

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Athlone Travel (Oak Bay) Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 2000/051

DATE OF HEARING: May 19, 2000

DATE OF DECISION: May 30, 2000

DECISION

APPEARANCES

Jane Purdie	On behalf of Athlone Travel (Oak Bay) Ltd.
Heather Holmes	On her own behalf
Gerry Omstead	Delegate for the Director

OVERVIEW

This is an appeal by Athlone Travel (Oak Bay) Ltd. ("Athlone") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination numbered ER# 084296 dated January 21, 2000 by the Director of Employment Standards (the "Director").

Heather Holmes ("Holmes" or "the employee") was employed by Athlone as a commission travel agent. She earned income based completely on the sales she was able to complete. Throughout the two year time period covered by the Determination Holmes rarely sold enough travel to "earn" minimum wage. She was paid a semi-monthly amount in excess of minimum wage as an advance against future earnings.

The Director determined that this "advance against earnings" arrangement did not satisfy the requirements in the *Act* for the employer to pay to the employee at least the minimum wage in each pay period.

Athlone appeals on three grounds. Firstly, Athlone submits that the advance against earnings does comply with the *Act* provided that the employee is always "paid" at least minimum wage in each pay period despite her earnings. Secondly, it is submitted that the method of calculation used by the Director in which the wages are calculated on a daily basis does not take into account the "days-off" (e.g. for "Fam Trips") taken by the employee. Thirdly, Athlone submits that even if they accept the calculations of the Director as to wages owing, Athlone has paid at least that amount in total payments to the employee.

PRELIMINARY ISSUE

At the opening of the hearing this adjudicator disclosed to the parties that Ms Purdie had previously worked with this adjudicator's wife in the travel business approximately 10 years ago and that Ms Purdie was known to the adjudicator at that time. The parties were offered the opportunity to adjourn the hearing to have another adjudicator assigned but both Ms Purdie and Ms Holmes wished to proceed and agreed that my prior knowledge of Ms Purdie was not an impediment to the fairness of the hearing. The Director's delegate agreed.

FACTS

Ms Holmes worked on commission as a travel agent at Athlone from early January 1996 to February 13, 1998. The period covered by the Determination is from February 13, 1996 to

February 13, 1998. She normally worked a seven hour day, or 35 hours per week, but also worked five hours on one Saturday every fifth week.

Ms Purdie testified, on behalf of Athlone, that for the first 6 months Ms Holmes was paid a guaranteed minimum wage of \$1,400.00 per month. Pay periods were bi-monthly so she was paid \$700.00 each pay period. This amount was in excess of the minimum wage requirements of the *Act*. The employment agreement was that, if she earned commissions in excess of this guaranteed income, she would be paid any amount by which her commissions exceeded the \$1,400.00. There is no issue with regard to the first 6 months because the \$1,400.00 was paid as a wage and Holmes did not create enough sales to earn commissions in excess of her wage.

After the first 6 months Holmes's income became fully dependent on her ability to earn commissions on travel sales. As her sales were slow Athlone always "advanced" her the same \$700.00 every pay period so that she never actually received less than minimum wage. However, these advances were recovered against commissions in months where her earned income exceeded the \$1,400.00. Over the two years Ms Holmes rarely actually "earned" income in excess of minimum wage but Athlone continued to carry her on the advance system. By the end of the two years and with the benefit of commissions that came-in after she had left her employment Ms Holmes more or less broke even with the money she had been paid by way of advances. The small surplus was paid to her in June 1998.

Ms Holmes did not agree that the above was the method of her payment. She claimed to not understand how she was paid or even how much she had actually been paid. I did not find her evidence on this point to be credible. She was not able to give a clear explanation of how she believed she was supposed to be paid and it defies common sense that she worked for over two years without knowing the basis of her pay or how much she was actually paid. The bookkeeper for Athlone testified that she had worked as the bookkeeper since 1985 and also worked for 15 other travel agencies in the city. She testified that the commission system (with advances) was virtually the same, except for small variations, in all of the agencies. Holmes says that she has worked in the travel business for 10 years and I found her claim to not understand the remuneration system to be equivocal and unreliable.

I accept the evidence as given by Ms Purdie to accurately reflect the method of payment. It is also consistent with the company payroll records and commission calculation sheets.

During the time that she was employed by Athlone, Holmes went on two "Fam Trips". These familiarization trips are promotions put-on usually by tour companies to familiarize travel agents with their product. Ms Holmes went on one such trip aboard a Norwegian Cruise Lines ship in November/December 1996 and another on a Rhine Cruise in June 1997 (there were several other trips which Athlone agreed during the hearing could be considered training). Athlone submitted that these two trips were largely pleasure. Although the cost was minimal, they were paid for by Ms Holmes herself. These trips are considered a "perquisite" in the travel business and an inexpensive way for travel agents to benefit from being in the business and to see the world. It is not normal for travel agents to be paid wages when away from the office on a Fam Trip.

Time out of the office on such Fam Trips or other promotional, or personal, activities is not usually an issue when it involves an agent who is paid solely on a commission basis. However, it has become significant in this case because the Director has converted the commission revenue

into a daily wage and applied that daily wage to every day worked by Holmes in calculating the wages owed. If wages are calculated in this manner then it is significant which days were actually "worked" by Ms Holmes. Athlone has conceded that several days out of the office were actually training sessions and therefore working days but takes exception to the notion that Fam Trips would be considered work days.

The Director analyzed the earnings of Ms Holmes and the money paid to her by initially setting aside the \$700.00 per pay period payments. He calculated her wages based on a minimum wage for 35 hours per week and where her actual commission earnings fell below this amount he credited her with the difference. In months where her commissions exceeded minimum wage the delegate gave her full credit for the commissions earned. In other words each pay period is calculated individually without any carry-over. If Holmes "earned" commissions less than minimum wage the delegate brought it up to at least minimum wage. If she "earned" commissions over minimum wage she kept the excess.

The delegate calculated that, using his method, the total wages that should have been paid over the two year term to be \$36,499.01 (including vacation pay). The delegate then calculated the total amount paid by Athlone to Ms Holmes to be \$33,539.36, leaving a shortfall of \$2,959.65 (with interest to be added).

Athlone led convincing evidence at the hearing that they had actually paid Ms Holmes \$35,649.04 during the time covered by the Determination leaving a balance of only \$849.97 even if the delegate's calculations on the earnings side were correct and no adjustment is made for days not worked.

The delegate took some objection to Athlone leading "new" evidence of what was paid as the evidence presented had not been given to the delegate during the investigation. While it is true that the Tribunal does not usually allow such new evidence it is not an absolute rule. In this case the new evidence was in the form of copies of the Revenue Canada T4 slips together with pay-cheque stubs and cancelled cheques. The bookkeeper testified that these records are consistent with the totals found in the payroll ledgers which were provided to the delegate. These documents only became necessary to locate and produce when Athlone disagreed with the totals as they appeared in the determination. I decided that it was reasonable and necessary to admit these documents as they were an inherently reliable record of the amount actually paid by Athlone to Ms Holmes.

Ms Holmes agreed that there were a number of days during the two years when she stayed at home and didn't work due to illness. Athlone had no agreement with its employees, or office policy, to pay for sick days. This was because agents are commission sales persons and not daily wage earners. There were also two days in July/August 1997 which Ms Holmes agrees that she did not work as she was away on personal travel.

ISSUES

There are essentially three issues to be decided in this case:

1. Is it permissible under the Act to "top-up" the wages of a commission sales agent, who "earns" less than minimum wage in commissions, by an advance against future earnings?

2. Are Fam Trips, or other leisure but work related activities, "work" as defined by the Act?
3. Is any money owed by Athlone to Holmes for wages earned over the period of the Determination ?

ANALYSIS

1. COMMISSION SALES AND MINIMUM WAGE:

I have found as a fact that Holmes was paid a guaranteed wage of \$1,400.00 per month for the first six months of her employment. She was entitled to a percentage of her commissions earned over and above \$1,400.00. Ms Holmes did not produce income in excess of the \$1,400.00. She was, nevertheless, paid in excess of the minimum wage and no issue arises in relation to this first 6 months.

I also find as a fact that for the balance of her employment Ms Holmes was paid as a commission sales person. There was no salary component and her earnings depended completely on her ability to produce commission from sales. In order to ensure that Holmes took home at least minimum wage in any one pay period Athlone agreed to pay her an advance on her commission earnings of \$700.00 per pay period. Based on Holmes's normal work day this was more than minimum wage. On all of the evidence before me I find as a fact that the employment agreement was that this \$700.00 was an advance against future commissions. It was also part of the employment agreement that these advances would be deducted from future commissions when commissions exceeded the \$1,400.00 per month.

As Holmes rarely produced sufficient income to meet her advances, there was in effect a running deficit that would be paid down in those few months where commissions exceeded the advances.

The Director's delegate submits that this system of payment does not comply with the *Act*. He points out that Section 17 requires an employer to pay to an employee all wages earned by the employee in each pay period. He says that Section 16 requires the employer to pay at least minimum wage. Therefore he submits that in a pay period an employee who worked for example 70 hours has earned \$490.00 (at a \$7.00 minimum wage as it then was) per week regardless of the commissions created.

The problem with the delegate's method of calculation is that if that employee only creates commission earnings of say \$290.00 in the first pay period of a month then the employer must pay the other \$200.00 as a wage. If in the second pay period of the month the employee now creates \$690.00 the employer must pay all those earnings to the employee. In this example, over the month the employee has earned minimum wage (\$290.00 + \$690.00) but has been paid an additional \$200.00 which is more than minimum wage for the month and more than the actual commissions earned.

While the *Act* refers to commissions in the definition of wages it does not seem to contemplate the workplace reality that many employees work on a commission basis. It is often a preferred way of earning an income because it is not capped like a salary or hourly wage but allows an employee the opportunity to benefit from their own increased productivity. It is difficult and

often illogical to try to convert commission earnings into hourly wages and semi-monthly time periods as contemplated by Section 17.

The Tribunal has held that "advances" of wages or commissions may be set-off against future earnings: *Re: Global Inking Systems Ltd.* BC EST #D129/98; *Re: Zaprawa* BC EST #D083/97. The question is whether the "top-up" required to bring inadequate commissions earned up to minimum wage can be considered an advance or whether the employer must pay this top-up as a wage separate and apart from any future commissions earned.

Two decisions of this Tribunal issued in November 1999 seem to take conflicting views on this issue. In *Re: Steve Marshall Ford Ltd*, BC EST #D382/99 the adjudicator noted that:

Marshall (the employer) had paid at least one salesperson minimum wage for a pay period when his sales commission did not equal minimum wage. That money was deducted from his next pay period in which his commissions exceeded minimum wage requirements.

The employer had relied upon a Dealer's agreement with the Branch to average earnings over a period of time but the adjudicator disagreed with that submission. He held that:

Commission salespersons are entitled to earn minimum wage. Where the salesperson's commissions do not total at least the minimum wage for the number of hours worked in a given pay period, the employer is obligated to pay the difference between the commission earned and the minimum wage. Therefore, each employee should be receiving at least minimum wage for all hours worked on each pay cheque.

Each pay period stands on its own and the minimum requirements of the *Act* must be met.

The same issue was addressed in *Re: Wen-Di Interiors Ltd.*, BC EST #D481/99 which followed closely in time but did not refer to *Steve Marshall Ford Ltd*. In *Wen-Di* the adjudicator found that the employee was to be paid on commissions with an advance against commissions to be no less than \$1,000.00 per month. If commissions fell below \$1,000.00 per month the employee received a "top-up" but this amount would be set-off against future earning in excess of the minimum.

The adjudicator in *Wen-Di* analyzed this issue extensively and the submission of the delegate in that case was on all fours with the argument made in this case in regards to Athlone. The delegate had awarded the employee minimum wage in each pay period where there was a shortfall without consideration of those periods which exceeded the minimum. The adjudicator said as follows:

The delegate held, at page 4 of the Determination: "An employee is entitled to receive minimum wage for all hours worked in a pay period, which is an earned amount. Therefore the employer cannot recover an advance that was actually earned by the complainant". While I agree that employees must be *paid* at least minimum wage for all hours worked in a pay period, it does not necessarily follow that monies so paid can be characterized as an "earned amount" - such monies may or may not be, depending on the nature of the parties' negotiated wage bargain.

* * * *

However, so long as the employee is *paid* at least the minimum wage in each pay period, monies so paid over and above actual commission earnings may be treated as an "advance" against future commission earnings and, therefore, should not be characterized as an "earned amount". (*emphasis added*)

The adjudicator goes on to note the problem, referred to earlier herein, that the legislation does not properly contemplate commission salespersons but notes that the purpose of Section 16 is to provide a level and minimum cash flow for all employees. He continues:

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. (*emphasis added*)

* * * *

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.

Where these two decisions conflict I prefer the reasoning in *Re: Wen-Di Interiors Ltd.* In my view, the adjudicator in *Steve Marshall* did not distinguish between the right to be "paid" minimum wage and the requirement to be paid all of the "earnings" in a that pay period. Simply put the law requires a person to be paid minimum wage whether they have earned it or not. Where no commissions are made in a pay period the minimum wage payment cannot be considered "earnings". The stated purposes of the *Act* are, *inter alia*, to ensure that employees receive at least basic standards of compensation but also to promote the fair treatment of employees and employers. It would be unfair to employers to expect them to pay additional wages to a commission salesperson in a poor pay period when the very next pay period earnings may exceed the minimum standards by a wide margin.

In this case I find that there was an express employment arrangement that ensured that the employee was *paid* at least minimum wage in every pay period whether she *earned* it or not. It was a term of the employment contract that such payments were "advances" against future commission earnings. In my opinion, such an arrangement does not offend the provisions of sections 16 and 17 of the *Act*.

In this case the employee was chronically in a deficit position against her advances. The employer showed enormous patience and allowed the deficits to continue for months at a time. This was clearly for the benefit of the employee as she was rarely *earning* minimum wage although she was being *paid* more than minimum wage every pay period. In my opinion this

process complies with both the spirit and letter of the *Act*. It ensures a level and minimum income for the employee but allows her the opportunity to earn significant income in excess of the minimum based on her productivity. The system is fair to the employer as it allows the employer to recover the advances at a time when the employee has significant earnings.

In this case, in fact, the employer's patience eventually allowed for a break-even situation after two years and I conclude that the employer was not in breach of either section 16 or 17 of the *Act*.

2. FAM TRIPS AND DAYS-OFF:

There have been a number of decisions of the Tribunal dealing with bonuses and perquisites. The general principal that emerges is that bonuses and perquisites are not wages unless there is a stated commitment to pay such bonuses. In the travel business there is no requirement on the employer to provide such perquisites. Fam Trips are promotions constructed by third parties and offered to the employer at a fairly nominal rate. It is optional for employees to buy into one or more of these promotions. They are not required to do so - although some employers will provide some contribution to allow employees the opportunity to travel.

"Work" is defined in the *Act* as meaning the labour or services an employee performs for an employer whether in the employee's residence or elsewhere. An employee is deemed to be at work while on call at a location designated by the employer. A travel agent on a Fam Trip is not on call for the employer and I conclude, on the evidence before me, that when an agent buys into a promotional tour being offered by a third party that is not labour or services being performed for the employer.

I conclude that such Fam Trips are not "work" and wages are not payable unless specifically provided for in the employment contract. Likewise, the employment standards legislation does not mandate payment for sick days: *Re: Schroeder*, BC EST #D075/97.

3. ARE THERE ANY WAGES OWING:

In my opinion there are no wages owing to the employee by Athlone. As I have concluded above that the "advance" system and rolling deficit does not offend the legislation, it is apparent that at the conclusion of the employment relationship there was a small surplus of commissions over advances and this amount was paid in June 1998.

Notwithstanding the "advance" issue and even if the Director's wage calculations were correct, there are no wages owing. Athlone provided convincing evidence that they had paid Holmes \$35,649.04 in the time period covered by the Determination. The Determination found that Holmes was entitled to \$36,499.01. When the days off-work including Fam Trips, personal business, and sick days are taken into account there would be a zero balance.

ORDER

I order, under section 115 of the *Act*, that the Determination is cancelled.

JOHN M. ORR

**John M. Orr
Adjudicator
Employment Standards Tribunal**