Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

AltaStream Power Systems Inc.
("AltaStream")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2017A/67

**DATE OF DECISION:** June 14, 2017

# DECISION

## SUBMISSIONS

Thomas F. Beasley — counsel for AltaStream Power Systems Inc.

## INTRODUCTION

1. This is an application filed by legal counsel on behalf of AltaStream Power Systems Inc. ("AltaStream") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D033/17, issued by Tribunal Member Stevenson on April 5, 2017 (the "Appeal Decision").

2. At this juncture, I am reviewing this application to determine if it passes the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). If the application, or any discrete issue raised in the application, passes the first stage, the respondent parties will be notified and requested to file submissions regarding the issues raised by the application following which AltaStream will be given a final right of reply. If the application does not pass the first stage, it will be summarily dismissed.

3. In adjudicating the application, I have reviewed AltaStream's application materials as well as the complete record that was before the Tribunal on appeal.

## PRIOR PROCEEDINGS

4. AltaStream designs, builds, leases and sells power generation systems fuelled by propane, diesel or natural gas. Mr. McMillan worked with the firm as a "business developer" and was employed for about one year with his tenure ending on November 25, 2015, when he was dismissed. In its appeal documents (prepared by its legal counsel) AltaStream conceded that it "terminated Mr. McMillan's employment on November 25, 2015 without notice or cause due to [AltaStream] and Mr. McMillan's inability to agree on Mr. McMillan's remuneration and whether or not it could be altered".

5. On January 11, 2016, Mr. McMillan filed an unpaid wage complaint seeking over $117,000 on account of unpaid commissions (approximately $102,000), compensation for length of service and vacation pay. I understand that Mr. McMillan filed a second revised complaint on or about March 16, 2016, in which he also claimed unpaid wages including statutory holiday pay, but this complaint is not contained in the section 112(5) record, nor does it appear to have been included in any other submission.

6. On December 19, 2016, and following a complaint hearing conducted by a delegate of the Director of Employment Standards (the "delegate") on April 5, 2016, a Determination was issued against AltaStream in the total amount of $129,985.73. By way of the Determination, AltaStream was ordered to pay its former employee, Tyler McMillan ("McMillan"), $127,985.73 on account of unpaid wages and section 88 interest. In addition, the delegate levied four separate $500 monetary penalties against AltaStream based on its contraventions of sections 17 (at least semi-monthly payment of all wages earned in a pay period), 18 (payment wages on termination of employment), 21 (unlawful wage deductions) and 63 (compensation for length of service) of the *Act*.

7. The delegate concurrently issued "Reasons for the Determination" (the "delegate's reasons") setting out the issues in dispute, the parties' evidence, her factual findings, analysis and conclusions.

8. AltaStream appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice (see subsections 112(1)(a) and (b) of the *Act*). Tribunal Member Stevenson dismissed the appeal under subsection 114(1)(f) of the *Act* on the basis that it had no reasonable prospect of succeeding. Thus, the Determination was confirmed as issued and AltaStream now applies for reconsideration of the Appeal Decision.

## THE APPLICATION FOR RECONSIDERATION

9. Mr. McMillan's unpaid wage complaint principally concerned a claim for unpaid commissions and the delegate awarded him $93,575.74 on this account (approximately 73% of the total award). The delegate also awarded Mr. McMillan vacation pay ($4,784.15), compensation for length of service ($12,012.26) and $14,015.87 on account of unlawful wage deductions.

10. As detailed in its submissions filed in support of the reconsideration application, AltaStream "agrees it owed Mr. McMillan commissions" but maintains that the Determination should be varied to reflect a lesser amount for unpaid commissions. More particularly, AltaStream says that after the complaint hearing, but prior to the issuance of the Determination, it paid Mr. McMillan the total sum of $26,294.58 representing monies owed to Mr. McMillan for commissions earned. AltaStream says, and this does not appear to be in dispute, that these further payments were not taken into account by the delegate in the Determination nor did Member Stevenson vary the Determination to reflect these payments. I should also note that AltaStream has deposited into the Director of Employment Standards' trust account the full amount of the wages and interest owed to Mr. McMillan under the Determination.

11. AltaStream seeks an order cancelling the Appeal Decision and dismissing Mr. McMillan's unpaid wage complaint or, alternatively, varying the Appeal Determination to account for the further commissions apparently paid to Mr. McMillan ($26,294.58), as well as an order reducing the total amount of the commissions payable by $11,460.40 to reflect deductions that should have properly been taken against commissions otherwise payable and, finally, that a further $14,015.87 be deducted from the monies payable to Mr. McMillan because this latter sum reflects deductions that AltaStream says it was properly entitled to deduct from commissions otherwise payable to Mr. McMillan. AltaStream also seeks an order directing the Director of Employment Standards to return the balance of the monies currently held in his trust account to AltaStream (after making the above noted adjustments).

12. Counsel for AltaStream refers to the further commissions paid as the "Additional Payments", the further deductions from commissions payable as the "Deductions from Commissions", and the $11,460.40 (representing four separately itemized amounts) as the "Other Deductions". For convenience, I will adopt the same terminology.

13. AltaStream advances several arguments regarding the Appeal Decision. First, it says that Member Stevenson "breached the principles of natural justice by failing to give adequate reasons with respect to [his] holding the Director did not err in finding that commissions were earned and payable to Mr. McMillan upon receipt of the [purchase order] by [AltaStream"]. Second, AltaStream says that the Member made several legal errors and, in particular:

- erred by applying "a standard of reasonableness to [his] review of the Determination, with respect to the timing of the commissions, when a standard of correctness was required" and otherwise erred "by finding the commissions were earned and payable to Mr. McMillan upon receipt of the [purchase order] by [AltaStream]";

- "erred in law by finding the Director did not fail to observe the principles of natural justice by going outside of the Complaint and not allowing [AltaStream] an opportunity to respond on the matter of a breach of section 21 of the [*Act*]";
- "erred in law by failing to recognize the Additional Payments in its order confirming the Determination"; and
- "erred in finding the Director did not commit an error in calculating length of service compensation".

14. AltaStream, as noted above, says that the delegate's approach to the question of when a commission became due and payable was fundamentally flawed and, as such, submits that "if the commissions were not earned and payable upon receipt of the [purchase order], a series of recalculations of what [AltaStream] owes to Mr. McMillan becomes necessary".

## FINDINGS AND ANALYSIS

15. AltaStream's principal challenge to the Determination and the Appeal Decision concerns the delegate's approach to the calculation of commissions. This challenge is framed in several alternative forms. Since this matter appears to be AltaStream's foundational argument, this is the issue to which I shall first turn.

### *Commissions Payable – the Determination*

16. Commissions are a form of "wages" as defined in subsection 1(1) of the *Act*. Subsection 18(1) of the *Act* states that an employer, after having dismissed an employee, "must pay all wages owing to [that] employee within 48 hours after the employer terminates the employment". Although AltaStream essentially concedes that it failed to comply with this provision, it disputes the amount of wages that it owed to Mr. McMillan.

17. Mr. McMillan joined AltaStream in early November 2014. On November 3, 2014, the parties executed a written employment agreement and also executed a "Sales Commission Agreement" dated as of November 24, 2014. Under the terms of these agreements, Mr. McMillan was paid an "annual base salary" and further commissions as well as a monthly automobile allowance.

18. As and from May 1, 2015, until his termination on November 25, 2015, Mr. McMillan's compensation was based solely on commissions earned. On June 5, 2015, Mr. McMillan signed a "MOU [memorandum of understanding] for Commission Based Sales Structure" (the "MOU"); AltaStream's authorized signatories signed this document on June 12, 2015. Paragraph 4 of this agreement states: "Tyler's [McMillan] existing Employment Agreement will continue to be in effect. Tyler agrees to sign a Salary Change Agreement effective May 1st (salary change from base plus commission to 100% commission), and a Sales Commission Agreement outlining the 100% commission terms with an effective start date of May 1st. In the event of any contradiction between the Employment Agreement and this agreement, this agreement takes precedence."

19. Although the MOU refers to both a "Salary Change Agreement" and a "Sales Commission Agreement", it appears that the parties did not subsequently enter into either agreement – no such agreements are contained in the subsection 112(5) record, nor is either form of agreement appended to any of the parties' submissions. The MOU, in paragraph 2, sets out the following formula for determining when sales commissions are payable:

> Effective May 1st, [AltaStream] agrees to pay [McMillan and another person described as an "independent contractor"] on a 100% commission basis on all quotes produced and presented to prospects by them,

> with a total remuneration of 25% of the actual gross margin for each quote that becomes a closed sale. The total remuneration of 25% will be split equally between [McMillan and the contractor] (unless stipulated otherwise at Tyler and [the contractor's] discretion) and will be calculated as follows:
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> a. The baseline commission will calculated [*sic*] as per the job costing signed off 2 weeks following the PO [purchase order].
> b. For sales over 200K upon completion of the project the actual costing will be reviewed, and if required, the commission amount adjusted, based on a mutually agreed reasonable cost differences, which differ from the baseline job costing (including originally budgeted contingency and shop supply amounts).
>
> The payments will be made on a pro-rated basis as [AltaStream] receives payments from its customers. Commission payment for the SAW-CIOC sale that closed on May 14th will be made as follows: 50% of the owed commission to both [McMillan and the contractor] will be paid on a pro-rated basis as [AltaStream] receives payment from SAW-CIOC. The final 50% will be delayed until such time as [AltaStream] has achieved the Gross Margin Target of $1200K. Should the Gross Margin Target not be achieved within 90 days of the final payment received from SAW-CIOC, then the outstanding amount of commission owed for SAW-CIOC will be converted to a loan from [McMillan and the contractor] to [AltaStream], with a 9% annualized interest payment, interest due and payable monthly until the loan is repaid in full.

20. Paragraph 3 of the MOU addressed the situation if Mr. McMillan were to be dismissed: "…[AltaStream] has no intention of terminating [McMillan's] employment, but should they choose to do so at a future date, [AltaStream] will also provide [McMillan] with 60 days [*sic*] notice. Commission will be paid out in full for any quote that closes within 90 days of the termination notice date". AltaStream later did terminate Mr. McMillan's employment, by a letter dated November 25, 2015, that commenced: "This letter represents formal notice that your employment with AltaStream is terminated effective immediately on a without cause basis".

21. As detailed in the delegate's reasons, at page R2, AltaStream would submit bids on projects that required custom-built power generation systems. Mr. McMillan's duties entailed preparing the requisite bid documents and the customer might not respond to any submitted bid for several months.

> If the customer accepted a quote, the customer sent [AltaStream] a Purchase Order ("PO") as confirmation. Mr. McMillan presented the cost estimate sheet, quote and PO to [AltaStream]. Once the PO was received [AltaStream] sent the first invoice to the customer and started work on the project. This process resulted in what is called a "clean order". [AltaStream] signed off on Mr. McMillan's quote at the projected margin which was based on the Booked Job Costing or Booked Gross Profit ("GP") Margin. (page R2)

22. The delegate, at page R3 of her reasons, summarized AltaStream's billing process and explained certain terms used by the parties in order to calculate the actual commission payable on a particular sale:

> For smaller projects, typically under $250,000, customers made two payments, 50% of the total cost upon receipt of the first invoice and the remaining 50% upon shipping. For larger projects, the first invoice was a pre-payment of typically 10% of the total cost and only once this was paid did [AltaStream] start building the project. Once [AltaStream] received the first payment, it provided the customer with a list of all major equipment that [AltaStream] needed to purchase for the project. After the customer signed off on this list, [AltaStream] purchased the equipment and sent the second invoice which was typically 40% of the total cost. Once the project was complete and ready to be shipped, the customer was invoiced another 40%. [AltaStream] then sent all the documents and drawings done on the sale to the customer for final approval. Once the customer accepted these documents, [AltaStream] sent the final 10% invoice.

> The following terminology was explained: The Gross Profit ("GP") Margin is the total projected profit of a sale after direct costs are taken into account. Direct costs include the equipment or items used in making the product that is shipped, including the wages of the employees who built the product, but not the wages of the sales people. The Booked GP Margin is the best estimate of what a project will ultimately cost [AltaStream] to complete. The Actual GP Margin is the actual cost of the project after all the costs associated with the project (e.g. supplier invoices) have been reconciled. The Actual GP Margin can only be determined at the end of the project after shipment of the product has occurred. As the Actual GP Margin was only known at the end of each project, [AltaStream] paid Mr. McMillan throughout the project based on the Booked GP Margin. However, there is a dispute between the parties as to whether the Actual or Booked GP Margin was used when determining Mr. McMillan's final commission totals.

23. Before the delegate, Mr. McMillan claimed that he was entitled to $102,076.64 on account of commissions earned with respect to five sales described as follows: "COIC"; "Chevron 1050"; "Chevron 1029"; "Apache"; and "Skyline". Mr. McMillan testified that all five sales "closed prior to his termination" and, that being the case, "since he had already earned his commissions for all five sales in full, once his employment was terminated he was entitled to be paid all commissions in full regardless of whether or not the customer made payments" (page R8). AltaStream's position was that while it owed Mr. McMillan some monies on account of the COIC sale, and three or four payments for the Skyline sale, no further monies were owed for any of the other three sales (page R11). AltaStream's position regarding the payment scheme set out in the MOU was set out at page R13 of the delegate's reasons:

> Even though the MOU used the term "closed" sale, [AltaStream] does not use this term in practice. [AltaStream] argued that "closed" referred to a project that was completely finished meaning that [AltaStream] had received the final or last payment from the customer and the product had shipped to the customer. [AltaStream] referenced the Sales Commission Agreement where it said that commissions were dependent on a completed sale and this was when shipment and final payment from the customer were made. [AltaStream] argued that "closed" and "completed" sales were the same thing…[AltaStream] argued that the term "owing" under section 18 of the Act meant "payable", and that "earned", "payable" and "closed" all meant the same thing. In other words, Mr. McMillan earned his commission and it would be payable to him once the customer paid [AltaStream]. Once the customer paid [AltaStream] in full, the sale was closed and Mr. McMillan earned the full commission which would be paid to him in full. [AltaStream] also stated that Mr. McMillan earned his commissions on an incremental basis; therefore, if [AltaStream] did not receive a payment from the customer, even if [AltaStream] had received prior payments, then Mr. McMillan did not receive any further commission regardless of the work he completed. [AltaStream] further stated that Mr. McMillan would perform work throughout the entire sale. For example, he would track change orders and have further discussion with the customer on the product being built. Regardless, [AltaStream] argued that the terms "earned" and "payable" are not used in section 18 of the Act and therefore are not relevant.

24. The delegate noted, at page R15 of her reasons, that the MOU provided for different commission structures for sales below or above $200,000 (see MOU, quoted above, para. 2.b) and that since the disputed commissions all concerned sales above $200,000 she only "made a determination on the relationship between the parties for sales over $200,000". The delegate, observing that "the MOU clearly states that [it] takes precedence if there is any conflict between the Sales Commission Agreement and the MOU", concluded that Mr. McMillan's unpaid commission entitlement must be determined in accordance with the latter document. For ease of reference, I have reproduced the relevant provision from the MOU:

> 2) b. For sales over 200K upon completion of the project the actual costing will be reviewed, and if required, the commission amount adjusted, based on a mutually agreed reasonable cost differences, which differ from the baseline job costing (including originally budgeted contingency and shop supply amounts).

25. This provision required the parties to agree on "reasonable cost differences" and there is no further provision addressing the situation if there were no such agreement. The delegate, at pages R16 – R17 of her reasons, addressed this deficiency:

> Past practice and the testimony of both parties support this notion because Mr. McMillan was always paid on the Booked Gross Margin until the Actual Gross Margin was known and an agreement was made to change the commission earnings to reflect 12.5% of the Actual Gross Margin. The MOU is silent on what happens when mutual agreement is not reached. In this circumstance, I interpret the silence to mean that no cost differences can be applied to Mr. McMillan's commission unless there was an agreement…
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> …On June 4, 2015 [AltaStream] agreed, the final wording of the MOU was agreed upon, and the MOU was signed according to this agreement. Therefore the emails confirm that there was agreement that commissions over $200,000 were calculated on the baseline job costing (Booked Gross Margin) and reasonable cost differences could be applied to adjust a commission from its baseline but only with mutual agreement. Within their testimony at the hearing and in their further submissions document dated April 22, 2016, [AltaStream] further confirms that the Actual Job Costing must have been mutually agreed upon in order to be applied. [AltaStream] did not provide evidence on what would happen if there was no mutual agreement.
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> As there was no mutual agreement on cost differences to establish the Actual Gross Margin either before or after termination, I find Mr. McMillan's disputed commissions must be calculated on the Booked Gross Margin.

26. Returning to the MOU, the delegate noted that it provided for commissions to be paid on a "closed sale". The delegate interpreted the agreement, given the evidence before her, that this did *not* mean when a sale was entirely completed (*i.e.*, when AltaStream received final payment). Rather, and in light of the payment history before her, she concluded "that a sale became a closed sale on receipt of the [Purchase Order]. The delegate rejected AltaStream's position that commissions were payable "incrementally" and held "that Mr. McMillan earned his commission in full all at once upon receipt of the [Purchase Order]" (page R20).

27. The delegate then turned her attention to the five commission claims in question and found in Mr. McMillan's favour with respect to four of the five claims for a total amount of $93,575.73 [Note: this is one cent less than the amount set out in the Determination]: CIOC ($78,343.31); Chevron 1050 ($1,727.42); Apache ($1,299.74); and Skyline ($12,205.26).

### *Commissions Payable – the Appeal Decision*

28. AltaStream appealed the Determination arguing, among other things, that the delegate erred in law in finding that Mr. McMillan's commissions were earned and payable on receipt of a purchase order. Tribunal Member Stevenson rejected that argument. His central findings on this issue were as follows (paras. 42 – 43; 50 – 51):

> … arrangements which allow for the deferral of commission payments earned and payable are accommodated but when push comes to shove, as it has here, the requirements of the *Act* apply. Section 4 of the *Act* prohibits arrangements that seek to avoid those requirements. This point answers the argument of the effect of the wording in the MOU that commission wage payments would be made on a pro-rated basis. Such a term can, and I would speculate in most commission agreements probably is, included without offending the requirements of the *Act*, but such a term is not particularly helpful in deciding, as a matter of law under *Act*, when commissions are earned and payable.
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> The above comment is also directly relevant to this case to the factual finding made by the Director, one not challenged in the appeal, that Mr. McMillan's work in securing a client was almost completely done prior to the closing of the sale (delivery of the PO), that "APS provided no evidence to show that he

> performed post sale work or to show the extent of the work he performed" and, even accepting that some "client follow-up" was necessary, it was minimal. This finding weighs in favour of a conclusion that Mr. McMillan's commission wage agreement should be interpreted in a way that conforms with the requirements and objectives of the *Act* that wages are earned and payable once the work is performed, unless there is a clear expression of intention in the employment contract to achieve a different result.
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> … In the context of interpreting an employment contract, the principles governing that task are well established. The goal of contract interpretation is to determine, objectively, the parties' intentions at the time the contract was made. The words of the contract are the primary source. If appropriate, reference may be had to extrinsic evidence.
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> From that perspective, I can find no error of law in the Director's finding that the terms of the wage commission agreement were those contained in the MOU and with the analysis or interpretation of the commission wage agreement expressed in the MOU. While APS complains that such an interpretation is unreasonable, irrational and inconsistent with the wording of the MOU, the Director's conclusion was based on an analysis of the terms of the contract and available relevant evidence relating to its formation and operation. There was ample evidence on which the Director could rely in making the findings on the interpretive issue and the view taken by the Director of the evidence was not unreasonable.

### *AltaStream's Position on Reconsideration*

29. In its application for reconsideration, AltaStream advances several separate arguments all of which concern the delegate's findings – and the Appeal Decision's confirmation – regarding when commissions were payable under the parties' agreement. AltaStream says that "the Tribunal made an error in law when it held the Director did not err by finding commissions were earned and payable to Mr. McMillan all at once upon receipt of a [Purchase Order]". AltaStream's argument continues:

> Section 18(1) of the *ESA* requires an employer to pay "all wages owing to an employee within 48 hours after the employer terminates the employment". This section not use the word "earned". The requirement is to pay all wages "owing". Section 18(1) does not have the effect of speeding up payment of commissions simply because of a termination of employment. As such, the section does not assist in answering the real question under consideration – when were Mr. McMillan's commissions owing?

30. AltaStream says the delegate's conclusion that Mr. McMillan's commissions were payable on receipt of a purchase order was not supported by the parties' past practice regarding the payment of commissions (namely, that commissions were paid "incrementally" as and when AltaStream received payment from the customer), nor by the terms of the Sales Commission Agreement. AltaStream says there is no inconsistency between the Sales Commission Agreement and the MOU and that under either agreement, commissions were not payable until AltaStream received payment: "…Mr. McMillan did not earn his commission in full until completion of a [Purchase Order] which occurred when the product was shipped and fully paid by the customer. That is the clear meaning of the wording in the MOU and the Sales Commission Agreement and is consistent with [AltaStream's] past practice with all salespersons, including Mr. McMillan".

31. With respect to the five commissions in dispute (and recall that the delegate determined that no commissions were owed regarding the Chevron 1029 sale), AltaStream says that since none of the sales had actually been "shipped" to the customer when Mr. McMillan was terminated, he had not earned any additional commissions on these sales and that his complaint was "premature".

32. The MOU states that AltaStream agreed to pay "a 100% commission…on all quotes produced and presented to prospects…with a total remuneration of 25% of the actual gross margin for each quote that becomes a

closed sale". The delegate, as noted above, calculated Mr. McMillan's commissions based on the "Booked Gross Margin", and AltaStream says this approach is not supported by either the Sales Commission Agreement or the MOU.

*Commissions Payable – Analysis and Findings*

33. Although the MOU states (as does the Sales Commission Agreement), that commissions are based on the Actual Gross Margin, the delegate utilized the Booked Gross Margin to calculate Mr. McMillan's entitlement. In reaching this conclusion, the delegate relied on the evidence before her that "Mr. McMillan was always paid on the Booked Gross Margin until the actual Gross Margin was known and an agreement was made to change the commission earning to reflect 12.5% of the Actual Gross Margin" (page R16). The delegate also noted that e-mails exchanged between the parties prior to the MOU being signed "confirm that there was agreement that commissions over $200,000 [referring to the sale price] were calculated on the baseline job costing (Booked Gross Margin) and reasonable cost differences could be applied to adjust a commission from its baseline but only by mutual agreement" (page R17). The delegate also noted that AltaStream confirmed "that the Actual Job Costing must have been mutually agreed in order to be applied" and that there was no evidence before her as to what would transpire if there were no such agreement (page R17). Accordingly, the delegate concluded that, in the absence of any agreement regarding cost differences for the disputed commission claims, either before or after Mr. McMillan's termination, "Mr. McMillan's disputed commissions must be calculated on the Booked Gross Margin" (page R17).

34. As noted above, the delegate also determined that Mr. McMillan's commissions were earned when a quotation to a particular customer became a "closed sale", and that a sale "closed" when AltaStream received a purchase order. The delegate made this finding despite a provision in the MOU stating "the payments will be made on a pro-rated basis as [AltaStream] receives payment from its customers". The delegate rejected AltaStream's argument that commissions were earned "incrementally" as and when the client paid monies to AltaStream. The delegate then reasoned (pages R20 – R21):

> The MOU stated, which was also reflected in [AltaStream's] practice, that payments would be made to Mr. McMillan on a pro-rated basis as [AltaStream] received payments from customers. [AltaStream] explained that financially they were not equipped to make large commission payments which is why they were hesitant to enter into a 100% commission scheme. However, just because a company is unable to financially support an employee's commission scheme does [*sic*] not mean that the Act can be disregarded. Section 1 of the Act defines wages to include commissions which are *paid or payable* for work [*italics* in original text]…Mr. McMillan earned his full commission on a sale when that sale closed; therefore once he earned his commission, it was rendered wages payable under the Act. Section 17 of the Act states that when an employee *earns* a wage [*italics* in original text], which is defined as including commissions, they must be paid those wages within eight days after the end of the pay period and at least semi-monthly. Therefore, once the sale closed, the commission was earned in full and became payable in full. Looking through [AltaStream's] records it could take anywhere from a few months to almost one year to receive full payment from a customer. The records also show that [AltaStream] typically paid Mr. McMillan his commission one month after payment had been received from the customer. There were also a few pay periods where Mr. McMillan was not paid anything at all as no customers had paid. [AltaStream] did not pay Mr. McMillan according to section 17 of the Act and therefore the pro-rated plan is in contravention of section 17 of the Act…
>
> …Furthermore, once Mr. McMillan's employment was terminated, because he had already earned the commission in full and it was therefore payable to him, it was owing under section 18 of the Act. Section 18 of the Act takes precedence over the pro-rated payment plan under the MOU. All five of the disputed sales closed and therefore were earned prior to Mr. McMillan's termination. Section 18 of the Act is a final deadline for payment and [AltaStream] had 48 hours to pay him all wages owing to him.

35. Tribunal Member Stevenson, noting the delegate's factual finding that Mr. McMillan's work regarding any particular sale was typically substantially, if not fully, completed by the time a Purchase Order was issued, then observed, as a matter of general principle, "wages are earned and payable once the work is performed, unless there is a clear expression of intention in the employment contract to achieve a different result" (see delegate's reasons, page R19 and Appeal Decision, para. 43). And with respect to the particular agreement in question, Member Stevenson held that the delegate's interpretation of the parties' agreement, based as it was on the evidence before her, was not an unreasonable interpretation (Appeal Decision, para. 51).

36. In determining that Mr. McMillan was entitled to commissions within 48 hours following his dismissal, the delegate interpreted and applied several provisions of the *Act* including subsection 18(1), which states that "all wages owing to an employee" must be paid within that time frame. The delegate noted that the subsection 1(1) definition of "wages" includes "commissions…paid or payable" for "work". Having determined that Mr. McMillan's commission entitlement crystallized when a customer delivered a Purchase Order, she reasoned that the commission was earned and therefore "owed", and by virtue of subsection 18(1), AltaStream was required to pay these earned commissions to Mr. McMillan within 48 hours of his dismissal.

37. AltaStream says that subsection 18(1) "does not have the effect of speeding up payment of commissions simply because of a termination of employment". I cannot accede to this argument.

38. I accept the delegate's position that, on termination, all earned wages must be paid. This is so even if, absent termination, the wages might not otherwise have been payable as of the date of termination. For example, under section 58(1) of the *Act*, vacation pay is *earned* (at either 4% or 6% depending on the employee's period of continuous employment) during the course of the employee's tenure but may not be *payable* until 7 days before the commencement of the employee's vacation leave (subsection 58(2)(a)). If the employee were terminated prior to having taken their vacation leave, any accrued vacation pay is payable upon termination under section 18(1). Thus, even though vacation pay might not otherwise have been payable, if the employer dismisses the employee, earned vacation pay is owed and must be paid within 48 hours after dismissal. Similarly, compensation for length of service (section 63) is *earned* during the course of the employee's tenure but is only presumptively *payable* upon termination without just cause (leaving aside the circumstances set out in the *Act* when the employer's obligation is deemed to be discharged or where section 63 is inapplicable). At this juncture, compensation for length of service is "owed" and must be paid in accordance with subsection 18(1). In either example, the precise effect of subsection 18(1) *is* to "speed up" the employer's payment obligation.

39. I now turn to AltaStream's argument regarding the appropriate standard to be applied in an appeal involving issues of contractual interpretation and, particularly, as this matter relates to the parties' commission agreement. In *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, the Supreme Court of Canada addressed a somewhat similar question to that raised both on appeal and in the reconsideration application, namely: What is the appropriate approach on appeal where the fundamental question is one concerning the interpretation and application of a commercial agreement? The court observed, at para. 50: "Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix." The court also noted: "These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation" (para. 52) and that appeal bodies "should be cautious in identifying extricable questions of law in disputes over contractual interpretation" (para. 54).

40. In my view, Member Stevenson did not err in upholding the delegate's interpretation and application of the parties' commission agreement. The delegate's interpretation of the agreement was grounded in the evidence before her and I am unable to conclude that her analysis of the relevant provisions of the *Act* was tainted by a

legal error. In particular, I adopt Member Stevenson's analysis as set out at paras. 50 and 51 of the Appeal Decision which strike me as being absolutely faithful to the approach prescribed by the Supreme Court of Canada in *Sattva*.

41. In my view, AltaStream's section 116 application as it concerns the delegate's interpretation and application of the parties' commission agreement, is simply a reiteration of the arguments that were placed before – and rejected by – both the delegate and Member Stevenson. As such, this aspect of the application does not pass the first stage of the *Milan Holdings* test inasmuch as AltaStream is simply asking me to reweigh the evidence and come to a different conclusion from that reached by the delegate and Member Stevenson.

### *Adequacy of Reasons – the Parties' Commission Agreement*

42. In a related but separate attack, AltaStream says that "the Tribunal breached the principles of natural justice by failing to give adequate reasons that the Director did not err in finding commissions were earned and payable upon receipt of the [Purchase Order]".

43. While I unreservedly accept the proposition that the Tribunal has a duty to give adequate reasons for decision, I am unable to conclude that Member Stevenson's reasons are inadequate. AltaStream says "the Tribunal failed to give adequate reasons why the Director's interpretation of the parties' agreement with respect to commissions was not an error of law" and that "no independent reasoning process is evident".

44. I have reproduced the relevant portions of the delegate's reasons addressing why she determined that commissions should be calculated on the Booked Gross Margin rather than the Actual Gross Margin. Clearly, AltaStream does not accept the delegate's conclusion on this score but her reasoning is, in my view, rational and intelligible. Similarly, the delegate explained how she determined when a sale "closed" and why the Purchase Order date was the critical crystallization point. Tribunal Member Stevenson essentially adopted the delegate's analysis since it was faithful to the *Act* and otherwise in accord with the evidentiary record before her. Although AltaStream does not accept the delegate's analysis (and Member Stevenson's confirmation of her approach), it does not follow that the analysis of either the delegate or Member Stevenson was opaque or in some way inadequate.

45. I am not persuaded that AltaStream's argument on this score has any presumptive validity and, as such, this argument does not pass the first stage of the *Milan Holdings* test.

### *The Appropriate Standard on Appeal*

46. AltaStream says that Tribunal Member Stevenson "erred in law by applying a standard of reasonableness to the [delegate's] Decision with respect to when the commissions were owing" and argues that a "correctness" standard should have been applied.

47. AltaStream notes that at para. 46 of the Appeal Decision, Tribunal Member Stevenson stated:

> The interpretation of an employment contract is a question of general law about which the Director must be correct: see *Director of Employment Standards (Re Kocis)*, BC EST # D331/98 (Reconsideration of BC EST # D114/98), where 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.

48. However, at para. 51, Member Stevenson stated: "There was ample evidence on which the Director could rely in making the findings on the interpretive issue and the view taken by the Director of the evidence was not unreasonable." AltaStream maintains that the correct standard is "correctness".

49. The principal thrust of AltaStream's argument on appeal was that the delegate erred in law in finding that Mr. McMillan was entitled to a commission once a Purchase Order was received. As noted above, in *Sattva Capital*, *supra*, the Supreme Court of Canada held that although, historically, the interpretation of a commercial contract was considered to be a question of law, the modern approach is to treat such matters as questions of mixed fact and law (*Sattva*, para. 50) and that although "it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law" (para. 53), "courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation" (para. 54). In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, the Supreme Court of Canada held that the appropriate standard for reviewing a finding involving mixed fact and law is the "palpable and overriding error" standard. In other words, the original decision-maker's finding of mixed fact and law is entitled to deference and should only be set aside when it is clearly wrong.

50. While it is perhaps unfortunate that the Appeal Decision refers to both a "correctness" standard (which is the appropriate standard for a pure legal question) and a "reasonableness" standard, I am of the view that, ultimately, Tribunal Member Stevenson appropriately considered that AltaStream's appeal failed with respect to the "commissions earned/payable" issue because the delegate's decision on this score was entirely defensible based on the evidence before her and a consideration of the relevant statutory provisions. To put it another way, the delegate's analysis and final determination of this issue was not tainted by a palpable and overriding error. Tribunal Member Stevenson concluded that the delegate had ample evidence before her to support her interpretation of the commission agreement, and that her "view…of the evidence was not unreasonable" (para. 51). In this case, I am not persuaded that his conclusion in this regard would have been materially different had he turned his mind to whether the delegate's decision was tainted by a palpable or overriding error.

### *Deductions from Commissions*

51. Section 21 of the *Act* provides as follows:

> 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

52. The delegate awarded Mr. McMillan $14,015.87 on account of unlawful wage deductions. The delegate itemized four separate unlawful deductions at pages R27 – R28 of her reasons. The impugned deductions are as follows: i) $4,880.90 for automobile lease payments; ii) $4,592.24 for an alleged "overpayment" on the Chevron 1050 sale; iii) $975.86 for an alleged overpayment of salary; and iv) $3,566.87 representing a deduction on account of income taxes for a commission advance.

53. In its reconsideration application, AltaStream challenged item number ii), above, together with two other items that were awarded for, respectively, a commission on the Apache sale ($1,299.74) and for an improper

automobile lease deduction on the Skyline sale ($976.18). AltaStream says that "based on the correct interpretation of when commissions are payable, the Director erred at law in determining the Deductions from Commissions were not permitted" and that, "the Tribunal, by extension, erred at law by not setting aside the Director's determination on this issue".

54. As I have explained, above, I am not persuaded that the delegate erred in law in her approach to the interpretation and application of the parties' commission agreement, and it thus follows that I similarly do not see any basis for varying or cancelling the Appeal Decision insofar as this issue is concerned.

55. In a somewhat related attack, AltaStream says that "the Tribunal erred in law by finding the Director did not fail to observe [the] principles of natural justice with respect to section 21 of the *ESA*". More particularly, AltaStream says that Mr. McMillan never advanced a claim under section 21 in his complaint and that the delegate did not afford it "an opportunity to respond on the matter of a possible breach of section 21 of the *ESA*".

56. Mr. McMillan's original complaint, filed January 11, 2016, did not include a claim for deductions from wages. However, the delegate nonetheless awarded Mr. McMillan $14,015.87 under section 21 (unlawful wage deductions). It is important to note that Mr. McMillan's complaint was *not* determined after an investigation by the delegate; rather, the Determination was issued following an oral complaint hearing. Since no investigation was conducted, the delegate's obligation under section 77 was never triggered (section 77 states: "*If an investigation is conducted*, the director must make reasonable efforts to give a person under investigation an opportunity to respond"). Nevertheless, fundamental fairness dictates that a "trial by ambush" does not occur.

57. The oral complaint hearing process under the *Act* does not involve any formal "discovery" process although both parties typically engage in some form of information/documentation exchange process in advance of the hearing. In this case, the parties were both represented by legal counsel. Two of the deductions in question relate to monies deducted from commissions otherwise payable. I note that in a letter dated December 22, 2015, from Mr. McMillan's counsel to AltaStream's counsel, the former expressly put these deductions in issue when he stated: "Under the *ESA*, AltaStream cannot withhold wages from employees because they have not been paid themselves". The remaining section 21 deductions concern the automobile lease and a deduction for income tax made on a commission advance payment. Mr. McMillan specifically raised the automobile lease deduction in the course of his testimony at the complaint hearing (see delegate's reasons, page R10) and AltaStream presented its own position regarding this issue in the course of its evidence (see page R15). Further, Mr. McMillan also queried AltaStream's policy regarding income tax deductions (see delegate's reasons, page R11) and, similarly, AltaStream responded to this argument (albeit in a very cursory manner – see page R15).

58. If AltaStream believed that it was taken by surprise at the hearing with respect to the section 21 issue, it could have applied for a hearing adjournment. It did not do so (although, about three weeks' prior to the hearing, it did apply for an adjournment – the delegate refused this application but granted "a three week extension to provide further records for the hearing": see delegate's reasons, page R6).

59. The subsection 112(5) record includes Mr. McMillan's 7-page "Closing Argument". At page 4 of this document, Mr. McMillan specifically refers to alleged improper deductions from his commission payments and AltaStream's "history of deducting significantly more tax than is required". Further, at page 6 of this latter document, Mr. McMillan made a specific submission regarding section 21 of the *Act* and, in addition, he included a case addressing section 21 in his "Book of Authorities". Thus, even though Mr. McMillan did not specifically advance a section 21 claim in his complaint, this was a live issue before the delegate at the hearing.

60. As noted, Mr. McMillan specifically referred to section 21 both in his testimony before the delegate and in his "Closing Argument". The hearing was conducted on April 5, 2016. AltaStream's legal counsel provided a final submission to the delegate by way of a letter dated April 15, 2016, and there is no mention of section 21 anywhere in this document despite this issue having been canvassed by both parties in their evidence at the complaint hearing. AltaStream's legal counsel also filed a reply submission dated April 22, 2016, and, in this document, at pages 5 – 6, counsel made only the briefest of submissions regarding section 21:

> 5. Section 21: Deductions
>
> The Commissions are based on actual gross margins. This is a method to calculate commissions not a breach of s. 21. Most Commissions are based on a % of profit. That is the norm across the province. Mr. McMillan's interpretation of s. 21 has no support in case law, statutory interpretation or common sense.

61. The reply submission did not address Mr. McMillan's concerns about tax deductions or in relation to the automobile lease.

62. In light of the above circumstances, I am unable to place any credence in AltaStream's counsel's position that "the section 21 issue was never put to [AltaStream]". Counsel also asserts, presumably referring to the fact that section 21, although not raised in the original complaint, was a matter in issue at the complaint hearing, says: "simply because the matter of deductions was put on the table at a later date, after the Complaint was made, does not mean [AltaStream] should have been alive to a consideration of section 21". I can only reiterate what Tribunal Member Stevenson stated in the Appeal Decision at paras. 64 – 71 and his conclusion that "[AltaStream] was aware of all these claims that raised a consideration of section 21" (para. 68).

63. I am not satisfied that AltaStream's arguments regarding section 21 are meritorious, even on a *prima facie* basis, and thus this aspect of the section 116 application must be dismissed since it does not pass the first stage of the *Milan Holdings* test.

### *The "Additional Payments"*

64. In its reconsideration application, AltaStream identified payments, totalling $26,294.58, apparently made to Mr. McMillan "since the hearing but before the Determination". I understand that these payments were made on account of commissions and were triggered by payments received from customers on sales for which Mr. McMillan was responsible. As noted above, AltaStream refers to these payments as the "Additional Payments" and I shall use the same nomenclature.

65. AltaStream says that "neither the Determination nor the [Appeal Decision] addressed the Additional Payments, despite the fact that [AltaStream] raised them in its submissions" and that this failure constitutes an error of law.

66. AltaStream's legal counsel did *not* refer to the Additional Payments in his "Written Reasons and Argument in Support of the Appeal" that was appended to AltaStream's Appeal Form. AltaStream's appeal was grounded on three assertions: first, that the delegate erred in determining when commissions were earned and payable; second, that the delegate erred in her treatment of deductions from commissions; and third, that she erred in calculating Mr. McMillan's compensation for length of service. AltaStream, in its appeal, simply did not make any argument regarding whether or not the Additional Payments should have been taken to account when fixing Mr. McMillan's unpaid wage entitlement.

67. However, AltaStream's counsel filed a concurrent application under section 113 of the *Act* to have the Determination suspended pending appeal and in his "Request to Suspend a Determination" he did refer to the Additional Payments but only in with respect to its position that the Tribunal should issue an order reducing the sum to be deposited with the Director by an amount equal to the Additional Payments.

68. The section 113 suspension application was the subject of BC EST # D027/17, issued on March 17, 2017 (by Tribunal Member Stevenson). Member Stevenson issued the following order:

> Pursuant to section 113(2)(a) of the *Act*, the Determination is suspended provided APS, within ten working days after the date of these reasons for decision, deposits with the Director of Employment Standards the full amount of the Determination ($129,985.73) to be held by the Director of Employment Standards while either, or both, parties are actively pursuing avenues of appeal, under the *Act*. If [AltaStream] wishes to have an order requiring the Director to continue to hold the amount deposited with the Director after proceedings under the *Act* have been concluded, that order should be requested in the appropriate forum.
>
> This Order is subject to further order by this Tribunal, by another tribunal acting within jurisdiction respecting the amount being held, or by a court of competent jurisdiction.
>
> If [AltaStream] fails to deposit the monies within ten working days as directed by this Order, the Director of Employment Standards shall be at liberty to enforce the Determination in accordance with the provisions of Part 11 of the *Act*.

69. AltaStream applied for reconsideration of the suspension decision and I issued reasons for decision dismissing the application on May 2, 2017 (see BC EST # RD051/17).

70. Two points should be noted. First, so far as I can determine, AltaStream did *not* appeal the Determination on the basis that the delegate should have taken into account the Additional Payments when fixing AltaStream's unpaid wage liability to Mr. McMillan. Second, in my reconsideration decision concerning the suspension decision, I held that matters relating to the Additional Payments were not within the Tribunal's, as distinct from the Director of Employment Standards', jurisdiction (at paras. 20 – 21):

> In my view, and in the circumstances of this case, issues relating to the Contested Payments concern the Director's enforcement powers under Part 11 of the *Act* rather than the Tribunal's adjudicative functions under Parts 12 and 13 of the *Act*. To the extent the Director is reasonably satisfied that the Contested Payments were made on account of AltaStream's liability under the Determination, they will be properly credited against AltaStream's liability. If there is a dispute between the Director and AltaStream regarding what funds have or have not been paid, or otherwise recovered, on account of AltaStream's liability under the Determination, that is a matter for the civil courts.
>
> AltaStream maintains that it deposited the funds with the Director on the understanding that the Director would hold the funds until any judicial review (and possible further appeal) proceedings were completed (see para. 10, 3rd bullet point, above). If, in fact, the Director agreed to hold the funds on that basis, that is a matter between AltaStream and the Director. Such an agreement is not binding on the Tribunal and, of course, was not reflected in the suspension order issued in this case. If and when the Director acts in a manner that is inconsistent with this alleged agreement, AltaStream's remedy lies in a court action to have the alleged agreement enforced.

71. I consider my decision regarding the legal effect of the Additional Payments to be a matter of *res judicata* and that reopening this question would not be appropriate in light of the doctrine of issue estoppel. In my view, the instant reconsideration application, as it relates to the Additional Payments, constitutes an impermissible collateral attack on my reconsideration decision relating to Tribunal Member Stevenson's section 113 suspension decision.

72. For these reasons, I am unable to conclude that AltaStream has raised a presumptively meritorious argument regarding the Additional Payments and, as such, this aspect of the reconsideration application must be dismissed because it does not pass the first stage of the *Milan Holdings* test.

### *Compensation for Length of Service (Section 63)*

73. Mr. McMillan was employed from November 3, 2014, to November 25, 2015, at which point he was dismissed without just cause and, accordingly, was entitled to 2 weeks' wages as compensation for length of service payable under section 63 of the *Act*. The parties' agreed that AltaStream paid Mr. McMillan the sum of $3,043.78. After taking this latter payment into account, the delegate awarded Mr. McMillan the sum of $12,012.26 under section 63.

74. AltaStream says that since the delegate erred in determining when Mr. McMillan's commissions were earned and payable, this error in turn affected the calculation of Mr. McMillan's section 63 entitlement. Since I am not persuaded that the delegate erred in this respect, this aspect of the attack on the section 63 award must be rejected. However, AltaStream further says that the delegate erred in her calculation of Mr. McMillan's "weekly wage" for purposes of determining his section 63 compensation.

75. It can be problematic to determine the proper amount of an employee's section 63 compensation when their earnings vary significantly from week to week (or even from month to month), such as is the case for many commissioned salespersons. Subsection 63(4) sets out a formula for determining average "weekly wages" that is based on the employee's last 8 weeks of "normal or average hours of work". "Wages", it should be recalled, are defined in subsection 1(1) of the *Act* as including "commissions…paid or payable by an employer". Subsection 63(4) 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.

76. In the case, the delegate, relying in part on the Tribunal's decision in *BFI Canada Inc.*, BC EST # D017/14, stated: "I find it appropriate in this case not to base the compensation on only the eight weeks immediately preceding the termination" (page R29). The delegate observed (page R30):

> Mr. McMillan earned and was paid his commission[s] on a random and sporadic basis depending on when bids were accepted by customers, sales closed and when payments came in from customers. In addition he could perform the work on a sale in one month, not have it close until months later and still be receiving payments on that commission until an even later point in time.

77. The delegate then held (page R30):

> Therefore, based on the best available evidence before me and in light of the purposes of the Act, I find the most appropriate way to reflect [McMillan's] average or normal weekly wage is to add all commissions he earned or had been rendered payable in his last six months of employment (the period of time he was paid entirely by commission) and to divide that number by the number of weeks within that period.

78. The delegate found that Mr. McMillan's earned and payable wages during his last six months of employment (26 weeks) was $195,320.09 and this, in turn, represents $15,024.62 for two weeks' wages (due to an

arithmetic or clerical error, the delegate calculated this latter figure to be $15,056.04). Since AltaStream had previously paid Mr. McMillan $3,043.78 for section 63 compensation, it appears that he should have been awarded $11,980.84, rather than the $12,012.26 actually awarded.

79. On appeal, AltaStream argued that its $3,043.78 payment to Mr. McMillan fully discharged its obligation to him under section 63. AltaStream alleged that the delegate erred in law by calculating Mr. McMillan's weekly wage by averaging his weekly earnings over the last six months of his employment. AltaStream submits that the delegate's approach runs afoul of subsection 63(4) of the *Act*. Finally, AltaStream says that the delegate's reliance on *BFI Canada* constituted an error of law. At least impliedly, AltaStream suggests that to the extent *BFI Canada* supports the notion that one can look at an average based on something other than the employee's last 8 weeks of employment when calculating the employee's average weekly wage, *BFI Canada* is incorrect. AltaStream says that the delegate erred in law when she relied on *BFI Canada* to go beyond Mr. McMillan's last 8 weeks of employment, and base his weekly wage on the 6-month period when he was paid solely on a commission basis.

80. With respect to the relevant "averaging" period, Member Stevenson found as follows (Appeal Decision, paras. 54 – 56):

> To the extent APS contends the Director erred in law in calculating length of service compensation by averaging Mr. McMillan's wages over a period of six months, rather than eight weeks, I do not find the Director committed any error in that regard. Such an approach has been endorsed in several decisions of the Tribunal: see *BFI Canada Inc.*, BC EST # D017/14, at para. 49.
>
> In one of the cases referred to in *BFI Canada Inc., Raymond Man Wah Lee, Director/Officer of C-O-E Posscan Systems Inc. and another*, BC EST # D281/00, the Tribunal stated, at page 2:
>
> > Looking at the commission earnings from the standpoint of "average" commissions, throughout Mr. Law's employment, the average turns out to be $2,975.24. In some cases, an average is appropriate, in other cases, perhaps, not. In some cases, it may be appropriate to consider a relatively short period, in other cases, a longer period. In my view, there is no "magic way" to calculate the liability, the point being that the delegate must consider the "wages that are earned by an employee over a period of time and are reasonably reflective of the employee's typical, regular or usual wages."
>
> As noted in *BFI Canada Inc.*, such an approach is sometimes required to prevent an unfairness to either the employee who has been terminated without cause or notice or the employer who may be liable to pay an entirely unrealistic amount if the Director was confined to an eight-week calculation period. In this case, the Director used a six-month period because limiting the calculation period to the last eight weeks of his employment resulted in a calculation that was neither accurately reflective of his earnings nor fair to APS.

81. In its reconsideration application, AltaStream maintains the position it took on appeal, namely, that the $3,043.78 payment it made to Mr. McMillan on account of compensation for length of service fully satisfied its obligation to him on that account. AltaStream says that this payment was calculated as follows: "The Termination Pay was correctly based on two weeks of pay from March and April 2015, when Mr. McMillan was receiving a regular base pay and working normal or average hours."

82. AltaStream says it actually paid Mr. McMillan a total of $25,565.67 during his last 8 weeks of employment and makes the following submission:

> [AltaStream] paid Mr. McMillan $25,565.67 in wages in the eight weeks prior to the termination of his employment. If these were the eight weeks that counted for the calculation of termination pay, he would have an annual income of $777,419.17 – again, an illogical and incorrect analysis and conclusion.

83. AltaStream then submits "the Director and the Tribunal have attempted to soften the invalidity of the reasoning by stepping outside of the statutory parameters in section 63(4) and averaging Mr. McMillan's wages over six months, and not eight weeks as required" and that this approach "is an error in law" because "neither section 63(4) nor any other applicable source of law permit a departure from the statutory parameters".

84. I am confused about AltaStream's counsel annual income calculation, set out above. If AltaStream paid Mr. McMillan $25,565.67 during his last 8 weeks of employment, and if his annual wage were derived from those earnings, this translates to an annual wage of about $166,177, dramatically less than counsel's $777,419.17 calculation. It would appear that counsel is adding the amount awarded by way of the Determination for commissions owed, and the monies actually paid to Mr. McMillan during his last weeks of employment, in order to arrive at the $777,401.17 figure. If this were the correct annual salary figure, Mr. McMillan would have been entitled to nearly $30,000 under section 63 prior to adjusting for monies actually paid on account of compensation for length of service (about double the actual amount awarded).

85. With respect to the proper interpretation of subsection 63(4), it should be noted that the statutory formula does not necessarily impose an ironclad immutable arithmetic formula. The 8-week period must reflect a period of time during which the employee "worked *normal or average* hours of work" (my *italics*). The delegate, as noted above, relied on *BFI Canada* in calculating Mr. McMillan's compensation for length of service entitlement based on his earnings during his last six months, rather than his last 8 weeks, of employment.

86. In *BFI Canada*, the delegate "grossed up" the employee's earnings in her last 8 weeks of employment to include, *inter alia*, commissions earned prior to her last 8-week employment period (but paid within the 8-week period) as well as commissions that were earned during her last 8 weeks but not paid until after her termination. Member Bhalloo upheld the delegate's approach observing (at para. 50): "I believe that the delegate has some flexibility in employing an approach that reasonably reflects the employee's typical, regular or usual wages". The employee was terminated on August 29, 2011, and BFI Canada argued that by including wages earned in June, but paid in July and August, this had the effect of "compress[ing] commission earnings from a 12-week period into the final eight (8) weeks of [the complainant's] employment". Member Bhalloo was not unsympathetic to this argument but ultimately concluded that BFI Canada's factual assertions were not adequately proven (para. 50):

> While on the face of it, BFI's argument has some merit in my view, I am not persuaded, based on the Reasons and the evidence adduced by BFI that the commissions paid by BFI to [the complainant] in the pay periods ending July 16 and August 15, 2011, were earned indeed based on work completed in June, 2011. The Director contends that the evidence does not support this conclusion, and BFI did not provide actual records to show how these payments were calculated, or for what period of time the work was performed to earn these commissions. The Director, furthermore, notes in the appeal submissions that there was a divergence in the evidence with respect to the purpose of the $1,500.00 payment made by BFI in the period ending August 5, 2011…In these circumstances, I find that there is sufficient uncertainty surrounding when these commissions were earned and I agree with the Director that "there is no way to determine when [the complainant] performed the work that resulted in the commission becoming payable". Therefore, I am not persuaded that the delegate erred in law in calculating the termination pay as she did. In my view, the onus, in the appeal, is on BFI to show that the delegate erred in law in calculating the termination pay and I am not convinced that BFI as done that.

87. In *BFI Canada*, Member Bhalloo referred to *Craig*, BC EST # D052/10, a case "factually distinguishable [but] instructive in terms of the approach the Tribunal takes under section 63(4) in calculating compensation for length of service" (para. 49). The principal issue in *Craig* concerned section 66 of the *Act* and whether the delegate's determination that the employer had not "substantially altered" Mr. Craig's conditions of

employment should be upheld. More particularly, the appeal concerned the employer's unilateral reduction in Mr. Craig's commission rate from 7.5% to 6% that took effect in April 2009. The delegate compared Mr. Craig's commission earnings in the first three months of 2009 (prior to the rate reduction) with his earnings in the two months following the rate reduction. The delegate concluded that the rate reduction "translated to a reduction of his average income over those last two months of $1,166.76, or 11.68%" and that this reduction in "average earnings was not substantial and, consequently, did not invoke section 66 of the *Act*" (para. 11). On appeal, Mr. Craig argued that alternative approaches, using a significantly greater time span, would have shown a much more significant adverse wage impact. Clearly, Craig was *not* a case directly relevant to section 63(4) and there is only a tangential reference in the appeal decision to this provision. The crux of the decision dismissing the appeal is captured in the following excerpts (para. 35; 37 – 38; 40 – 42):

> …there is no indication in any of the Director's statements that section 64(4) formed the rationale for the decision made to use only 2009 earnings in the analysis. In any event, when considering the average or normal wages for commissioned employees, the Tribunal has endorsed an approach that seeks to reasonably reflect the employee's typical, regular or usual wages and that approach is not necessarily limited to looking at the wages earned only in the eight weeks preceding the termination…
>
> The Director could have used the time frame suggested by Craig…
>
> The concern in this appeal, however, is not to simply reassess what the Director could have done, but to decide whether the Director committed a reviewable error in using an earnings analysis covering only five months in 2009 – or in using an earnings analysis at all – to decide if the change to the commission rate amounted to a "substantial" alteration.
>
> …I am not persuaded the Director has committed a reviewable error in using an earnings analysis covering a relatively short period of time, over one that covers a longer period of time. As indicated above, there is no one formula that is "correct". Craig has provided alternative ways of performing the analysis using different time periods which he submits would yield a different conclusion. The Director has countered by indicating there are also time frames which could have been used that would generate the same result.
>
> However, showing there are different periods does not resolve the appeal one way or the other. The burden on Craig in challenging the time period chosen for analysis by the Director is to show that choice, which is in large part discretionary, was not made for *bona fide* reasons, was arbitrary or was based on irrelevant factors. The evidence in the file must support the challenge and justify the Tribunal's intervention…
>
> I am unable to find any legal basis for finding the earnings analysis used by the Director was an error in law or for disagreeing with the Director's conclusion that this change was not sufficiently substantial to constitute a deemed dismissal under section 66 of the *Act*.

88. The *Craig* decision also referenced, with approval, the Tribunal's decision in *Lee and Rowlett*, BC EST # D2181/00. This latter decision concerned the appropriate methodology to be used when calculating an employee's wages for purposes of director/officer liability under subsection 96(1) of the *Act* and, as such, was not a decision that addressed the subsection 63(4) formula for calculating compensation for length of service. Subsection 96(1) provides that a director or officer may be held liable "for up to 2 months' unpaid wages for each employee [of the corporation]". The Tribunal had originally referred this calculation issue back to the Director based on the following considerations (at page 2):

> …I agree that the delegate erred when he determined the "2 months unpaid wages" based on the last four months of employment for the purpose of liability under Section because "the last four months ... was the period during which the bulk of the outstanding commissions were earned" and that it was, therefore, "reasonable" to use that period. In the circumstances, the delegate may well have "overestimated" the

> director/officer liability and I refer the determination of liability with respect to the Law Determination back to the director based on the principles set out in this Decision.

89. For purposes of determining the director/officer's "2-month unpaid wage liability" where the employee in question is a commissioned salesperson, Member Petersen observed (at page 2):

> In some cases, an average is appropriate, in other cases, perhaps, not. In some cases, it may be appropriate to consider a relatively short period, in other cases, a longer period. In my view, there is no "magic way" to calculate the liability, the point being that the delegate must consider the "wages that are earned by an employee over a period of time and are reasonably reflective of the employee's typical, regular or usual wages."

90. In my view, none of *Lee and Rowlett*, *Craig* or *BFI Canada* specifically addresses the issue raised in this case, namely, whether the delegate erred in law in ignoring Mr. McMillan's last 8 weeks of employment – choosing to use a much longer time frame (6 months) – for purposes of calculating his section 63 entitlement. However, I do accept that these decisions strongly support the notion that some flexibility is called for when endeavouring to determine the "normal" or "average" earnings of a commissioned salesperson whose wages may vary greatly from one pay period to the next.

91. The earnings of commissioned salespersons selling relatively high volume, low price-ticket items may not demonstrate much variability from one pay period to another. But commissioned salespersons selling specialized high-value items – precisely Mr. McMillan's situation – may have extreme volatility in their wages. Would it make sense to examine such an employee's last 8 weeks' earnings if a very large percentage of their annual compensation, say, 25%-50% of their annual commissions, were earned or paid in the last two months before their employment ended? Certainly, such an approach would benefit the employee, but would it also create an unfair windfall that the employer should not have to shoulder? Conversely, what if the bulk of the employee's commission earnings were paid many months prior to termination with the employee only earning very modest sums during his or her last two months of employment? Would the employer benefit from an unfair windfall in such circumstances?

92. Subsection 2(d) dictates that that *Act* should be interpreted and applied in a manner that promotes fair treatment of both employers and employees. Although subsection 63(4) refers to "normal or average hours of work", in my view, fundamental fairness dictates that, in an appropriate case, "normal or average" *wages* must also be taken into account. If the wages earned by the employee during the last 8 weeks of their employment are dramatically higher, or lower, than an average calculated over a longer, more representative, time frame, then I do not believe that one should slavishly apply the 8-week rubric. I believe this approach is entirely consistent with the Tribunal's general stance toward "averaging" commission earnings for purposes of calculating a weekly wage.

93. In this case, the delegate noted that there was extreme volatility in Mr. McMillan's earnings from one pay period to another. The delegate stated (page R29): "…sometimes he was paid multiple times in a month and sometimes he was not paid anything in a pay period or entire month…Mr. McMillan's commission payments also ranged from $1,000 to $23,000 depending on what invoices were paid [and] there is no way to reasonably determine when Mr. McMillan performed the work on each project that resulted in the commission becoming payable because it could take months to secure a sale after a bid was placed". In light of this volatility in earnings, the delegate concluded that "limiting the calculation period to the last eight weeks of employment and including all outstanding wages in that calculation would result in an award to Mr. McMillan which is does [*sic*] not accurately or fairly represent his earnings".

94. The delegate's decision to average Mr. McMillan's commission over the entire last six months of his employment (when he was exclusively paid by commission) produced an accurate picture of his typical weekly earnings and, although one might posit other types of averaging formulae, I am unable to conclude, as was Member Stevenson, that the delegate's approach was an unreasonable one or otherwise tainted by a palpable and overriding error. In my view, the delegate's approach produced a sensible result that was both reasonable and entirely fair to both parties. I cannot find that the delegate's decision to refuse to apply the "8-week" formula, given the rather unique facts of this case, constituted an error in law.

95. It follows from the foregoing that I am not satisfied that AltaStream has raised a serious argument that Member Stevenson erred in upholding the delegate's approach to the compensation for length of service issue.

## ORDER

96. Since, in my view, no aspect of AltaStream's application to have the Appeal Decision reconsidered passes the first stage of the *Milan Holdings* test, this application is refused in its entirety and the Appeal Decision is confirmed.

97. Notwithstanding the foregoing order, and as noted above, it appears that the delegate may have made a comparatively minor error in calculating Mr. McMillan's compensation for length of service entitlement. Rather than amending the Determination, I simply draw this matter to the parties' attention and I expect that if there is, indeed, an error, the Director will take this into account (and also make the requisite ancillary adjustments) prior to making any payment to Mr. McMillan from the funds now being held in the Director's trust account (which constitute, as I understand it, the full amount of the Determination).

**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**