

An appeal

- by -

BFI Canada Inc.
("BFI")

- 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: Shafik Bhalloo

FILE No.: 2013A/83

DATE OF DECISION: March 27, 2014

DECISION

SUBMISSIONS

Michael Hamata	counsel for BFI Canada Inc.
Teresa Kaczmarczyk	on her own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) BFI Canada Inc. (“BFI”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 8, 2013.
2. The Determination concluded that BFI contravened the *Act* in respect of the employment of Teresa Kaczmarczyk (“Ms. Kaczmarczyk”) and ordered BFI to pay Ms. Kaczmarczyk wages (section 18), compensation for length of service (section 63), vacation pay (section 58) and accrued interest on the amounts awarded pursuant to section 88 of the *Act*, totalling \$7,966.50.
3. In addition, the delegate levied four (4) administrative penalties of \$500.00 each against BFI for contraventions of sections 18, 27 and 63 of the *Act*, and section 46 of the *Employment Standards Regulation* (the “*Regulation*”).
4. BFI is appealing the Determination in part only, disputing three aspects of the Determination. First, BFI contends that the Director erred in law when calculating Ms. Kaczmarczyk’s entitlement to compensation for length of service under section 63 of the *Act*. Second, BFI contends that the Director erred in law in assessing a penalty against BFI under section 27 of the *Act* for failing to provide Ms. Kaczmarczyk a wage statement on November 25, 2011. Third, BFI argues that the Director erred in law and breached the principles of natural justice in issuing a penalty against BFI pursuant to section 46 of the *Regulation* for failing to produce records on July 19, 2013.
5. BFI is seeking the Employment Standards Tribunal (the “Tribunal”) to cancel the penalties issued for breaches of section 27 of the *Act* and section 46 of the *Regulation*, and vary the Determination with respect to the calculation of length of service pay under section 63(4) of the *Act* to \$4,855.81.
6. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (pursuant to s. 103), and Rule 8 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”), the Tribunal may hold any combination of written, electronic and oral hearings. In this appeal, none of the parties have requested an oral hearing and, in my view, the appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination (the “Reasons”).

ISSUES

7. The issues in this appeal are threefold; namely:
 - (i) Did the Director err in law in applying section 63(4) of the *Act* to calculate the quantum of termination pay owed to Ms. Kaczmarczyk?
 - (ii) Did the Director err in law in assessing the section 27 penalty against BFI?
 - (iii) Did the Director err in law and breach the principles of natural justice in assessing the section 46 penalty against BFI?

BACKGROUND AND SUBMISSIONS

8. BFI operates a waste disposal business and employed Ms. Kaczmarczyk as its Senior Account Manager in its Lower Mainland operation between November 10, 2008, and August 29, 2011. In her role as a Senior Account Manager, Ms. Kaczmarczyk was tasked with increasing BFI's business. More particularly, this role included the following duties and responsibilities: negotiating new contracts with existing customers; negotiating new contracts with businesses undergoing a change of ownership; negotiating price increases with existing customers; and negotiating contracts with new clients in her assigned territory.
9. BFI compensated Ms. Kaczmarczyk by way of a base salary of \$1,605.58 paid bi-weekly and commissions. The commission structure encompassed various categories of Ms. Kaczmarczyk's sales, including price increases, re-signing of contracts by existing customers, new business, securing contracts when ownership of the business changes, and a monthly commission incentive.
10. On August 29, 2011, Ms. Kaczmarczyk's employment with BFI terminated. Ms. Kaczmarczyk argued that BFI terminated her employment on that date after she went for lunch with her supervisor and informed him she was contemplating leaving BFI in the future. BFI, however, argued that Ms. Kaczmarczyk resigned and it did not terminate her employment. Based on the preponderance of evidence at the hearing of Ms. Kaczmarczyk's complaint (the "Hearing"), the delegate concluded that Ms. Kaczmarczyk was summarily dismissed by BFI. I note BFI, in this appeal, is not disputing that conclusion but instead challenging the delegate's calculation of termination pay contending that the latter erred in law in calculating the termination pay.
11. As indicated previously, BFI is also contending that the delegate erred in law in assessing a penalty pursuant to section 27 of the *Act* and further erred in law and failed to observe the principles of natural justice in levying a penalty under section 46 of the *Regulation*. Below I will briefly review, under descriptive subheadings, the Reasons for the Determination (the "Reasons") with respect to each issue raised by BFI in its appeal, and summarize the respective appeal submissions of both BFI and the Director.
12. I also note Ms. Kaczmarczyk has made brief submissions in response to BFI's challenge of the administrative penalties pertaining to breaches of section 27 of the *Act* and section 46 of the *Regulation*. I have carefully read those submissions and they are consistent with the Director's submissions and I do not find it necessary to reiterate them below.
 - (i) ***Compensation for length of service***
13. In the Reasons, the delegate, having found that Ms. Kaczmarczyk's employment was terminated by BFI (without cause), determined that she was entitled to two weeks' wages as compensation for length of service.

In calculating the two weeks' wages, the delegate referred to section 63(4) of the *Act*, noting that the said section states that "compensation for length of service is calculated by totalling the employee's regular wage, including commissions earned or paid in the last eight (8) weeks; dividing the total by 8; and multiplying the result by the number of weeks' wages the employer is liable to pay". The delegate then went on to note that the parties agreed that during the final eight (8) weeks of her employment, Ms. Kaczmarczyk was paid total gross wages of \$14,763.62, including her salary and commissions. In addition to these wages, the delegate noted that Ms. Kaczmarczyk received two (2) payments post-termination for commissions earned during the month of August. These payments included the one on October 28, 2011, for gross wages in the amount of \$4,968.90, which included \$500.00 for mileage and \$166.58 for expenses; and a second payment on November 25, 2011, for gross wages in the amount of \$4,202.32. The delegate noted that these wages were payable to Ms. Kaczmarczyk upon termination of her employment and, therefore, these wages, excluding the mileage and expenses, but including \$1,095.00 which the delegate determined Ms. Kaczmarczyk was owed as commissions, should be included in her total earnings during her last eight (8) weeks of employment. In the result, the delegate concluded that Ms. Kaczmarczyk earned gross wages totaling \$24,363.26 during her last eight (8) weeks of employment. Based on this assessment, the delegate resolved that Ms. Kaczmarczyk's average weekly wage in the last 8 weeks' of her employment was \$3,045.41 and applied that amount to determine that BF owed her \$6,090.82 for two (2) weeks' wages for compensation for length of service.

14. In its appeal submissions, while BFI agrees that Ms. Kaczmarczyk is entitled to two weeks' wages as compensation for length of service under section 63 of the *Act*, it contends that the delegate erred in applying section 63(4) of the *Act* in calculating the quantum of those wages.
15. BFI contends that during Ms. Kaczmarczyk's final eight (8) weeks of employment, she was paid the following wages and commissions:

Pay Period Ending	Type	Wages
7/16/2011	Wages	\$1,605.58
	Commission	\$3,439.62
8/05/2011	Wages	\$1,605.58
	Commission	\$1,500.00
8/13/2011	Wages	\$1,605.58
	Commission	\$3,401.68
8/27/2011	Wages	<u>\$1,605.58</u>
Total		\$14,763.62

16. BFI explains that commissions are earned in the month before they are paid and, Ms. Kaczmarczyk testified at the Hearing that she would wait until the end of the month before presenting her commissionable sales to her manager for payment. Thereafter, she would be paid commissions. And sometimes she was paid late because her manager would forget to send the commission spreadsheet to payroll. However, the commissions were usually paid in the first pay period in the following month, and sometimes later than that, but they were never paid in the month they were earned.

17. BFI further submits that after Ms. Kaczmarczyk's employment was terminated, she received two (2) payments, one on October 28, 2011, for \$4,968.90, which included \$500.00 for mileage and \$166.58 for expenses. The remaining \$4,302.32 was for commissions she earned during her employment. The second payment of \$4,202.32 was made to Ms. Kaczmarczyk on November 25, 2011, and this was for commissions previously earned.
18. BFI also states that the Determination awarded Ms. Kaczmarczyk an additional commission of \$1,095.00, which she was never paid, but earned during the month of August. In total, BFI argues that Ms. Kaczmarczyk earned \$9,599.64 in commissions that were either paid, or ordered paid, after she was terminated. Those commissions, BFI argues, were earned in July and August.
19. When the delegate calculated Ms. Kaczmarczyk's wages in the final eight (8) weeks of her employment, the delegate added commissions actually paid in July and August, plus commissions paid, or ordered paid, after termination. BFI argues that the Director erred in so doing because commissions paid in July and August were earned in June, and should not have been included in the calculation of Ms. Kaczmarczyk's final eight (8) weeks' wages. BFI states that to include those commissions compresses Ms. Kaczmarczyk's commission earnings from a 12-week period into the final eight (8) weeks of her employment, and this gives Ms. Kaczmarczyk a windfall.
20. BFI further submits that section 63(4) of the *Act* requires the Director to calculate compensation for length of service using Ms. Kaczmarczyk's "regular wage...in which the employee worked normal or average hours of work". However, BFI argues that the calculation used in the Determination by the delegate yields a wage that is approximately 200% of Ms. Kaczmarczyk's regular wage and does not conform to the language of the *Act*. In these circumstances, BFI argues that the Director erred in law when it awarded Ms. Kaczmarczyk \$6,090.82 as compensation for length of service. That amount should be vacated and the amount of \$4,855.91 should be substituted. Further, the award relating to vacation pay at 4%, pursuant to section 58 of the *Act*, and interest, pursuant to section 88 of the *Act* on the \$6,090.82 figure should also be accordingly adjusted, according to BFI.
21. In response to BFI's submissions, the Director submits that in calculating the amount of compensation payable to Ms. Kaczmarczyk, pursuant to section 63(4) of the *Act*, the definition of "regular wage", as found in section 1 of the *Act*, must be considered. In particular, the Director highlights section 1(b) which defines "regular wages" to mean:
 - (b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,
22. The Director argues that based on the said definition of "regular wage", if an employee is paid both a salary and commissions, the total commissions and salary paid in the pay period are divided by the hours worked during the pay period to determine the regular wage. The Director argues that the regular wage, therefore, is a blended rate reflecting both these earnings and may fluctuate each pay period, based on the amounts paid and number of hours worked by the employee.
23. The Director further argues that in calculating the regular wage, the *Act* does not provide any mechanism to adjust the calculation of "regular wage" as submitted by BFI "to exclude wages paid in a pay period on the basis the work done to earn the wages was performed in a prior period". While BFI argues that such an interpretation creates an unfair outcome by providing Ms. Kaczmarczyk with compensation in excess of two (2) weeks' average pay based on her total yearly earnings, the Director argues that if Ms. Kaczmarczyk had earned significant commissions in the first six (6) months of the year, but earned no commission in the last

eight (8) weeks of her employment, the amount of her compensation for length of service would have been determined solely on her salary in the last eight (8) weeks of her employment, and this would have resulted in Ms. Kaczmarczyk receiving less than two (2) average weeks' pay based on her total yearly earnings.

24. The Director also reasons:

Furthermore, if the Employer's argument were to be adopted it could be difficult, if not impossible in some cases, to establish which commissions to include and which to exclude in the calculation of compensation for length of service. In the case at hand the Complainant's employment ended August 29, 2011 which means the last eight weeks of her employment were July 5, 2011 to August 29, 2011. On these facts one might reasonably [*sic*] argue that the commissions paid in for work performed in June ought to be excluded because June is not included in the last eight weeks of employment. However, had the Complainant's employment ended on August 12, 2011 the last eight weeks of her employment would have been the period of June 18, 2011 to August 12, 2011. In this case, based on the Employer's argument, how would one reasonably and accurately determine which of the commissions paid in July for work done in June be included in the calculation?

Finally, the Employer asserts that all of the commissions paid during the pay periods ending July 16, 2011 and August 5, 2011 were earned based on work completed in June 2011; however, is not fact supported by the evidence. The Employer did not provide records to show how these payments were calculated or for what period of time the work was performed to earn these commissions. As noted in the determination at pages R21 and R22, there was divergent evidence about the purpose of the \$1,500.00 payment made in the pay period ending August 5, 2011; the parties disputed whether it was the monthly incentive paid for June or July 2011. (Italics mine)

Given the lack of records calculating these commissions, there is no way to determine when the Complainant performed the work that resulted in the commission becoming payable. Additionally, it is possible that the Complainant performed work over the course of several pay periods in order to achieve the result needed to earn the commissions paid, such as negotiating price increases on existing contracts. (Italics mine)

25. On the basis of the foregoing, the Director submits that the calculation of compensation for length of service set out in the Determination should not be interfered with, and the calculation of termination pay is in accordance with the requirements of section 63(4) of the *Act* and the definition of "regular wage" in section 1 of the *Act*.

(ii) Administrative penalty: section 27 of the Act

26. BFI argues that the Director erred in law in issuing the penalty pursuant to section 27 of the *Act* against BFI for failing to provide a written wage statement on November 25, 2011. BFI states that with every payment of wages to every employee, it issues a paystub generated by ADP, an independent payroll management company employed by BFI. BFI states that every payment made to Ms. Kaczmarczyk during her employment, which includes payments on October 28, 2011, and November 25, 2011, included paystubs from ADP.

27. BFI states ADP paystubs contain regular pay, sales commission, bonuses, other wage amounts and employee information. BFI presents with its appeal a paystub issued to Ms. Kaczmarczyk for the pay period ending August 19, 2011, and contends that the ADP paystubs meet all of the requirements of section 27 of the *Act* and therefore the Director erred in law when it assessed against BFI a penalty for breach of section 27 of the *Act*.

28. BFI also contends that although it does not retain wage statements in the form of the ADP paystub, it does retain the same information in a different format and copies of these records were produced to the delegate in response to the Demand for Employer Records before the Hearing. BFI reproduces these records at Tab

D of its appeal submissions. BFI contends that these internal payroll documents together with the ADP paystubs issued to Ms. Kaczmarczyk, fulfil the requirements of section 27 of the *Act* and, therefore, the penalty issued for contravention of the *Act* was in error.

29. In response to BFI's submissions, the Director submits that section 27(1)(h) of the *Act* is instructive in this case because Ms. Kaczmarczyk's pay included commission. Section 27(1)(h) of the *Act* states:

27 (1) On every payday, an employer must give each employee a written wage statement for the pay period stating *all* of the following:

...

(h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for;

(Emphasis Added)

30. The Director contends that the wage statements BFI's payroll company, ADP, issued to Ms. Kaczmarczyk did not include information required in section 27(1)(h) of the *Act* since they did not show how her wages were calculated but only indicated the total amount of her sales commissions paid in each pay period.
31. The Director further submits that section 2 of the *Act* promotes open communication between employers and employees, and the requirements of section 27 are "harmonious" with this purpose. Where the employer opts to pay wages by way of commission, the Director argues the employer must provide the employee with a calculation of the commission wages paid each pay period in order to allow the employee to know whether wages have been paid in accordance with the commission agreement. To accept BFI's interpretation that section 27 only requires an employer to indicate the total amount of commissions paid each pay period is inconsistent with the purposes of the *Act*, argues the Director.

(iii) Administrative penalty: section 46 of the Regulation

32. BFI also submits that the Director erred in law and failed to observe the principles of natural justice when it assessed the section 46 penalty. BFI states that the precise nature or the basis of the section 46 penalty is difficult to understand, and states that it presumably includes a failure on BFI's part to produce documents which would allow Ms. Kaczmarczyk to calculate her commission entitlement, including records required to determine whether any commissions were earned or payable in Ms. Kaczmarczyk's territory between April and August, 2011. BFI contends that in the Determination, the delegate states that no records were produced pursuant to the Demand for Employer Records, which is misleading. BFI states that on July 19, 2013, it produced extensive records in response the Demand for Employer Records, and reproduces those at Tab E of its submissions. Included in these records are internal payroll documents which, BFI contends, show the breakdown between commissions, wages and other payments made.
33. BFI further contends that the Director misconstrued the testimony of BFI's Mr. Hankins at the Hearing when he testified, in response to Ms. Kaczmarczyk's cross-examination question regarding why he did not provide her with a list of the customers to whom she had made sales in August and the amount of those sales. BFI states Mr. Hankins did not, at the Hearing, testify that BFI refused to provide the requested records to the Director following the Demand for Employer Records in July, 2013, because the information in question was confidential. He simply testified that BFI did not provide the records to Ms. Kaczmarczyk following the conclusion of her employment in September, 2011, because she could have used that information to compete with BFI. BFI states that Mr. Hankins was not testifying regarding BFI's response to the Demand for Employer Records, and it was an error of law for the Director to take that testimony into

account in assessing the section 46 penalty, when there was no evidence upon which the Director could have made that finding.

34. BFI also contends that the Director failed to observe the principles of natural justice in assessing the section 46 penalty when BFI, in good faith, attempted to extend the Hearing timeline to determine whether the documents within the missing document classes existed. BFI indicates that Mr. Kinsey was Ms. Kaczmarczyk's direct supervisor and responsible for calculating her benefit entitlements and he would have created records falling within the missing document classes, if they were at all created. However Mr. Kinsey left BFI before the Hearing and was not available as a witness, and that his absence made it extraordinarily difficult for BFI to produce the documents which form the basis of the section 46 penalty. BFI further contends that if given a meaningful opportunity to reply to the Director, BFI may have been able to locate records falling within the missing document classes. However, since Ms. Baxter (Controller for BFI) was the only BFI employee who may have been able to locate, or reconstruct, those records, and she was on maternity leave during the summer of 2013, this interfered with BFI's ability to locate or reconstruct the required records.
35. BFI delineates at least six (6) separate occasions during the months preceding the Hearing when BFI requested the delegate to adjourn the Hearing to accommodate Ms. Baxter's absence and to allow BFI to produce the required documents, but the Director refused to extend the dates for document production and refused to adjourn the Hearing date to accommodate Ms. Baxter's return from maternity leave. Subsequently, on July 19, 2013, BFI contends that it produced the requested records and sent correspondence to the Employment Standards Branch (the "Branch") advising that "the employee with access to relevant records is on maternity leave until the end of August" and that BFI has made its "best efforts to comply with the disclosure request, but the attached records may not be complete".
36. Subsequently, on July 26, 2013, BFI contends it sent further correspondence by email to the Branch regarding witness lists for the Hearing and in this correspondence sent it reiterated that it "face[d] a similar problem with respect to producing a witness list and brief will say statements", explaining again that Ms. Baxter was its primary witness and she was away on maternity leave until the end of August. Following this, on September 1, 2013, BFI requested an adjournment of the Hearing, and that request was denied by the delegate.
37. BFI contends that the refusal to adjourn the Hearing prevented it from making a full answer to the case against it because it was not able to marshal the full evidentiary record available to it due to Ms. Baxter's unavailability. In the circumstances, BFI argues that the Director breached the principles of natural justice and erred in law in levying a penalty against it under section 46 of the *Regulation* and seeks the Tribunal to cancel the penalty.
38. In response to BFI's submissions, the Director notes that on June 25, 2013, BFI was sent the Notice of Complaint Hearing together with a Demand for Employer Records. The Demand for Employer Records requires the employer to produce, *inter alia*, any and all records relating to Ms. Kaczmarczyk's commission wage, including documentation concerning the various categories of commissions to which she was entitled, including any documentation explaining how those commissions were earned, calculated and paid. The Director contends that, while BFI produced other documents that were requested pursuant to the Demand for Employer Records, BFI did not produce documents relating to Ms. Kaczmarczyk's commission wages, which were required in order to determine whether any additional commissions were payable to Ms. Kaczmarczyk, as claimed. This failure of BFI resulted in the finding that there was insufficient evidence to prove various aspects of Ms. Kaczmarczyk's complaint, including, in particular, her claim for commissions

related to customer service activities in her region from April, 2011, to the termination of her employment, as well as her claim for her additional commissions relating to sales activities during the month of August, 2011.

39. The Director further submits that section 85 of the *Act* affords the Director the authority to require production of records relevant to the investigation of a complaint, and the records the Director demanded relating to Ms. Kaczmarczyk's commission wage were not only relevant, but highly probative, to her complaint.
40. With respect to BFI's contention that there was a denial of natural justice, the Director submits that BFI's counsel was aware that Ms. Baxter was on maternity leave when he was canvassing hearing dates in April, 2013. In counsel's email of April 17, 2013, counsel suggested dates for late August and early September, 2013, for a hearing. The Director submits that the Hearing date was set based on the information provided by BFI's counsel that Ms. Baxter was scheduled to return to work at the end of June, 2013.
41. The Director further submits that BFI's request to adjourn the Hearing was denied based on the reasons set out in the delegate's correspondence to BFI's counsel on September 3, 2013. In that letter, in addition to setting out the objections of Ms. Kaczmarczyk, the delegate explained that the Notice of Hearing was sent to the parties on June 25 and the Hearing date was set based on Ms. Baxter's availability after her maternity leave. The delegate also reasoned, in rejecting the adjournment request, that BFI did not provide any particulars as to why Ms. Baxter was now unavailable to attend the Hearing when BFI had several months advance notice of the Hearing date.
42. The Director also submits that BFI was aware from the outset of the complaint resolution process the nature of the dispute and was afforded with a reasonable opportunity to gather and produce the required records, but failed to do so. The Director also argues that BFI did not provide any explanation to support its assertion that Ms. Baxter was the only person who could have provided the employer records requested by the Director. In any event, the Director argues BFI is required to manage its affairs to comply with the requirements of the *Act*, and the absence of an employee from the workplace does not relieve BFI of this requirement.
43. Lastly, the Director submits that BFI's suggestion that the required records may not exist "implies that it has not endeavoured to produce them". The Director also adds that the records pertaining to the commission wages of Ms. Kaczmarczyk (and requested in the Demand for Employer Records) related to activities for the month of August, 2011, and constitute business records that had to exist in order to calculate the commissions that were paid to Ms. Kaczmarczyk by BFI.

ANALYSIS

44. I will deal with the issues raised on appeal under headings corresponding to those delineated above in the section summarizing the submissions of the parties.

(i) *Compensation for length of service*

45. The delegate, in calculating her award of two (2) weeks' wages as compensation for length of service to Ms. Kaczmarczyk in the Determination, referred to section 63(4) of the *Act*, which provides:

63 (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

- (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
- (b) dividing the total by 8, and
- (c) multiplying the result by the number of weeks' wages the employer is liable to pay.

46. Section 1 of the *Act* provides a five-part definition of "regular wage" in subparagraphs (a) to (e). For our purposes, subsection (b) is relevant, and I propose to set it out verbatim below:

(b) If an employee is paid...commission...the employee's wages in a pay period divided by the employee's total hours of work during that pay period,

47. Based on the language in section 63(4) and the definition of "regular wage" contained in section 1(b), the delegate went on to consider all wages received by Ms. Kaczmarczyk during the last eight (8) weeks of her employment as set out in the table below which included commissions BFI argues were earned in June but paid on July 16 and August 5, 2011, as well as commissions earned in August and July, but paid after the termination of Ms. Kaczmarczyk's employment.

Pay Period	Determination	
7/16/2011	\$1,605.58	Salary
	\$3,439.62	Commissions earned in June
8/05/2011	\$1,605.58	Salary
	\$1,500.00	Commissions earned in June
8/13/2011	\$1,605.58	Salary
	\$3,401.68	Commissions earned in July
8/27/2011	\$1,605.58	Salary
	\$4,302.32	Commissions earned in August and July, but paid after termination
	\$4,202.32	Commissions earned in August and July, but paid after termination
	\$1,095.00	Commissions earned in August, and ordered paid after termination
Total 8 weeks	\$24,363.26	
Bi-Weekly	\$6,090.82	

48. As indicated previously, BFI contends that the commissions paid in the July 16, 2011, and August 5, 2011, pay periods were earned during June, 2011, and must not be included in Ms. Kaczmarczyk's final eight (8) weeks' wages; otherwise, it compresses her commission earnings from a 12-week period into the final eight (8) weeks of her employment and gives her a "windfall". According to BFI, the delegate should have calculated the two (2) weeks' compensation for length of service taking into consideration all of the wages and commissions paid in the last eight (8) weeks of Ms. Kaczmarczyk's employment, but excluding the commissions of \$3,439.62 and \$1,500.00 paid to Ms. Kaczmarczyk on July 16, 2011, and August 5, 2011.

Pay Period	BFI proposes	
7/16/2011	\$1,605.58	Salary
	Exclude \$3,439.62	Commissions earned in June
8/05/2011	\$1,605.58	Salary
	Exclude \$1,500.00	Commissions earned in June
8/13/2011	\$1,605.58	Salary
	\$3,401.68	Commissions earned in July
8/27/2011	\$1,605.58	Salary
	\$4,302.32	Commissions earned in August and July, but paid after termination
	\$4,202.32	Commissions earned in August and July, but paid after termination
	\$1,095.00	Commissions earned in August, and ordered paid after termination
Total 8 weeks	\$19,423.64	
Bi-Weekly	\$4,855.91	

49. The delegate, as indicated previously, argues there is no mechanism in the *Act* to adjust the calculation of "regular wage" as submitted by BFI. I note that a decision of the Tribunal in *Robert Craig* (BC EST # D052/10), although factually distinguishable from the case at hand, is instructive in terms of the approach the Tribunal takes under section 63(4) in calculating compensation for length of service. At paragraph 35 of the decision, the Tribunal states:

...when considering the average or normal wages for commission employees, *the Tribunal has endorsed an approach that seeks to reasonably reflect the employee's typical, regular or usual wages and that approach is not necessarily limited to looking at the wages earned only in the 8 weeks preceding the termination.* Although the case arises under a different provision, the following comment from *Raymond Man Lee Wah and Blaine Howard Rowlett, Directors/Officers of C-O-E Poscann Systems Inc.*, BC EST # D281/00 describes the objective of taking such an approach:

The delegate has provided the Tribunal with information from two perspectives. Mr. Law worked for the Employer for 21 months. For 10 months his commissions exceeded \$3,011.09 (April 1998), for 10 months his commissions were less. Looking at the commission earnings from the standpoint of ‘average’ commissions, throughout Mr. Law’s employment, the average turns out to be \$2,975.24. In some cases, an average is appropriate, in other cases, perhaps, not. In some cases, it may be appropriate to consider a relatively short period, in other cases, a longer period. *In my view, there is no “magic way” to calculate the liability, the point being that the delegate must consider the “wages that are earned by an employee over a period of time and are reasonably reflective of the employee’s typical, regular or usual wages.” (Italics mine)*

50. Based on the Tribunal’s decision in *Craig, supra*, as well as the decision of the Tribunal in *Raymond Man Lee Wab* referred to in the *Craig* decision, I believe that the delegate has some flexibility in employing an approach that reasonably reflects the employee’s typical, regular or usual wages. BFI’s argument is that the inclusion of the commissions earned in June, but paid on July 16 and August 5, 2011, results in a calculation of termination pay that compresses commission earnings from a 12-week period into the final eight (8) weeks of Ms. Kaczmarczyk’s employment. In other words, it can be said that BFI is arguing that the amount calculated by the delegate, viewed objectively, does not reasonably reflect Ms. Kaczmarczyk’s typical or usual wage. While on the face of it, BFI’s argument has some merit in my view, I am not persuaded, based on the Reasons and the evidence adduced by BFI that the commissions paid by BFI to Ms. Kaczmarczyk in the pay periods ending July 16 and August 15, 2011, were earned indeed based on work completed in June, 2011. The Director contends that the evidence does not support this conclusion, and BFI did not provide actual records to show how these payments were calculated, or for what period of time the work was performed to earn these commissions. The Director, furthermore, notes in the appeal submissions that there was a divergence in the evidence with respect to the purpose of the \$1,500.00 payment made by BFI in the period ending August 5, 2011, and whether that payment was incentive paid for June or July, 2011. In these circumstances, I find that there is sufficient uncertainty surrounding when these commissions were earned and I agree with the Director that “there is no way to determine when [Ms. Kaczmarczyk] performed the work that resulted in the commission becoming payable”. Therefore, I am not persuaded that the delegate erred in law in calculating the termination pay as she did. In my view, the onus, in the appeal, is on BFI to show that the delegate erred in law in calculating the termination pay and I am not convinced that BFI has done that.

(ii) Administrative penalty: section 27 of the Act

51. I have reviewed the submissions of both BFI and the Director with respect to the administrative penalty levied against BFI under section 27 of the *Act*. I find the Director’s submission persuasive over BFI’s. More particularly, the Director, in my view, correctly submits that section 27(1)(h) of the *Act* applies in this case because Ms. Kaczmarczyk was paid by commission. Section 27(1)(h) of the *Act* requires an employer to provide each employee a written wage statement for the pay period stating, *inter alia*, “how the wages were calculated for the work the employee is paid for” where the employee is paid other than by the hour or by salary. In this case, the ADP paystubs provided to Ms. Kaczmarczyk on both October 28, 2011, and November 25, 2011, did not explain how the commission portion of Ms. Kaczmarczyk’s wages was calculated. I note that BFI contends that it produced, in response to the Director’s Demand for Employer Records, similar information to that appearing on the ADP paystubs, but this does not address the requirement of section 27(1)(h) of the *Act*. What was provided to Ms. Kaczmarczyk during the said pay periods by BFI’s payroll agency, ADP, did not contain information on how Ms. Kaczmarczyk’s commissions were calculated. Therefore, I find the Director correctly concluded that BFI breached section 27(1)(h) of the *Act*. In the circumstances, the administrative penalty levied in respect of that breach, should stand.

(iii) Administrative penalty: section 46 of the Regulation

52. The delegate issued a Demand for Employer Records to BFI on June 25, 2013. Included in that Demand was a request for any and all records relating to Ms. Kaczmarczyk's commission wages, including documentation explaining how her commissions were earned, calculated and paid.
53. Section 46 of the *Regulation* provides:
- 46 (1) A person who is required under section 85(1)(f) of the Act to produce or deliver records to the Director must produce or deliver the records as and when required.
54. In its appeal submissions, in respect of the administrative penalty issued against it for breach of section 46 of the *Regulation*, BFI states that there is some confusion about why this penalty was issued by the delegate against it, and BFI submits that it did produce extensive records in response to the Demand for Employer Records and reproduces those at Tab E of its submissions. These records included internal payroll documents which, BFI contends, indicate the breakdown between commissions, wages and other payments made to Ms. Kaczmarczyk. In response, the Director contends that although BFI produced other documents that were requested pursuant to the Demand for Employer Records, BFI did not produce documents relating to Ms. Kaczmarczyk's commission wages and, particularly, documentation explaining how commissions were earned, calculated and paid. The Director further contends that it was this failure of BFI that led to the issuance of an administrative penalty for breach of section 46 of the *Regulation*. I do not find that the Director erred in law in arriving at that conclusion and, therefore, I do not find there is any basis to cancel this administrative penalty.
55. I also note that BFI contends that the Director breached the principles of natural justice when it assessed the section 46 penalty. This allegation is primarily anchored in BFI's contention that the Director did not adjourn the Hearing to accommodate BFI's witness, Ms. Baxter, who was away on maternity leave and who could have assisted in producing the required documents (in this case, the documents relating to Ms. Kaczmarczyk's commission wages and how commissions were earned, calculated and paid), if they existed. Ms. Baxter was needed in this instance according to BFI because Ms. Kaczmarczyk's direct supervisor, Mr. Kinsey, had left his employment with BFI in advance of the Hearing.
56. Based on my review of the record, Ms. Kaczmarczyk filed her Complaint against BFI on October 17, 2011, and BFI would have received the Complaint shortly thereafter and had ample time to understand the nature of the Complaint and to gather all documents material to the Complaint including any documents relating to Ms. Kaczmarczyk's claim for regular wages (including commissions) well in advance of the September 5, 2013, Hearing date. Why BFI would not have gathered or searched those materials, if they existed, earlier before Mr. Kinsey left BFI or Ms. Baxter went on maternity leave I do not know. I would think BFI certainly had enough time before the Hearing date to gather the required documents and I do not find that BFI was somehow prejudiced by the delegate's decision to reject adjournment of the Hearing date.
57. I also find somewhat curious the suggestion in BFI's submissions that the required records - relating to commission calculation - may not exist. While I do not necessarily accept the delegate's conclusion here that this "implies that [BFI] has not endeavoured to produce them" it does raise in my mind the question of how BFI then calculated Ms. Kaczmarczyk's commissions during her entire period of employment. Surely there must have been some business records generated to determine the commissions she was paid during her period of employment.

58. I have also reviewed all of the correspondence between the delegate and BFI's counsel including the email exchanges in April 2013 when a hearing date was being canvassed. BFI's counsel was then aware that Ms. Baxter was required as a witness and she was on maternity leave and not due back until the end of June 2013. It appears that the Hearing date was scheduled around her availability.
59. It also appears that Ms. Baxter, at some point, extended her leave for a couple of additional months, and this led to correspondence between BFI's counsel and the delegate later in June of 2013 with counsel asking for an adjournment of the scheduled Hearing date. I note, in particular, counsel's September 1, 2013, correspondence to the delegate advising that Ms. Baxter has now returned from maternity leave but she is unavailable to attend at the Hearing. Counsel again reiterates in this correspondence his request for an adjournment. In response, the delegate, by way of a letter dated September 3, 2013, points out to counsel that his request for an adjournment is lacking "any particulars as to why, despite several months' notice, Ms. Baxter is now 'unavailable to attend the hearing date'". The delegate was not prepared to grant an adjournment. In response, counsel, by way of a letter of same date, sets out several reasons why Ms. Baxter would not be available for a hearing on September 5th but would be available on a rescheduled date later in the month. These reasons included the following: Ms. Baxter was returning to a different position than the one she was in when she left for maternity leave; she had to train another individual for her previous position; there were some statutorily-imposed reporting requirements for BFI which needed to be completed by September 6th and that she was responsible for ensuring that BFI meets those reporting requirements; Ms. Baxter was travelling on September 5th to attend an out-of-town wedding on September 6th; and Ms. Baxter had a newborn baby at home and was unable to modify her limited hours given her baby's breastfeeding requirements. The delegate did not find any of those reasons convincing and, in her subsequent letter of September 4, 2013, to counsel, again rejected BFI's request for an adjournment, pointing out, *inter alia*, that Ms. Kaczmarczyk also objected to the adjournment request because BFI knew when Ms. Baxter was scheduled to return to work from maternity leave and the Hearing date was set for September 5, 2013, to accommodate Ms. Baxter. Further, the request for adjournment was made on short notice, only two (2) days before the Hearing, and Ms. Kaczmarczyk had arranged to take a day off work in order to attend the Hearing. Ms. Kaczmarczyk had also arranged for her witness to be available for the Hearing date. She also postponed a medical treatment to deal with the Hearing, and an adjournment would require a further postponement of her medical treatment. Further, Ms. Kaczmarczyk was also not available to attend a hearing on the new proposed dates in September. The delegate also reiterated that in addition to Ms. Kaczmarczyk's objection, the Hearing date was set on September 5, 2013, by mutual agreement of the parties, and that none of the reasons BFI's counsel provided for adjourning the Hearing constituted "an unforeseeable event or emergency precluding [Ms. Baxter's] attendance". Accordingly, the delegate denied the adjournment request and proceeded with the Hearing on the scheduled date.
60. Having reviewed the submissions of both parties, I am not persuaded with BFI's contention that the Director breached the principles of natural justice by denying BFI's request for an adjournment of the Hearing and accommodating Ms. Baxter's absence. I am not persuaded that this is what made it impossible for BFI to comply with the document request. BFI had ample notice of the Hearing date which was scheduled in April, 2013, with Ms. Baxter's return from maternity leave in mind and Ms. Kaczmarczyk relied on the mutually scheduled date to arrange her schedule and witness for attendance at the Hearing. As with the Director, I am not persuaded that any of the enumerated reasons listed in counsel's letter of September 3, 2013, delineating Ms. Baxter's personal and other business commitments justify delaying an otherwise mutually-agreed-upon Hearing date which incidentally was set just shy of 2 years after the filing of Ms. Kaczmarczyk's Complaint. I also add an adjournment of the Hearing date, in the circumstances of this case, would have been inconsistent with one of the stated purposes of this *Act* in section 2(d), namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". In the result, I do not find that

there has been a breach of natural justice on the part of the delegate and, the administrative penalty levied against BFI for contravention of section 46 of the *Regulation* will stand.

61. Accordingly, this appeal is dismissed.

ORDER

62. Pursuant to section 115 of the *Act*, I order the Determination, dated November 8, 2013, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal