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-

Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd.

("Wen-Di" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/334
DATES OF HEARING:	September 14th & 27th, 1999
DATE OF DECISION:	November 19th, 1999

DECISION

APPEARANCES

Paul M. Pulver & Andrea Karr	for Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd.
Lonni J. Hamill	on her own behalf
Adele Adamic & James R. Dunne	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd. ("Wen-Di" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 6th, 1999 under file number ER 086064 (the "Determination").

The Director's delegate determined that Wen-Di Interiors Ltd. and Wen-Di Interiors (B.C.) Ltd. were "associated corporations" as defined by section 95 of the *Act*. This aspect of the Determination is not in issue before me. The delegate also determined that Wen-Di owed its former employee, Lonni J. Hamill ("Hamill"), the sum of $5,628.46 on account of unpaid wages and unauthorized payroll deductions. By way of the Determination, the Director also levied a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.* The penalty was issued based on the employer's contravention of sections 16, 17, 21, 40, 45 and 58 of the *Act*.

The appeal was heard at the Tribunal's offices in Vancouver on September 14th and 27th, 1999. The employer called two witnesses, Diana Joseph and Cheryl Murray--Ms. Joseph is the president and a director of both employer companies; Ms. Murray is a vice-president of Wen-Di Interiors Ltd. Ms. Hamill testified on her own behalf and did not call any other witnesses. The Director appeared at the hearing and made submissions but did not call any evidence.

I should note that this appeal was heard concurrently with another appeal also filed by Wen-Di of a determination, similarly issued on May 6th, 1999 under file number ER086064, pursuant to which Ms. Hamill's former colleague, Melany Bosch, was awarded $10,451.36 on account of unpaid wages. Some of the issues raised on this appeal--particularly in regard to the employer's commission structure and the complainant's overtime claim--are also raised by the "Bosch" appeal. My Reasons for Decision in the "Bosch" appeal are being issued concurrently with these Reasons.

ISSUES TO BE DECIDED

At the outset of the appeal hearing Wen-Di's legal counsel submitted that the delegate erred:

- in determining that Hamill's regular working hours consisted of 7.5 hours worked over 5 days each week (*i.e.,* a 37.5 hour work week);
- in finding that the employer's commission pay structure did not comply with the *Act;*
- in awarding Hamill overtime pay based on her having worked at least 1 Saturday every month;
- in determining that the employer made unauthorized deductions from Hamill's pay.

FACTS AND ANALYSIS

Wen-Di offers interior design services and also sells window coverings. Another aspect of Wen-Di's business is designing window coverings for builders' "show homes". About 60% of its revenues are generated from the sale of window coverings. Wen-Di operates four retail locations--three in Alberta and one in Kelowna, B.C. Ms. Hamill formerly worked at Wen-Di's Port Coquitlam store which opened for business some 5 years ago but was closed down in May 1999 due to poor performance.

Wen-Di's employees are paid a commission based on their individual sales performance. Hamill was employed by Wen-Di as a commissioned sales representative (her official title was that of "decorator") from November 15th, 1997 until her termination on December 15th, 1998. During her tenure with Wen-Di, there were about 4 to 5 employees at the Port Coquitlam store all of whom were supervised by the store manager, Carla Loewen (Ms. Loewen did not testify before me).

Hamill's Hours of Work and Overtime Claim

Hamill's "Commission Sales Contract Agreement" does not specify her working hours but she was obliged under this agreement to "provide her services as a decorator exclusively to [Wen-Di] and to no other person or business during the term of this Agreement". Ms. Joseph testified that part-time employees typically devoted from 10 to 20 hours per week to their duties; full-time employees, on the other hand, worked 37 to 40 hours each week. Wen-Di's sales staff were not expected to be in the store, nor were they, from 9 to 5 each weekday; obviously, the nature of the work entails some evening and weekend work as not all customers (most of whom were residential, not commercial, customers) are available for sales calls or installations during regular weekday daytime hours.

Neither Ms. Joseph nor Ms. Murray was in a position to testify, from her own personal knowledge, about Hamill's actual working hours. Ms. Joseph characterized Hamill as a dedicated employee but one who simply could not generate sufficient sales volume. Ms. Joseph confirmed that the Port Coquitlam store was open on Saturdays from 11 A.M. to 4 P.M and that employees were expected to "take their turn" working Saturdays although employees were supposed to take the following Monday

off after having worked a Saturday shift. Ms. Murray testified that she believed Hamill generally worked "full-time" which I understood to mean 37.5 hours per week.

Hamill testified that when she was first hired her daily hours (Monday to Friday) were from 8:30 A.M. to 5:30 P.M. and that some time later her daily hours changed from 9:00 A.M. to 5:00 P.M. Hamill says that she devoted at least 37.5 hours per week to her job plus additional Saturday overtime hours--Hamill's evidence is that she worked at least one Saturday 5-hour shift (11 A.M. to 4 P.M. or sometimes later) each month and that she was never instructed to, nor did she, take the following Monday off after working on a Saturday. Had the employer wished, it could have instructed Hamill not to report for work on the Monday following a Saturday shift and if she failed to honour such a direction, she could have been sent home, or I suppose, even disciplined for having refused to follow a lawful direction to leave the workplace. However, there is absolutely no evidence (recall that the store manager was not called as a witness) before me that Hamill was instructed not to report on Mondays after having worked a Saturday or was instructed to go home when she did so report.

The delegate determined that Hamill typically worked 7.5 hours per day over a 5-day (Monday to Friday) work week plus a 5-hour Saturday shift once each month. Hamill's evidence as to her hours of work is, essentially, uncontradicted. The one person who was best positioned, from the employer's perspective, to contradict Ms. Hamill as to her hours worked--namely, the former store manger, Ms. Loewen--did not testify before me. The employer did not maintain "hours of work" records for its commissioned sales staff and the *viva voce* evidence of the employer's two witnesses, Ms. Joseph and Ms. Murray, tends to support, rather than contradict, Ms. Hamill's evidence regarding her work schedule. Therefore, I cannot conclude that the delegate erred with respect to his finding as to Hamill's hours of work.

The Employer's Commission Structure

At the outset of her employment, Hamill signed a "Commission Sales Contract Agreement". This agreement provided, *inter alia,* that Hamill was to be paid commissions, of varying percentages depending on the particular product sold, based on her sales performance and a further $30 per hour for "decorating consultant" services rendered to Wen-Di clients. The commissions were to be paid "upon completion of a sale and receipt of payment in full". The agreement also provided that "an advance against commissions is available on the 30th day of each month" and that this advance "shall be deducted from the Employee's monthly calculated commission paid on the 15th day of the ensuing month". Although not set out in the agreement, Wen-Di guaranteed that Hamill would be paid not less than $1,000 per month regardless of her actual commission earnings.

As I understand the evidence, the employer did not pay commissions strictly in accordance with the agreement. Rather, all of the commissioned sales staff at the Port Coquitlam store were paid their commissions earned during the first half of the month (subject to a "cut-off" date a few days before the scheduled payday) on the 15th of each month. Thus, if the commissions earned during the first half of the month were, say, $250, Hamill would receive a paycheque for that amount even though this sum represents less than the minimum hourly wage for all hours worked. The payroll records before me show that on several occasions Hamill received a paycheque for substantially less than the minimum wage (assuming a 37.5 hour work week) for the first half of the month.

At the end of the month, Hamill was paid the balance of her commissions earned during that month and if the total commissions earned in the month were less than $1,000, she was paid an additional amount (referred to as a "top-up") so that her total monthly earnings were at least $1,000. In those months where her total commissions earnings met or exceeded the $1,000 threshold, no additional monies (beyond commissions earned) were paid to her.

According to Ms. Joseph, the "top up" payroll scheme, which was put in place in October 1997, was implemented after consultation with representatives of the Employment Standards Branch. Ms. Hamill's unpaid wage claim dates as and from November 1997. Although the $1,000 monthly guarantee amounts to about $100 less than what an employee working 37.5 hours, at the then-minimum wage, should have been paid, Wen-Di settled on the $1,000 figure because it expected that most of the commission sales staff would actually work something less than full-time (37.5 hours per week) hours.

Wen-Di's counsel suggested during his final argument that because the employer's compensation system was implemented after consultation with the Employment Standards Branch, some sort of estoppel might arise. I do not find this submission persuasive. First, there is nothing in writing from the Employment Standards Branch giving their "seal of approval", as it were, to the scheme in question. Second, the employer's evidence is that it received conflicting advice from the Branch--one officer specifically stated that the proposed system would *not* comply with the *Act*. In my mind, at a very minimum, the doctrine of promissory estoppel (assuming that *contractual* doctrine even applies, which I doubt, to a situation where a government agency gives some sort of advice with respect to a statutory obligation affecting third parties--*i.e.,* employees) calls for an unequivocal statement which, in turn, is relied on by the promisee. Third, in December 1996 this Tribunal clearly stated that an employer could defer, from one pay period to the next, earned commissions *provided that employees were paid at least the minimum wage in each pay period* (see *Fabrisol Holdings Ltd., infra.*). Thus, in October 1997 (when the employer's compensation system was introduced), the employer could have discovered, had it made an effort to do so, that its proposed compensation system was, at least in the Tribunal's view, unlawful. Finally, I fail to see how a representation made by an officer of the Branch could create an estoppel insofar as Ms. Hamill's claim is concerned. In my view, an officer can only lawfully extinguish an employee's entitlement under the *Act* by way of a variance granted pursuant to sections 72 and 73 of the *Act*. Clearly, the employer never sought nor obtained such a variance. If, in fact (and I make no finding in this regard), the employer did receive inaccurate or inappropriate advice from a delegate, then that is a matter to be addressed strictly between the employer and the Employment Standards Branch.

The delegate held, at page 2 of the Determination, that "it was possible for [Hamill] to be paid less than minimum wage for the hours worked in the first half of the month". Indeed, as noted above, on several occasions Hamill was paid less than minimum wage (assuming a 37.5 hour work week) for the first half of the month--*e.g.,* March 15th, 1998: $66.71; April 15th, 1998: $238.18; May 15th, 1998: $55.37; November 15th, 1998: $64.63. However, the evidence also shows that Hamill received at least $1,000 per month even in those months where her commission earnings fell below that threshold.

The delegate proceeded on the basis that Hamill had two "pay periods" each month and was, therefore, entitled to be paid at least minimum wage for all hours worked during each pay period. Thus, for

example, even though Hamill's commission earnings for the pay period March 1st to 15th, 1998 were $66.71, she ought to have been paid $525 for that period [37.5 hours x 2 weeks x $7 per hour]. In the second half of March 1998, Hamill earned a further $139.81 in commissions and, accordingly, Hamill was paid her earned commissions plus a "top up" of $793.43 (*i.e.,* a total of $933.24) on March 31st; her total compensation for March 1998 was $999.95 (*i.e.,* a nickel shy of her $1,000 monthly guarantee).

The employer does not dispute that Hamill was entitled to be paid at least the minimum wage for all hours worked in March 1998, a month in which her commission earnings did not meet at least the minimum wage for either pay period. The problem, from the employer's perspective, is a month such as September 1998 where Hamill was paid a total of $1,315.04 (*i.e.,* an amount in excess of the minimum wage for all hours worked during the month--157.5 hours x $7.15 per hour=$1,126.13) but was awarded an "extra" $467.92 by the delegate. The additional monies were awarded because, while Hamill was paid, based on her earned commissions, an amount in excess of minimum wage for the first half of the month ($1,193.09), her commission earnings for the second half of the month totalled only $121.95. The employer paid Hamill this latter sum for the second half of the month (on September 30th) whereas the delegate awarded her minimum wage for this latter pay period less commissions paid--the "shortfall" being $467.92. The employer's position is that in those months where Hamill received at least the minimum wage *for all hours worked during the month,* no additional compensation should have been awarded to her. The employer's position, as set out in its appeal documents, is as follows:

> "...if the complainants [Hamill and Ms. Bosch] did not earn any commissions in the first pay period of a given month, [the delegate] awarded minimum wages to them for that pay period. However, he did not take into account the guaranteed commissions payment of $1,000.00 at the end of the month. Therefore, the complainants reaped a windfall in months in which their commissions in the first pay period were 'below' minimum wage.
>
> Wen-Di submits that, if any violation of the *Act* occurred, it was only in relation to Section 17 (failure to pay wages semi-monthly), not Section 16 (failure to pay minimum wage).
>
> There is an obvious reason for Wen-Di Interiors to pay guaranteed commissions at the end of each month. If it did not do so, its employees could have manipulated the commissions earnings in order to receive them in the second half of each month, thereby collecting both the guaranteed commissions and the minimum wages. A payment at the end of each month prevents this from occurring, as it is [no] longer beneficial to the employees to attempt to manipulate their earnings."

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.

Clearly, where the parties agree to an hourly wage that is less than the minimum wage, that agreement is void by reason of section 4 and the minimum wage for each hour worked is an "earned amount". On the other hand, a commission system is not presumptively unlawful; it may become unlawful if, through its application, an employee is not paid at least the minimum wage for all hours worked--in such a circumstance, the minimum wage must be treated as an "earned amount". 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".

"Pay period", as defined in section 1 of the *Act,* "means a period of up to 16 consecutive days of employment". Wen-Di's payroll system complies with section 17 inasmuch as it has two pay periods each month. There is, of course, a question regarding the amount of wages that were paid in each pay period. Section 17(1) of the *Act* obliges an employer to pay an employee, for each pay period, "all wages earned by the employee in a pay period". In this case, setting aside the monthly guarantee for the moment, Hamill's "wages" consisted of her commissions earned during each pay period; as noted, in some pay periods, these commissions amounted to less than the minimum wage for all hours worked during the pay period. Nevertheless, in accordance with her employment contract, Hamill's wages consisted of her commission earnings, subject to a minimum monthly guaranteed wage.

The *Act* does not proscribe what might be termed a "pure commission" compensation system. "Wages" are defined in section 1 as including, *inter alia,* "commissions" paid or payable. Employers often implement commission-based compensation systems because such systems reduce fixed payroll costs and more clearly reward their employees' performance. Some employees prefer to be paid on a pure commission basis because their earnings are not "capped" (unlike a salary-based system) and because their superior performance will be reflected in their earnings. On the other hand, and depending upon the nature of the employer's business, commissioned sales employees' earnings may vary dramatically from one pay period to the next. Indeed, despite their best efforts, some employees may not have *any* commission earnings for an extended period of time. For example, real estate agents (who are excluded from the *Act*) or heavy equipment sales representatives (who are not excluded) may close only a few sales each year, each of which generates a comparatively large commission. *On an annual basis,* the employee may well have earned a handsome income but the year's earnings may be concentrated in a small number of pay periods.

I might add that this pattern of variable earnings is not unique to commissioned sales employees--the same pattern may be experienced by small business entrepreneurs or professionals carrying on small or solo practice. However, for those employees who fall within the ambit of the *Act,* the effect of section 16 is to "level" their earnings from one pay period to the next and to provide, at a minimum, a "base" cash-flow for each pay period. Section 16 states that "an employer must pay an employee at least the minimum wage" and, in my view, such mandated minimum wage constitutes an amount "required to be paid by an employer to an employee under this Act" [see section 1 definition of "wages", subsection (c)]. Thus, *for each pay period,* Wen-Di was obliged to pay Hamill her earned commissions and if

those commissions amounted to less than the minimum wage for all hours worked during the period, section 16 directed the employer to "top up" her commissions to at least the minimum wage level.

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. In other words, the wages paid for the first pay period may be treated--*provided the employment contract is specific on the point*--as an "advance" against commissions earned for the month as a whole.

Under the *Act,* employers and employees are free to agree on *any* commission structure they choose so long as, in its operation, *the employee is paid at least the minimum wage for all hours worked in each pay period.* As previously observed, the *Act* permits employers to establish commission-based compensation systems. On the other hand, a commission-based system cannot be used as an instrument to pay employees less than the minimum wage for each hour worked in a given pay period. Neither section 16 nor 17 is contravened so long as employees are paid, for each pay period, not less than the minimum wage for each hour worked during the pay period.

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.

The foregoing may be clarified by way of an example. Let us assume that an employee is paid strictly on a commission basis and has two pay periods each month, each pay period comprised of 80 working hours. Further, let us assume that the commissions earned during two consecutive pay periods are $500 and $1,000, respectively. The employment agreement specifically states that an "advance" against commissions earned (which are reconciled monthly, at the end of the month) will be paid in the middle of the month (the first pay period). The minimum wage for each pay period is $572 (80 hours x $7.15 per hour). For the first pay period, the employee must be paid $572 since earned commissions fall below minimum wage. However, this payment can be treated--*since the contract specifically so provides*--as an "advance" against earned commissions. Thus, at the end of the month, the employee is entitled to be paid $928 [total commissions earned in the month ($1,500) less mid-month advance ($572)]--the employee receives at least minimum wage for each pay period. If the employee was paid only $500 for the first pay period, the employer would not have contravened section 17 since the employee was paid all commissions earned (*i.e.,* his or "wages" earned) in the pay period but the employer would have breached section 16 since the employee was not paid at least minimum wage for all hours worked.

However, the employee is not entitled to be paid $572 (minimum wage for first pay period) *plus* $1,000 (commissions earned in second pay period)--a total of $1,572 for the month because to do so ignores the contractual agreement that the mid-month payment was only an *advance* against commissions earned for the month as a whole. Section 16 of the *Act* establishes a "floor" for each pay period but should not be interpreted, in my view, to create an entitlement to a higher wage than the parties actually bargained, so long as their "wage bargain" results in the payment of at least minimum wage for each pay period.

In the instant case, it is clear that the parties' intention was to treat the mid-month payment as an "advance" against commissions earned for the entire month. The employer was not entitled, however, to pay, in a given pay period, only commissions earned if that resulted in the employee receiving less than minimum wage for the pay period in question.

I have reviewed the delegate's calculations and, for the most part, there are no adjustments to be made. However, some adjustments are necessary--for example, in April 1998, Hamill's total commission earnings were $238.18 for the first half of the month and $14.07 for the second half of the month. Hamill was paid only her commission earnings on April 15th but was entitled to be paid minimum wage--$536.25. At the end of the month, she was paid $761.82--an amount well above minimum wage--to "top up" her monthly earnings to the $1,000 guarantee. The delegate awarded Hamill an additional $298.07 for the month (representing the minimum wage "shortfall" for the first pay period). In my view of the matter, Hamill ought to have been awarded an additional $126.13 not $298.07--since Hamill's commissions in both pay periods fell below minimum wage, she was only entitled to be paid minimum wage for each pay period (a total $1,126.13) in the month. She was underpaid for the first pay period and "overpaid" for the second. The "net underpayment" for the month is $126.13 and that is the sum that ought to have been awarded to her. Clearly, in this instance, Wen-Di contravened section 16 of the

Act but, equally clearly, Hamill was only entitled (under her contract and the *Act*) to an amount not exceeding $1,126.13 for the entire month rather than the $1,298.07 awarded to her by the delegate.

Taking the same approach, an "adjustment" in favour of the employer ought to be made for the month of May 1998 (Hamill is entitled to an additional $72.54 rather than $534.50 as determined by the delegate).

The approach that I have taken is, in my mind, entirely consistent with the comments (especially at paragraph 10, QuickLaw) of Adjudicator Stevenson in *Fabrisol Holdings Ltd.* (B.C.E.S.T. Decision No. 376/96). Further, this approach, for the most part, addresses the employer's espoused concern regarding employees "manipulating" their commission earnings by ensuring (say, by withholding invoices) that commissions earned in the first half of a month are not processed until the second half of the month since the mid-month payment is treated as merely an advance against commissions payable for the entire month. It is possible that some "manipulation" could occur in the second half of the month by artificially transferring earned commissions during that pay period to the next month's pay period. However, such a manipulation would constitute a breach of company rules regarding the processing of invoices and, in all likelihood, would require falsification of company records--such behaviours can be appropriately addressed through the disciplinary process and the fact that an employee could be disciplined for such action, in my mind, substantially reduces the probability of this sort of manipulation occurring in the first place.

Unauthorized Payroll Deductions

The delegate awarded Hamill an additional sum of $567.25 as unauthorized payroll deductions (see section 21 of the *Act*). The delegate's rationale for this award is set out below (Determination, page 4):

> "The Act allows an employer to recover from an employee advances paid against future earnings. However, *in this case the employer has deducted from the complainant an amount that the complainant had earned.* That is, the complainant was given advances in pay periods that she did not receive minimum wage. 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...." (my *italics*)

While I agree that an employee must be paid at least minimum wage for all hours worked in a given pay period, it does not necessarily follow that the employee has "earned" this amount. As I previously noted, the obligations under sections 16 and 17 of the *Act* are independent. An employee's *earnings* are determined by the employment contract--in this case, commissions based on sales. So long as the employee is paid, at least semimonthly, the full amount of their commission earnings, the employer cannot be said to have breached section 17. However, if in a given pay period, the employee's commission earnings fall below the minimum wage threshold, the employee must be paid at least minimum wage--if the employee is not paid at least minimum wage, the employer will have contravened section 16. Nevertheless, when an employee is paid minimum wage because actual commission earnings fall below the minimum wage threshold--*and provided the employment contract so provides*--this payment can be treated as an advance against future commission earnings. In other

words, it does not follow that simply because the employer is obliged to pay minimum wage for each hour worked in a pay period, that such minimum wage payment cannot be characterized as an advance against future commission earnings.

It follows that since I do not accept the delegate's approach to the issue of unauthorized deductions, this aspect of the Determination cannot stand.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be varied (including any necessary adjustments regarding statutory holiday pay, vacation pay and interest) in accordance with the findings and directions set out in these Reasons.

Given my conclusion that Wen-Di, at the very least, contravened section 16 of the *Act,* the $0 monetary penalty is confirmed.

I will leave it to Wen-Di's counsel and the delegate to determine between themselves Hamill's precise monetary entitlement. In the event that they are unable to reach such an agreement, I will retain jurisdiction to determine Hamill's entitlement.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal