).
52. The Tribunal did, however, quote from *Wen-Di* to the effect that employers and employees are free to agree on any commission structure they choose so long as, in its operation, the employee is paid at least the minimum wage for all hours worked in each pay period. The Tribunal also affirmed that, provided the minimum requirements of the *Act* are met, the Director may interpret and enforce such agreements entered into by employers and employees.
53. In my view, the purpose of this reference to *Wen-Di* was not to offer an opinion as to the legality of an employer's deducting previously paid minimum wages advanced to an employee as a draw against commissions earned in future. Rather it was to assert the proposition that as long as minimum wages are paid, and the other minimum requirements of the *Act* are adhered to, the Director will enforce commission arrangements which permit advances to be recouped at a later date.
54. In this case, the Director found that the employer applied the commission arrangement in the correct manner and that no contravention of the *Act* had occurred. The Tribunal concurred, stating there was no evidence the question of the employer's commission payment practices was relevant to the wage claim advanced by the complainant in his complaint, or on appeal. The basis for this conclusion was that the Director found as a fact that those elements of the commission arrangement challenged by the complainant had never been engaged during the section 80 claim period. The Tribunal decided, therefore, that the Director made no error

in declining to adjudicate the “legality” of the employer’s commission payment practices because such a finding was not necessary in order to resolve the specific claim made by the complainant.

55. For these reasons, this case is also of limited, if any, value in determining whether section 16(2) permits employers to recoup minimum payments made under section 16(1) from commission earnings accruing to employees in a pay period in the future.
56. As for the reference to *Wen-Di* which appears in *Lazauskas*, I prefer to interpret it in a manner consistent with what was stated by the Delegate in his Reasons for the Determination. The Delegate stated that section 16(2) creates no prohibition preventing employers from issuing and later recovering advances that exceed the earned minimum entitlement for all hours worked in a pay period, provided there is an express employment agreement that permits this to occur.
57. The final case relied upon by Kitchen Craft is *Skana Forest Products Ltd. v. Lazauskas* 2015 BCCA 85. This case involved the same parties identified in the Tribunal decision in *Lazauskas* to which I have referred. The decision of the Court of Appeal in *Skana* resulted from a claim by the employer for damages in respect of monies said to be owed by *Lazauskas* after he resigned from his position of employment.
58. The trial judge had decided that *Skana*’s practice of requiring traders like *Lazauskas* to share in profits and losses on lumber sales, and accede to deductions from commissions for inventory write downs, violated section 21(2) of the *Act* because they constituted the passing of business costs onto traders.
59. The appeal was confined to a determination whether those orders made at trial were correct. No part of the appeal decision directly engaged the application of section 16(2), or the deducting of sums previously paid as minimum entitlements under section 16(1). Indeed, the appeal decision appears to concern the method by which the amount of a commission is determined at first instance, and not about what deductions may then be made from those commissions. There was no suggestion in the case that any part of the overpayments found to be owed by the employee *Lazauskas* represented payments of his minimum entitlements under the *Act*.
60. The Court held that an employee’s sharing an employer’s business risk is not prohibited by the *Act*, but deductions of business costs are precluded due to the effect of section 21(2). The effect of the decision was that *Lazauskas* was found to owe overpaid commissions.
61. In reaching this conclusion, the Court did quote from the Tribunal decision in *Lazauskas*, and its reference to *Wen-Di*, but again only to the effect that if the minimum requirements of the *Act* are met, employers and employees can make whatever commission agreements they wish and the Director may interpret and enforce such agreements. Again, that aspect of the *Wen-Di* formulation has never been the subject of controversy.
62. I find myself, in the end, in agreement with the following comments of the Tribunal regarding the effect of section 16 of the *Act* for commissioned salespersons set out in *United Specialty Products Ltd.*, BC EST # D075/12, at paragraph 55, and adopted by the Delegate in his Reasons:

Where the commissions do not total at least the minimum wage for the number of hours worked in a pay period, the employer is obligated to pay the difference between the commissions earned and the minimum wage. Further, where the employer makes up a shortfall between commissions actually earned and minimum wage owed for hours worked in a pay period, the employer cannot recover that payment in a subsequent pay period where the employee makes a commission in excess of minimum wage.

63. As I read the decisions to which I have referred, this is the only statement that directly addresses how section 16(2) should be applied in circumstances where commissioned salespersons are paid an advance against future earnings, and the employer seeks to withhold, deduct, or require payment out of wages paid in the future in order to recoup. The statement also appears to be an *obiter dictum*, but I find it persuasive nevertheless.
64. The second aspect of Kitchen Craft's appeal alleges that the Delegate erred in finding that the Compensation Plan entitled the Complainant to a minimum payment of \$1,000.00 biweekly, and not merely minimum wage.
65. Kitchen Craft is correct to point out that the Compensation Plan expressly provided it was to be "100% commission-based" and included a "biweekly draw against commissions." The draw was identified to be \$1,000.00. The Compensation Plan also stated, clearly, that the amount by which the \$1,000.00 exceeded the commissions earned by the Complainant was to be construed as an advance against future commissions, and that the Kitchen Craft could deduct from commissions earned any advances made in previous pay periods.
66. All of these facts argue forcefully in favour of a conclusion that the \$1,000.00 payments, or the parts of them that did not represent compensation for commissions earned, were not intended to be wages for the purposes of the *Act*, but merely as advances against wages, in the form of commissions to be earned in future.
67. As I have noted, the Delegate decided that one of the factors supporting a conclusion that the \$1,000.00 payments did constitute payments of wages was the fact that the Compensation Plan and the information provided to employees regarding it nowhere stated that the Complainant would be entitled to only minimum wages. Given that the *Act* required Kitchen Craft to pay minimum wage for all hours worked, one might conclude that such an express indication would be redundant. However, the evidence the Delegate heard at the hearing revealed that Kitchen Craft intended the \$1,000.00 to act as a "buffer", by which was meant a sum greater than what the Complainant would ordinarily earn if he was paid for all his hours of work at minimum wage. This suggests that the \$1,000.00 minimum payment was intended to be something different than a payment of minimum wages, or indeed merely an advance on commissions. Such an interpretation was reinforced for the Delegate by his observation, in his submission on the appeal, that the Compensation Plan stated the Complainant was to be paid the greater of \$1,000.00 "or" (rather than "and") commissions. Since the Complainant was always paid at least \$1,000.00 in a pay period, regardless of his hours worked, or the commissions he earned, the inference to be drawn, for the Delegate, was that the Complainant was contractually entitled to a minimum payment of \$1,000.00 per pay period, and not merely minimum wages.
68. Kitchen Craft contends that these findings of the Delegate meant that he acted on a view of the facts which could not reasonably be entertained, and so the Delegate erred in law. I disagree. While I might have reached a different view of the facts had I acted as the adjudicator at the hearing of the complaint, it is not open to me to substitute my view of the facts for those found by the Delegate unless it can be demonstrated that he acted in a manner that was irrational, perverse, or inexplicable. I am not persuaded that he did so in this instance. The evidence to which I have referred could, in my view, lead a reasonable person to conclude that the \$1,000.00 minimum payments Kitchen Craft made to the Complainant were the result of an independent contractual obligation related to, but nevertheless distinct from, the commission-based aspect of his entitlement to compensation.

ORDER

- ⁶⁹. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal