

An appeal

- by -

Metasoft Systems Inc.
(“Metasoft”)

- 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.: 2012A/32

DATE OF DECISION: June 7, 2012

DECISION

SUBMISSIONS

Todd Sherman	on behalf of Metasoft Systems Inc.
Denise M. McConachie	on her own behalf
Jim Dunne	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought on behalf of Metasoft Systems Inc. (“Metasoft”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”).
2. Metasoft challenges a part of a determination (the “Determination”) of a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) issued on February 17, 2012. The Determination was issued in respect of a complaint filed by Denise M. McConachie (“McConachie”), a former employee of Metasoft.
3. The Delegate determined that Metasoft had contravened the *Act* when it failed to pay McConachie wages and annual vacation pay. Together with interest, the Determination required Metasoft to pay \$2,816.46.
4. In addition, the Delegate imposed two \$500.00 administrative penalties. One of the penalties was imposed on the basis that Metasoft had contravened section 17 of the *Act* when it failed to pay McConachie minimum wages. The other related to a contravention of section 21 of the *Act*, in respect of a deduction Metasoft made from McConachie’s wages.
5. The total amount the Determination required Metasoft to pay was therefore \$3,816.46.
6. For the purposes of this appeal, Metasoft takes no issue with the Delegate’s decision regarding the deduction from wages. The matter before me therefore relates only to that part of the Determination which decided that Metasoft had failed to pay McConachie minimum wages for a portion of the work she had performed during her employment with the company.
7. I have reviewed the Appeal Form, the Determination, the Reasons for the Determination, the record provided by the Director pursuant to section 112(5) of the *Act*, the submissions of the parties, and the submission of the Delegate.
8. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

9. Metasoft operates a computer software sales business. McConachie was employed as a sales associate for the company from November 2005 until January 2012.
10. McConachie did her work from her home, selling software to Metasoft's clients. She was paid a commission percentage based on the value of sales produced, less amounts payable due to returns. She received no base salary. The relevant portions of McConachie's employment contract read as follows:
 1. Sales Commission
 - (a) Basic Sales Commission (BSC) is set at 27.5% of new sales revenues each month (30% including vacation and statutory holiday pay). New sales are those from a "first-time purchaser" of a BIG Database product.
 - (b) Commission will be paid monthly on revenues received netted against any product returns for a given month. In the event of your resignation or termination, you will be paid out on all revenues received up to and including the last day of employment.
11. McConachie filed a series of complaints against Metasoft, most of which were resolved. The complaint which has resulted in this appeal deals with work McConachie performed for Metasoft in the first few weeks of August 2011. She alleged that she received no remuneration for that work. While she generated no sales as a result of the August work, she asserted that she should be paid for it at the minimum wage rate of \$8.75 per hour set by section 15(1) of the *Employment Standards Regulation*.
12. McConachie commenced an extended leave, for health reasons, later in August 2011. It does not appear that she returned to work thereafter. She resigned from her position with Metasoft in January 2012.
13. McConachie expected that Metasoft would pay her for her August work in September 2011, but no payment was received, either at that time, or at all.
14. The evidence presented to the Delegate revealed that McConachie did receive two payments from Metasoft in August 2011, one on August 15, and the other on August 31. In his Reasons, the Delegate stated that the August payments represented payment of commission remuneration generated by sales McConachie made in July 2011.
15. The Delegate also stated that Metasoft took the position the payments made in August were an advance on commissions payable to McConachie for sales in July. The reason for this was that Metasoft had a policy, reflected in McConachie's employment contract, which permitted customers to return products within six months, and so commissions were not "earned" by McConachie until the return period expired.
16. Metasoft argued before the Delegate, and by inference on this appeal, that it had complied with the provisions of the *Act* dealing with the payment of wages because the amounts paid to McConachie in August 2011 were greater than the amounts payable to her at the minimum wage rate for the work she performed during that month.
17. The Delegate determined that the payments made to McConachie in August 2011 were not advances. Instead, they were commissions earned by her in July. That being so, they could not be used by Metasoft to satisfy its obligation to pay McConachie minimum wages for the work she had performed in the following month. Indeed, the Delegate stated that Metasoft's delaying payment to McConachie of her commissions

earned in July to August 15 and 31, 2011, violated the provision in section 17 of the *Act* requiring Metasoft to pay to McConachie all wages earned by her in a previous pay period at least semi-monthly, and within eight days after the end of the pay period.

18. In the result, the Delegate determined that Metasoft should pay McConachie minimum wages for her hours of work in August 2011. The Delegate also imposed a \$500.00 administrative penalty due to Metasoft's failure to pay McConachie minimum wages for August, as required by section 17.
19. I note that in its submission accompanying its Appeal Form, Metasoft states that it was incorrect for the Delegate to say in his Reasons that the August payments were for commission sales made by McConachie in July 2011. In fact, Metasoft says, McConachie made no sales in July, and the August payments were made because revenue arrived in July that related to sales made by her in previous months. In his appeal submission, the Delegate appears to acknowledge that this is what occurred.
20. Regardless, it is clear that the August 2011 payments did not represent remuneration for McConachie's work performed in that month. She received no payment in September 2011, or at any time, for the work she performed for Metasoft during that month.

ISSUE

21. Has Metasoft established that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

22. 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.

23. 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.

24. Metasoft's Appeal Form states that the Delegate failed to observe the principles of natural justice in making the Determination. This is the ground of appeal referred to in section 112(1)(b) of the *Act*.

25. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by a delegate was unfair. The principles of natural justice mandate that a party must have an opportunity to know the case it is required to meet, and an opportunity to be heard in reply. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if, as occurred here, an investigation is conducted, the Director,

and a delegate acting on her behalf, must make reasonable efforts to give a person under investigation an opportunity to respond.

26. Metasoft has produced no evidence suggesting that the Delegate failed to apprise it of the elements of McConachie's complaint, or that he denied Metasoft an opportunity to tender evidence or to make submissions in reply. There is, therefore, no basis on which one might conclude that the Determination should be disturbed because of failure to observe the principles of natural justice.
27. This is not the end of the matter, however. In order to do justice to the parties to an appeal, most of whom will be unrepresented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, regardless of the particular box an appellant has checked off on an Appeal Form (see *Triple S Transmission Inc.*, BC EST # D141/03).
28. In my view, Metasoft's appeal raises the question whether the Delegate erred in law in deciding that McConachie did not receive minimum wages for the hours she worked in August 2011. That is a ground of appeal which engages section 112(1)(a) of the *Act*.
29. Two sections of the *Act* are relevant in the analysis of this issue. They read 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 another period.
- 17 (1) At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.
- (2) Subsection (1) does not apply to
- (a) overtime wages credited to an employee's time bank, or
- (b) vacation pay.
30. There is no issue that commission remuneration constitutes "wages" for the purposes of the *Act*. The definition of "wages" in section 1 of the *Act* makes this abundantly clear.
31. The position of Metasoft, I believe, is captured in the following statement appearing in its appeal submission:
12. For August 2011, this determination is seeking to pay Ms. McConachie minimum wage in addition to commission for the month.
32. The Delegate argues that this characterization is incorrect, for two reasons.
33. First, the Delegate submits that while McConachie received remuneration from Metasoft in August, it related to revenue received in the previous month of July, which involved different pay periods altogether.
34. The second reason flows from another statement made in Metasoft's submission on appeal:
11. Each month, Ms. McConachie is paid commission on revenue received the previous month. In the event that Ms. McConachie received no commissions, she would receive minimum wage for hours worked.

35. The Delegate submits that if one follows the logic contained within this statement, the fact that McConachie made no sales in August 2011, and no revenue was received by Metasoft during that month in respect of sales made by her in previous months, Metasoft should have paid McConachie minimum wages for her hours worked in August. No such payment occurred in September 2011, or at all.
36. I find I must agree with the analysis presented by the Delegate. I cannot accept Metasoft's submission that if McConachie is paid minimum wages for her work in August 2011 it will mean that she will receive commission income and minimum wages "for the month." The reason is that the commission remuneration paid by Metasoft in August did not relate to McConachie's work, or her earnings for that matter, during that month. Instead, it related to what had transpired during the previous pay periods in July. For that reason, the August 2011 payments should have been made within 8 days of the end of the July pay periods to which they referred, and the Delegate was correct to state that Metasoft was in breach of section 17 of the *Act* when it made those payments in two later instalments, one on August 15, and the other on August 31.
37. Does Metasoft's submission that the August payments represented an "advance" make any difference to the outcome in this case? I do not believe it does. The Delegate found that the August payments did not constitute an advance, but represented commissions that had been earned. In doing so, the Delegate relied in part on the wording of McConachie's employment contract, which stated clearly that commissions would be paid monthly on revenues received netted against any product returns for the given month. Nowhere was it stated that any part of the commission income paid would be construed as an advance.
38. In my view, the Delegate was entirely correct to decide that the commission remuneration paid to McConachie did not constitute an advance. But even if the Delegate can be said to have erred on this point, it does not affect the result in this case. Sections 16 and 17 make it clear that Metasoft was required to pay McConachie minimum wages for her work in August 2011, within 8 days of the end of each pay period during that month. 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.
39. On this view of the provisions of the *Act*, the terms of McConachie's employment contract, and the facts as presented, it is clear that McConachie received no remuneration for her work in August 2011. That being so, the Delegate was right to find that Metasoft must pay minimum wages for McConachie's hours of work during that month.
40. This outcome does not result in McConachie's receiving both commission remuneration and minimum wages for the month of August 2011. Rather, it means that she will have received commission remuneration for the month of July 2011, and minimum wages for the month of August 2011. The fact that McConachie received her July commission remuneration in August does not alter this reality.

ORDER

41. Pursuant to section 115 of the *Act*, I order that the Determination dated February 17, 2012, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal