

An appeal

- by -

Susan A. McKay
("McKay")

- 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.: 2001/354

DATE OF DECISION: September 27, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Susan A. McKay (“McKay”) of a Determination that was issued on April 11, 2001 by a delegate of the Director of Employment Standards (the “Director”).

McKay claimed she was owed wages by her former employer, Utilicorp Networks Canada Ltd. operating as West Kootenay Power Ltd. (“WKP”). The wages claimed consisted of a non-discretionary bonus in the maximum amount of \$11,500.00 (the “bonus”) under an incentive program operating at WKP. The Determination concluded the bonus was not wages under the *Act* and consequently determined the *Act* had not been contravened, ceased investigating the complaint and closed the file.

McKay says the Director wrongly concluded the bonus was not wages under the *Act*.

ISSUE

The issue is whether the Director erred in concluding the bonus was not wages under the *Act*.

FACTS

There is no dispute on the facts, only the result flowing from those facts.

McKay was employed at WKP as Manager of Management Information at a fixed salary of \$77,010.00 a year. She voluntarily terminated her employment with WKP on December 15, 2000. In addition to her fixed salary, McKay was in a position to receive performance based compensation, which was identified in the Determination as a “non-discretionary bonus”. The guidelines for the administration of the bonus are set out in a document attached to the Determination. In the provisions setting out the eligibility requirements for payment of the bonus, the Guidelines state:

ELIGIBILITY

An employee who has been allocated an Incentive Award must be an employee on the payment date to receive an Incentive Award unless such employee has:

- (a) retired;
- (b) died; or
- (c) become disabled and unable to work.

If a participant’s employment is terminated during the Incentive Award period for any other reason, no Incentive Award will be paid.

The Determination concluded that McKay had not met the eligibility requirements of the incentive program, as she was not an employee on the payment date and had terminated her employment during the Incentive Award period, the bonus was not payable and did not fall within the definition of wages, specifically, Section 1, subsection (b) of that definition, which states:

“wages” includes

...

(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency;

ARGUMENT AND ANALYSIS

Counsel for McKay argues that the Determination failed to recognize and give effect to her position that the bonus was an integral part of her compensation package that was payable upon meeting the Personal Goals and Corporate Goals that were established at the beginning of the year 2000. Counsel says the work, upon which the bonus was based, was performed and logic demands the bonus be found “payable” regardless of the eligibility requirements. Counsel relies on a decision of the Tribunal, *Re Lu Verticchio*, BC EST #D096/01, in support of the appeal which found, in similar circumstances that the bonus had been earned and, having been earned, was payable as wages under the *Act*.

The Director and WKP have filed replies to the appeal. The submission of the Director focusses on an interpretation and application of the definition of wages in the *Act* to the circumstances of this case.

The Director reiterates the position that the bonus was not payable because the all of the conditions precedent to such payment were not met. The Director also argues that the position taken by McKay counteracts the purpose for including incentive based compensation in the definition of wages:

Even though there is a strong element of discretion present in this incentive program, the employer is bound by the terms and conditions it has set out and consistently practised. To deny the requirement that a person be employed at the time of the payout, is to deny the very purpose of this requirement - to retain employees.

The Director takes the position that wages cannot be paid or payable until all of the conditions set for earning them have been satisfied and, in the context of incentive based compensation, such monies do not become wages until and unless all of the conditions for requiring their payment have been met.

The submission of WKP primarily addresses their view that the bonus is discretionary. The implication of their submission is that the bonus is excluded from the definition of wages in the *Act* by subsection (g). In essence, their submission, which was dated May 24, 2001, challenges a statement of fact made in the Determination that the bonus was a non-discretionary payment. It was received by the Tribunal more than three weeks past time limited for appealing the Determination and no request has been made to extend the time for filing an appeal. In form, the submission does not satisfy the requirements of an appeal from a Determination. For those reasons, I will not consider that aspect of their submission. The submission also says that McKay was aware of the requirement to be an employee of WKP on March 9th, 2001 in order to receive the Incentive Award. McKay does not deny this assertion.

It should first be noted that the *Verticchio* decision has been reconsidered, and cancelled, by a panel of the Tribunal. The reconsideration decision, *Re Shell Canada Products Limited Produits Shell Limitée*, BC EST #RD488/01, is determinative of this appeal. In that decision, the Tribunal made the following statement:

The reasoning found in *Re Cascadia Technologies Ltd.* and *Re Kocis* is relevant and applicable to our conclusion. 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.

...

While nothing legally obliges an employee to remain with an employer, neither is there anything improper with employers designing incentives that encourage continued employment. They are not uncommon, as the Director points out, in

the tourism industry. Such incentives help employers reduce costs incurred in the hiring and training of a replacement for an experienced employee. In our view, this aspect of the Results Pay was an equally important consideration as was the productivity and efficiency targets when analysing whether the Results Pay was “earned” and it should have been given effect in deciding whether the bonus was payable in this case.

As noted in McKay’s appeal submission, this case is factually very similar to the *Verticchio* case. In fact, the relevant provisions of the employment agreement in the *Verticchio* case were almost identical to that present here and similarly, I can find no reason not to give effect to them. The agreement between McKay and WKP, as it related to the payment of the bonus, is clear and unmistakable. McKay was required to be an employee of WKP at the time the bonus was paid in order to be eligible for it. That condition was also expressed in terms that the bonus would not be paid if a participant’s employment was terminated during the incentive award period, in this case January 1 to December 31, 2000. The exceptions to the forgoing provision did not apply to McKay. McKay’s failure to satisfy all of the preconditions for payment of the bonus made her ineligible to receive it. Having failed to satisfy all of the preconditions for payment, she could not be said to have earned the bonus for the purposes of the *Act* and, unless the bonus was earned, it was not payable and could not be wages.

There is no issue that the employment agreement did not meet the minimum requirements of the *Act* or was inconsistent with the objectives and purposes of the legislation. Nor can the circumstances of this case be characterized as the employer making a thinly disguised attempt to frustrate McKay’s right to receive the incentive in question or wrongfully terminating her in order to avoid paying the bonus. In such circumstances, different considerations would come into play.

I have not been persuaded the Determination was wrong in its conclusion that the bonus was not wages under the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 11, 2001 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal