

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 -

Pinnacle West Systems Inc. operating as
Okanagan Kirby Co.
("Pinnacle West")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE No.: 1999/280

DATE OF **D**ECISION: July 28, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Pinnacle West Systems Ltd. operating as Okanagan Kirby Co. (“Pinnacle West”) of a Determination issued on May 4, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Pinnacle West had contravened Sections 17(1) and 21(2) of the *Act* in respect of the employment of Robert McCormick (“McCormick”) and ordered Pinnacle West to cease contravening the *Act*, to comply with the *Act* and to pay an amount of \$8,093.94.

Pinnacle West says the Determination is wrong because a “performance guarantee”, which was used to determine the wages owed to McCormick, was no longer payable by Pinnacle West as the term for which it was payable had ended.

The Tribunal has decided an oral hearing is not required in order to address the issue raised by this appeal.

ISSUE TO BE DECIDED

The issue raised by the appeal is whether Pinnacle West has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law in reaching the conclusions upon which the Determination is based.

FACTS

McCormick was employed by Pinnacle West to market Kirby vacuum systems and supplies. One of the issues that arose in the context of investigating the complaint was whether McCormick was an employee of Pinnacle West or an independent contractor. The Director concluded McCormick was an employee. That conclusion has not been appealed.

As an employee, McCormick was entitled to the minimum standards and conditions of employment set out in the *Act*, including entitlement to wages for the work he performed for his employer. On April 17, 1997, Pinnacle West and McCormick signed a document that outlined, in general terms, the compensation that McCormick would receive:

This agreement between Pinnacle West Systems Inc. and Rob McCormick (Hereinafter referred to as the Independent Dealer). The Independent dealer [sic] is entitled to a performance guarantee of \$500.00 per week. This is based upon the completion of weekly presentations and is to be paid on the following pay period.

The profit margin will be calculated at a check out cost of \$1349.00 on the basic Kirby Generation 5 package. If the profits exceed the guarantee, then the profits will be paid for the week.

Although the above document contains no reference the “performance guarantee” being payable for any specific period of time, Pinnacle West says the “performance guarantee” was limited, by verbal agreement, to a period of approximately four months following McCormick’s date of hire and expired on August 31, 1997. In their appeal, Pinnacle West states:

The facts that are in dispute is the time in which the guarantee was calculated. Clearly, Mr McCormick went on and sold for (4) months after the oral agreement between the parties had ended.

McCormick has taken the position throughout that there was no oral agreement limiting the duration of the payment of the "performance guarantee". Pinnacle West also contends that the record shows McCormick was not paid the "performance guarantee" after August 31. In the appeal, Pinnacle West states:

It clearly shows that after August / 97 Mr. McCormick was paid directly on the proceeds of profit generated from sales and not from a guarantee.

The material on file, however, does not "clearly" show that McCormick was paid only on profit from sales after August 31. The material shows a two week period, from October 27 to November 9, where no sales were generated but McCormick was paid \$500.00 a week for each of the two weeks. Pinnacle West says this payment was an "advance against future sales". That statement is not believable. First, there is nothing in the material that shows the "advance" was ever applied to sales that were generated following payment of those amounts. Second, the amount of the payment, \$500.00, is perfectly consistent with the agreement outlined in the above letter.

I would add that the amount of \$500.00 is also close to minimum wage for the hours that were being worked by McCormick during this period.

Having concluded that McCormick was an employee under the *Act*, the Director found the wages payable to him to be \$500.00 a week plus any profit margin earned in a week throughout his term of employment, April 21, 1997 to January 18, 1998.

ANALYSIS

In *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98, the Tribunal commented on the approach it would take in appeals challenging the Director's calculation of wages owed. The Tribunal has taken a broad and purposive approach to such appeals and has been loathe to disturb calculations made by the Director if the Determination and the material on file show there was some rational basis for the conclusion reached or if the appellant is unable to show there is no rational basis for the conclusion of the Director.

It takes more than a simple disagreement with conclusions of fact made by the Director to meet the onus on an appellant seeking to have the Tribunal cancel or vary a wage calculation. The nature of the burden on the appellant is captured in the following statement from *Mykonos Taverna operating as the Achillion Restaurant, supra*:

After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of

fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case, the question is whether the appellant has shown the decision is unfair or unreasonable.

In this case as well, the question is whether Pinnacle West has shown that the conclusion of the Director, which was based on a plain reading of the written agreement of April 17, 1997, is unfair or has no rational basis. I conclude that Pinnacle West has not met their burden. In my opinion, the conclusion of the Director was both a fair and a reasonable assessment of the facts and the requirements of the *Act*. There is nothing in the agreement or in any of the other established facts to support the submission of Pinnacle West that the "performance guarantee" came to an end August 31. In fact, I do not accept the assertion of Pinnacle West that the \$500.00 guarantee was ever limited to a period ending August 31.

The sole basis for the appeal is with the conclusion that the "performance guarantee" was payable for the entire period of employment. Pinnacle West has not established this conclusion is either unfair or unreasonable and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 4, 1999 be confirmed, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*

David Stevenson
Adjudicator
Employment Standards Tribunal