

An appeal

- by -

Priszm Brandz Inc. operating as Kentucky Fried Chicken
(“Priszm”)

- 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.: 2002/335

DATE OF DECISION: September 9, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Prizm Brandz Inc. operating as Kentucky Fried Chicken (“Prizm”) of a Determination that was issued on May 22, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Prizm Inc. had contravened Part 3, Section 18 of the *Act* in respect of the employment of Jose Mendes (“Mendes”) and ordered Prizm to cease contravening and to comply with the *Act* and to pay an amount of \$7,793.08.

Prizm says it believes the Determination was in part based on an error made by Prizm, when it paid Mendes a bonus after he had terminated his employment, and did not take into account relevant information provided during the investigation.

ISSUE

The issue in this appeal is whether Prizm has been able to show the Determination was wrong in its conclusion that Mendes was owed wages, in the form of a year end bonus, from Prizm.

FACTS

Prizm is a fast food restaurant operating under the name Kentucky Fried Chicken. Mendes worked for Prizm as a manager of the restaurant from August 24, 1994 to January 27, 2002. He was paid a salary. Mendes terminated his employment effective January 27, 2002. He gave written notice to Prizm of his decision to leave his employment on December 8, 2001. During the years Mendes worked, Prizm had a bonus plan. The Determination described the principles of the plan in the following terms:

. . . the company would pay; 1. a bonus for achieving cash profit dollars against plan. 2. Annual year-end accelerator bonus for cash profit dollars above 100% of the manager’s plan. 3. a bonus every time a manager successfully develop [sic] and promote [sic] a member of the team.

The first bonus was identified in the Plan pamphlet as the Quarterly Bonus, the second as a Profit Sharing bonus and the third as the Team Development Bonus.

Mendes claimed he was not paid, and was owed, the Profit Sharing bonus. He said he intentionally made his resignation effective January 27, 2002 because a term of the bonus plan was that any bonus be paid out within forty-five days of Prizm’s year-end, which was December 3, 2001. He was paid the Quarterly Bonus on January 28, 2002.

Prizm took the position that the bonuses were not part of Mendes’ salary, but were incentives and were not paid to persons who were not employed at the time of the payout. Prizm also took the position that because Mendes was not employed at the time of the payout of the bonuses, he was not entitled to receive them. In this appeal, Prizm says the Quarterly Bonus was paid in error.

The Determination made the following findings of fact:

The company provided a copy of the Restaurant General Managers Bonus Fiscal 2001 pamphlet.

In the pamphlet it states when the payment schedule is and states:

Quarterly Bonus is paid at the end of the quarter

1st Quarter - Period 1-3

2nd Quarter - Period 4-6

3rd Quarter - Period 7-9

4th Quarter - Period 10-13

Profit Sharing Bonus is paid at the end of the fiscal year.

Team Development Bonus is paid at the end of each quarter.

Note: All bonus payments will be made within 45 days of the end of the quarter.

The pamphlet also states the eligibility for the bonus payments and that does say that an employee must be actively employed by Prizm at the time the bonus payments are made.

The Determination concluded the amount of the Profit Sharing bonus was \$7,282.53 and the Prizm's fiscal year end was December 3, 2001. There is no dispute in this appeal with either of those conclusions. The Determination also found the bonus at issue was wages under the *Act* and similarly no disagreement with that conclusion has been raised in this appeal.

ARGUMENT AND ANALYSIS

In *Shell Canada Products Limited Produits Shell Limitée*, BC EST # RD488/01 (Reconsideration of BC EST # D096/01), the Tribunal addressed the question of an employer's obligation to pay an incentive bonus which, under the terms of the Plan limited eligibility for the bonus to only persons who were employed and actively at work at the time the bonus was paid. In that decision, the Tribunal accepted that, at least in the context of arrangements such as incentive bonus plans, an employer and employee have room to fashion the terms applicable to such plans:

In *Re Kocis*, the Tribunal stated:

The *Act* does not define when a commission is earned. The relationship between employee and employer is one of contract, and the effect of the *Act* is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law. The entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract.

The legislature has not seen fit to grant the Director a roving mandate to regulate private employment contracts that in all respects satisfy the minimum statutory requirements of the *Act*. The authority of the Director is limited to enforcing such agreements. The Tribunal has also accepted that parties are free to arrange their relationship as they choose provided the terms of a private employment contract do not contravene the requirements of the *Act* and are otherwise consistent with the objectives and purposes of the legislation. We can find no prohibition in the *Act* against employers and employees agreeing, simpliciter, to conditions for the payment of

incentive based remuneration. In fact, as the Director has noted, on one level such agreements are entirely consistent with the stated purposes of the *Act*, found in Section 2, to encourage open communication between employers and employees and to encourage continued employment.

The Director considered the terms of the bonus ‘agreement’ between Prizm and Mandes and found that Prizm had agreed to make any bonus payments within forty-five days of its fiscal year-end, which was December 3, 2001. There is no dispute in this appeal with that finding. Prizm cannot rely on its own failure to comply with the requirements of the plan to deny Mendes the bonus that should have been paid no later than January 17, 2002, while Mendes was still actively employed. I can find no error with either the approach taken or the interpretation of the agreement made by the Director in this case.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 22, 2002 be confirmed in the amount of \$7,793.08, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal