

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 -

Fabrisol Holdings Ltd. operating as Ragfinder
("Fabrisol")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 96/611

DATE OF DECISION: December 19, 1996

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Fabrisol Holdings Ltd. operating as Ragfinder (“Fabrisol”) from a Determination, Number CDET 004158, dated September 30, 1996, of a delegate of the Director of the Employment Standards Branch (the “director”). The director found Fabrisol had failed to pay the complainant, Terri McLennan (“McLennan”), length of service compensation and vacation pay upon her termination as a result of a layoff exceeding 13 weeks. Fabrisol does not dispute McLennan is entitled to length of service compensation and vacation pay. They challenge the conclusion of the director of what amounts should be included in the calculation of the last 8 weeks of “weekly wages” in subsection 63(4) of the *Act*, which states:

- 63 (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
- (a) totalling all the employee’s weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
 - (b) dividing the total by 8, and
 - (c) multiplying the result by the number of weeks’ wages the employer is liable to pay.

The director calculated the last 8 weeks of “weekly wages” to include amounts earned prior to the commencement of the 8 week period, but paid to McLennan in the 8 week period, and amounts earned in the 8 week period but not paid until after the date McLennan is deemed to have been terminated, May 5, 1996. Fabrisol says neither amounts should be included for the purpose of establishing length of service compensation. The main issue in this Appeal can be decided without a hearing, as it relates to a matter of interpretation and application of the *Act*, not on any factual dispute.

ISSUE TO BE DECIDED

The issue is whether the director correctly decided what amounts were to be included in the last 8 weeks of “weekly wages” in calculating the employee’s regular weekly wage for the purpose of Section 63.

FACTS

McLennan was employed by Fabrisol for over 6 years. On May 5, 1996 she was temporarily laid off. She was deemed to be terminated when the temporary layoff exceeded 13 consecutive

weeks. Section 63(5) places her termination date as May 5, 1996, the beginning of her layoff. She became entitled to receive 6 weeks compensation for length of service.

At the time of her termination McLennan's wage was 10% commission on gross daily sales. The straight commission wage structure was implemented April 1, 1996. Before that date her wage was 10% commission on gross daily sales with a base rate of \$10.00 per hour.

While it is not entirely clear on the record, it appears the commission earned by and payable to McLennan was normally paid in the month following that in which it was earned. What is clear on the record is the commission was earned and payable at the time the sale was made. That conclusion is supported by Fabrisol's calculations which attribute the commission earned as wages in the weeks the sales occurred. There is nothing in the material suggesting or indicating the employer's obligation to pay a commission earned on sales was conditional upon the happening of some future event.

The pay stubs provided by Fabrisol show McLennan had received total taxable earnings to June, 1996 of \$7940.59. This amount is comprised of the following:

period ending January 31, 1996:	143 hours at \$10.00 per hour	\$1430.00
Statutory holiday pay:	\$70.00	
period ending February 29, 1996:	commission (on January sales)	\$197.44
	Advances:	\$1000.00
period ending March 31, 1996:	190 hours at \$10.00 per hour	\$1900.00*
	Vacation pay	\$114.00
period ending April 30, 1996:	commission (on March sales)	\$973.82
	Statutory holiday pay	\$46.41
period ending May 31, 1996:	commission (on April and May sales)	\$2320.90
period ending June 30, 1996:	commission (on May sales)	\$48.42

*Fabrisol says \$360.00 of this amount is a "top up" for February to bring the salary of McLennan to \$10.00 per hour for the 136 hours worked in February. Fabrisol says the salary for McLennan in March was \$1540.00 based on 154 hours worked in that month.

The last eight weeks of employment would be a period commencing March 10, 1996 and concluding the date of deemed termination, May 5, 1996. The record indicates McLennan worked 35 hours in each of the three weeks in March and earned a salary of \$350.00 per week. The record does not indicate how the commission on March sales would be allocated.

ANALYSIS

In determining the amount of length of service compensation payable to an employee the *Act* provides, in subsection 63(4), a formula for determining the amount payable. That formula focuses on the “weekly wages” earned by an employee in the last 8 weeks of employment. The *Act* does not define “weekly wages”. It contains definitions of “week”, “regular wages” and “wages” in Section 1. For the purpose of this appeal the definitions of “regular wages” and “week” add nothing to a determination of the issue. The *Act* defines “wages” as follows:

“wages” includes

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work.
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency.
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act.
- (d) money required to be paid in accordance with a determination or an order of the tribunal, and
- (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee’s benefits, to a fund, insurer or other person.

but does not include

- (f) gratuities,
- (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
- (h) allowances or expenses, and
- (i) penalties.

As a matter of law, the *Act* identifies wages in the context of work performed by an employee. Simply put, wages are earned when work is performed. The *Act*, with minor exceptions, requires wages to be paid relative to the time they are earned. Section 17 requires an employer to pay its employees at least semi monthly and within 8 days of the end of a pay period all wages earned by the employee in the pay period. The only exceptions to this requirement are banked overtime wages, banked statutory holiday pay and vacation pay. Commissions are not an exception to this statutory requirement. As a matter of law, this requirement would compel an employer to pay all commissions earned by employees in the pay period in which they are earned. I understand as a

matter of practice, in certain circumstances, the director relaxes this legal requirement for commissioned employees, provided those employees are paid some wages semi monthly, the wages received represent at least minimum wage for all hours worked in the pay period and it is a term of the employment contract to allow deferral of earned commission to a subsequent pay period. This decision is not intended to interfere with that practice, which is eminently sensible in the context of commissioned employees. However, this practice does not change the legal conclusion that the *Act* says wages, which includes commissions, become payable, unless their payment is conditional upon some future event, when they are earned.

Also, Section 18 requires all wages owing to an employee to be paid within 48 hours, if the employment is terminated by the employer, or within 6 days, if terminated by the employee. In this context, it is the practice of the director to require all commissions to be paid if they have been earned, without regard to when they might otherwise be paid had the employment not terminated. There is no exception to this practice.

The effect of this analysis of the definition of “wages”, Section 17 and Section 18 leads to the following conclusion about what amounts should be included in “weekly wages” for the purpose of calculating length of service compensation: “weekly wages” should include only those amounts which are earned by the employee in the last 8 weeks.

In this case, the director asserts “wages become wages when paid”. That is incorrect. The *Act* provides a much broader concept of wages than that. Even in the context of what the comment addressed, it fails to appreciate the definition of “wages” includes amounts paid **or payable**. The *Act* would not define wages with reference to amounts payable if it was intended to identify wages only in reference to what has been paid.

As a result of this analysis, I conclude the appeal must succeed in part. The director should not have included in the calculation of “weekly wages” amounts which were earned before the commencement of the last 8 weeks of employment. This would include any salary or commission earned in February but not paid until after March 10, 1996 and any Commission earned in March before March 10, 1996.

The director was correct to include commission earned after March 10, 1996, and in April and May, even though they were not paid at the time of the termination. Those amounts were, in fact and law, wages. They were earned and payable at the date of termination.

In this case, the following amounts are to be included in determining “weekly wage” for the last 8 weeks of employment:

1. Salary paid from March 10, 1996 to the end of March, a total of \$1050.00;
2. That portion of commission earned from March 10, 1996 to the end of March. This amount cannot be determined from the material on file, although the file does indicate a total commission for March of \$973.82;

3. All commissions earned to the date of termination, which in the circumstances of this case would be all commissions as none of McLennan's commissions were conditional upon any future event. This amount appears to be \$2369.32; and
4. Statutory holiday pay.

ORDER

Pursuant to Section 115 of the *Act*, I order the matter be remitted to the director to determine the amount of commission earned from March 10, 1996 to the end of March and to recalculate the length of service compensation based on the conclusions reached in this appeal. This will also provide the director the opportunity to adjust the vacation pay calculation, which the director indicated in the appeal submission may have been miscalculated.

David Stevenson
Adjudicator
Employment Standards Tribunal