

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*, S.B.C. 1995, c. 38

-by-

Ronald McTavish

(“McTavish”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 96/685

**DATE OF HEARING:** March 3rd, 1997

**DATE OF DECISION:** March 6th, 1997

**DECISION**

**APPEARANCES**

Ronald McTavish            on his own behalf

No appearance            for New Concept Information Systems Ltd.

No appearance            for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Ronald McTavish (“McTavish”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 004473 issued by the Director of Employment Standards (the “Director”) on October 29th, 1996. The Director determined that New Concept Information Systems Ltd. (“New Concept” or the “employer”) owed McTavish, its former employee, the sum of \$980.65 on account of unpaid commission earnings, concomitant vacation pay and interest.

Neither the Director nor the employer appeared at the appeal hearing, which was held in Vancouver at the Tribunal’s offices on March 3rd, 1997. It is my understanding that New Concept is no longer an operating business although no formal insolvency or winding-up proceedings are currently underway; the chief principal of New Concept, Stephen Koltai, has apparently abandoned the business and is now residing in Hong Kong.

**FACTS**

I wish to reiterate at the outset that my findings of fact are predicated exclusively on the testimony of, and documents submitted by, the appellant. In the absence of any contrary evidence submitted at the hearing by the employer (the only employer submission I have before me is a letter to the Director dated July 9th, 1996 in which the employer simply makes the bald assertion that the appellant “is owed nothing”), I have based my decision on the apparently credible testimony of the appellant.

In early July 1995, McTavish was hired by New Concept to market its products-- primarily "barcode" scanning equipment. New Concept was the local distributor for a manufacturer located in Kansas City, U.S.A. Prior to accepting the position (which was styled as the "general manager"), McTavish met with an executive search consultant (more commonly, though somewhat less elegantly, known as a "headhunter"). This meeting took place sometime during the last week of June 1995 and lasted approximately thirty minutes. McTavish made some brief handwritten notes immediately after the meeting; these notes (a single page) were submitted as evidence at the appeal hearing. According to these notes, the employer proposed the following employment terms and conditions:

- Annual Salary - \$55,000 (\$4,500 per month) (sic)
- Commission - 10% to 15% of profits earned on sales
- Share options - 30,000 shares
- Monthly sales quota - \$20,000

A few days later, McTavish met with the Chief Executive Officer of New Concepts, Stephen Koltai (who was then, and still was as of June 10th, 1996, the company president and sole director). This meeting took place at the employer's office in Richmond and lasted approximately one hour. Following this meeting McTavish once again made some handwritten notes (one page); these notes were also submitted into evidence. These notes read, in part, as follows:

PLAN

\$4500/mo salary - Comm	Over 35% - 15%
Quota \$20K/mo	Under 35% - 10%
\$350/mo car plus gas + insurance	

Shares	- 30K options	
	- more from his personal account	—

McTavish testified that these notes reflected an offer of employment whereby he would be paid a monthly salary of \$4,500 *plus* a monthly commission of 15% on sales where the profit margin was over 35% (markup relative to cost) and 10% where the profit margin was less than 35%. McTavish stated the offer also included a monthly car allowance and an offer of \$30,000 worth of share options in the company. Although not set out in his notes, McTavish says that he would be given a monthly sales quota of \$20,000.

McTavish left the meeting saying that he would “think about” the offer and get back to Koltai within a couple of days. A few days later, McTavish telephoned Koltai and accepted the offer. McTavish commenced his employment on July 10th, 1995.

Although McTavish made a number of sales, the company experienced more or less constant cash-flow problems during the ensuing two months and thus in mid-to late September 1995 McTavish submitted his resignation, effective as at October 31st.

### **ISSUE TO BE DECIDED**

McTavish acknowledges that he received his monthly salary and car allowance during his tenure with New Concept. McTavish is not seeking any compensation regarding the so-called “share options” (properly so, in my view, as this particular “agreement” seems too vague to be enforceable). However, McTavish says that he has not been paid any of his commission earnings.

The employer’s position is that all commissions were payable only on sales that exceeded the monthly \$20,000 sales quota (in which case no commissions would be payable). McTavish, on the other hand, maintains that the commissions were payable over and above the monthly salary and that the sales quota was merely a target. At best, a failure to meet the sales quota would be a “job performance” rather than a compensation issue.

Accordingly, the issue before me is simply: Was McTavish entitled to a percentage commission on all sales or only on sales over and above the \$20,000 monthly sales quota?

### **ANALYSIS**

The strongest evidence in favour of the employer’s position is contained in a letter dated July 12th, 1995 which purports to set out the employment agreement between McTavish and New Concept. This letter states, part, that a “Commission of 10% will be be paid on all sales exceeding the personal monthly minimum of \$20K and having a better than 20% net profit, (bottom line).”

I do, however, have several concerns regarding this letter and it is my conclusion that it is not what is purports to be, namely, a letter that accurately sets out the terms and conditions of McTavish’s employment with New Concept.

First, McTavish testified that this letter was not provided to him until September 29th, 1995 by which time he had already submitted his resignation. Second, when pressed on this point by the Director's delegate, Koltai "was rather vague about when the document was actually presented to the complainant" (see Determination Reason Schedule, p. 2). Third, Koltai told the Director's delegate that this letter was also forwarded to the executive search firm, but that firm has no such letter in their file.

McTavish testified that it is a common practice in the industry to pay commissions on all sales, not merely those that exceed some specified monthly quota. Further, McTavish testified that when he worked for IBM and Phillips he was paid a commission on all sales even though he also received a monthly salary.

The Director's delegate rejected McTavish's position primarily because if "commissions were paid on all sales, it would render meaningless the parties' agreement that there was a \$20,000 monthly quota". I must disagree. I do not find it inherently contradictory to have a commission structure based on all sales and, at the same time, a monthly sales quota. I accept McTavish's evidence that, in general in this industry, sales quotas are established as a measure of job performance and that commission earnings are not dependent on attaining a specified monthly sales target.

In the absence of any contrary evidence regarding the amount of the commissions that would be payable if I accepted McTavish's evidence regarding the commission formula (the employer did not submit any sales or payroll records), I accept McTavish's calculations as to his unpaid commission earnings.

## ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004473 be varied as follows:

Commission earnings payable:	\$3,640.14
Vacation pay on commission earnings:	<u>\$ 145.61</u>
Total	<u>\$3,785.75</u>

and that an amended Determination be issued as against New Concept in the amount of \$3,785.75 together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**