Employment Standards TRIBUNAL

An appeal

- by -

Park Lane Ventures Ltd.
("Park Lane")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2003A/107

DATE OF DECISION: July 3, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Park Lane Ventures Ltd ("Park Lane") of a Determination that was issued on April 1, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Park Lane had contravened the *Act* in respect of the employment of Donna Kelsch ("Kelsch") and ordered Park Lane to cease contravening and to comply with the *Act* and to pay an amount of $3,027.60.

Park Lane says the Director erred in law in finding there was any wages owed to Kelsch and asks that the Determination be cancelled.

Park Lane has requested a suspension of the effect of the Determination under Section 113 of the *Act* pending the outcome of this appeal. It is not necessary to adjudicate that request as the Director has undertaken to hold the funds remitted to the Director in trust pending the outcome of this appeal.

ISSUE

The issue in this appeal is whether the Director erred in law in finding Kelsch entitled to minimum wages in all pay periods of her employment.

The basic facts are not in dispute. Park Lane builds and sells housing developments. Kelsch worked for Park Lane from January 1, 2001 to August 31, 2001 as a sales representative. She sold single family dwellings built by Park Lane. Kelsch was employed under a written contract of employment that, among other things, included a compensation plan based primarily on commissions paid on sales of single family homes. I say "primarily", because the compensation plan also included benefits, statutory holiday pay and allowed for Kelsch to earn a performance bonus based on achieving established goals and objectives. The compensation plan provided for an advance of $2500.00 a month in the following terms:

> An advance against future commissions of $2500.00 per month will be paid to the Professional Sales Representative in the event the Professional Sales Representative's commissions for that month are less than $2500.00.

While it is not reflected in the contract of employment or in the Determination, Kelsch was paid salary plus commission for the first four months of her employment. That fact is found in the record in a September 25, 2002 letter from Kelsch to the Director. From May 1, 2001 to the end of her employment, August 31, 2001, Kelsch was paid according to the compensation plan in the contract of employment and received the following amounts in each pay period (not including bonus payments) during that time:

Pay period ending	Amount paid	Explanation
May 15, 2001	$1,250.00	advance
May 31, 2001	$2,080.18	$3,330.18 commission less $1,250.00 advanced
June 15, 2001	$1,250.00	advance
June 30, 2001	$1,250.00	advance
July 15, 2001	$1,250.00	advance
July 31, 2001	$1,250.00	advance

August 15, 2001	$1,250.00	advance
August 31, 2001	$1,944.59	$8,194.59 commission less $6,250.00 advanced

In the last pay period, Park Lane deducted all the amounts that had been advanced from the amount of commissions paid to her in that pay period.

The Director decided, as a matter of interpretation and application of the *Act*, that Park Lane could not deduct the minimum wage paid to Kelsch, in pay periods where no commission wages were earned, from commission wages earned in her final pay period. In reaching that decision, the Director considered, and rejected, the Tribunal's decision *Wen-Di Interiors Ltd.*, BC EST #D481/99.

The Director also addressed an argument made by Kelsch that half the commissions she earned in her final pay period should have been paid to her husband, concluding the income splitting arrangement she had with Park Lane had no bearing on the matter being considered. That conclusion has not been appealed.

ARGUMENT AND ANALYSIS

Subsection 112(1) of the *Act* sets out the grounds for appeal to the Tribunal:

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 made.

The burden in this appeal is on Park Lane to show an error in the Determination.

Park Lane argues the Director erred in interpreting the combined effect of Sections 16, 17 and 21 of the *Act* as prohibiting treating amounts paid in each pay period in excess of the commissions earned as an advance, or "loan", against future commission wages earned. Park Lane says that interpretation flies in the face of the reasoning and result in two Tribunal decisions, *Wen-Di Interiors Ltd.* and *Athlone Travel (Oak Bay) Ltd.*, BC EST #D210/00. In *Wen-Di Interiors Ltd.*, the Tribunal said:

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

In my view, the obligations set out in sections 16 and 17, though obviously complementary, are nonetheless independent obligations. Employees must be paid, at least semimonthly, all of their earnings in accordance with their employment contract (section 17). In addition, for each pay period, regardless of the actual earnings as per the employment contract, employees must be paid not less than the minimum wage for each hour worked (section 16). However, no provision of the *Act* outlaws the practice of treating monies paid over and above actual commission earnings as an advance against future commission earnings. This advance may be set off, in accordance with the employment contract, against earnings in a future pay period provided that in each and every pay period the employee is paid at least the minimum wage for all hours worked. This set off does not implicate section 21 of the *Act* (dealing with unauthorized deductions from "wages") because the set off does not amount to a deduction of an employee's wages since the employee's wages (namely, commissions earned) will have been paid in full--the advance amounts to a prepayment of wages which, when combined with the balance paid in the subsequent pay period, fully satisfies the employer's obligation to pay all wages payable pursuant to the employment contract. The only proviso to be noted is that, regardless of the amount of the "advance" given in a prior pay period, an employee must be paid at least minimum wage for all hours worked in the current pay period.

I note that the decision in *Athlone Travel (Oak Bay) Ltd.* relied on, and applied, the reasoning in *Wen-Di Interiors Ltd.* in circumstances which the Adjudicator of that case felt were indistinguishable from those in *Wen-Di Interiors Ltd.* In *The Director of Employment Standards and Jannex Enterprises (1980) Limited* , BC EST #RD163/01 (Reconsideration of BC EST #D438/00), the Tribunal said the following about the *Wen-Di Interiors Ltd.* and *Athlone Travel (Oak Bay) Ltd.* decisions:

> It should also be recognized that *Re Athlone Travel (Oak Bay) Ltd.* was itself based on the approach taken by the Tribunal in *Re Wen-Di Interiors Ltd.* Like the decision in *Re Athlone Travel (Oak Bay) Ltd.*, the decision in *Re Wen-Di Interiors Ltd.* relied heavily on the terms of the employment contract. The Adjudicator in that case very clearly and carefully conveyed that his analysis and conclusion was based on what he found to be the mutual intention of the parties as expressed in the contractual arrangement.

In this case, the contract of employment contains a clear and specific contractual provision that Park Lane would pay Kelsch *"an advance against future commissions of $2500.00 per month"*. I find an expression of mutual intent which makes this case indistinguishable on its essential facts from the two earlier decisions.

The Director argues that she is justified in rejecting the Tribunal's decisions in *Wen-Di Interiors Ltd.* and *Athlone Travel (Oak Bay) Ltd.* because it is perceived to be wrong and "Employment Standards Tribunal cases are not precedent-setting". Accepting the Director's argument on this appeal would require that I also conclude those decisions were wrong. I am not prepared to do that.

The statement that the Director may ignore a decision of the Tribunal which she feels is wrong smacks of an abuse of the decision making and appeal processes established by the legislature in the *Act*. The decision of the Director to substitute her opinion for that of the Tribunal in order to develop her own interpretation of the *Act* eliminates the Tribunal's decision-making autonomy and ignores the intention of the legislature, which, through Sections 110 and 112, has deemed it appropriate that the Tribunal have the final say on matters of law under the *Act*. The attitude expressed in the Determination and in the Director's submission on the appeal is a serious impediment to the unquestionably valid objectives of fairness, efficiency and finality in decision making under the *Act*. It generates a level of arbitrariness to the decision making and appeal processes that is generally unacceptable.

As the Director notes, it is not the Director's role to amend the legislation. I agree with the submission of Park Lane that the *Act* is not as specific and clear on the issue raised in this appeal as suggested by the Director. The Tribunal has, however, spoken on it. If the legislature considers the interpretation given to the *Act* by the Tribunal is incorrect, the legislature has the authority to amend the statute to more accurately reflect their intent as they did following the judicial review of the Tribunal's decision in *Darryl-Evans Mechanical Ltd.*, BC EST#D442/00, where paragraph 65(1)(e) was amended to add specificity and clarification to the wording of that provision.

I do not contest the view that, as a matter of law, neither the Tribunal or the Director are bound by the doctrine of *stare decisis*. Notwithstanding, there are valid reasons for respecting decisions made by the Tribunal. The rationale for the doctrine of *stare decisis* is the desirability of uniformity and consistency. That rationale applies equally to administrative decision making as it does to judicial decision making. In H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie L.J. 435, at p. 446, the author states:

> Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration".

The public has a right to expect that the *Act* will be applied in a consistent fashion. As noted by the Supreme Court of Canada in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282:

> It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION] "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one": Morissette, *Le contrôle de la compétence d'attribution:__thèse, antithèse et synthèse* (1986), 16 R.D.U.S. 591, at p. 632.

I do not suggest the search for uniformity and consistency is an absolute one. The Tribunal accepts that a strict application of the doctrine would be counter productive as the Tribunal must be able to evolve and remain responsive to changing legislative and policy objectives.

In this case, however, the Director has not persuaded me that I should reject the earlier Tribunal decisions in *Wen-Di Interiors Ltd.* and *Athlone Travel (Oak Bay) Ltd* in favour of the interpretation advanced by her. Those decisions were careful and considered examinations of the statutory provisions and the purposes of the *Act*. While the Director may not feel compelled to follow those decisions, and correctly points out the doctrine of *stare decisis* does not apply, for the above reasons it is appropriate that the Tribunal adopt and apply the doctrine so far as it is reasonable for it to do, given that it must apply legislation in a policy-making and policy developing context.

Accordingly, I agree with the submission of Park Lane that the circumstances of this case make it indistinguishable from the circumstances in which *Wen-Di Interiors Ltd.* and *Athlone Travel (Oak Bay) Ltd.* were decided and find the Director erred in law in her interpretation and application of Sections 16, 17 and 21 of the *Act*. Based on the circumstances of this case, the Director wrongly concluded Kelsch was owed minimum wage and Park Lane could not set off advances made in one pay period from commission wages earned in a future pay period. The appeal is allowed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 1, 2003 be cancelled.

David B. Stevenson
Adjudicator
Employment Standards Tribunal