An Application for Reconsideration

- by -

The Director of Employment Standards
(the "Director")
- and by -
Jannex Enterprises (1980) Limited
("Jannex")

- 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

ADJUDICATORS: David B. Stevenson, Panel Chair
Fern Jeffries
Mark Thompson

FILE No.: 2000/843 and 2001/34

DATE OF DECISION: April 9, 2001

DECISION

OVERVIEW

The Director of Employment Standards (the "Director") and Jannex Enterprises (1980) Limited ("Jannex") have both applied for reconsideration of a decision of an Adjudicator of the Employment Standards Tribunal (the "Tribunal"), Decision BC EST #D438/00, dated October 19, 2000 (the "original decision"). The original decision substantially confirmed a Determination dated January 14, 2000, referring one aspect of the Determination back to the Director for further investigation. In result, it was determined that Jannex owed an amount of $13,450.48, and interest accruing on that amount under Section 88 of the *Act*, in respect of the employment of Peter Kerr.

The application for reconsideration by the Director was filed with the Tribunal on December 11, 2000. The application for reconsideration by Jannex was filed with the Tribunal on January 5, 2001.

The Director says the original decision contains a serious error of law with respect to the application of the minimum wage provisions of the *Act* to commission salespersons. For its part, Jannex restates the fourteen points raised in its appeal of the Determination and submits nine of them for reconsideration, either reiterating the same arguments against those conclusions made in their appeal or, in a few instances, stating their disagreement with the original decision. The matters raised in its application for reconsideration include: whether Kerr was an employees for the purposes of the *Act*; whether there was a denial of natural justice in the way the complaint was investigated by the Director; whether Jannex was prejudiced in the appeal process by the inclusion of "without prejudice" discussions in the Determination; whether Jannex was denied a fair hearing; whether Section 80 of the *Act* was correctly interpreted and applied; whether there was an abuse of power by the Director; whether "advances" on commission can satisfy the minimum wages requirements of the *Act*; whether money allegedly owed by Kerr to Jannex should have been "set off" against money owed under the *Act*; and whether interest on the amount found owed on the minimum wage and illegal deduction aspects of the complaint should have been calculated from the date of those complaints, rather than from the initial complaint, which was made in November, 1999.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the potential issues raised in these reconsideration applications are outlined in the above paragraph.

FACTS

The original decision provided the following outline of the key facts:

> . . . Kerr was employed by Jannex, which is a greeting card and calendar distributor based in Ontario. He was employed in British Columbia. He worked for the Employer between February 21, 1994 and November 30, 1998, as a sales representative, thought he was off on medical leave between May and November, 1998 and was in receipt of benefits under the Employer's benefit plan. He was paid on a commission basis and did not receive vacation pay or statutory holiday pay. Commissions were paid when the order was shipped, not when the order was placed.

The Adjudicator of the original decision analysed each of the grounds of appeal and, except for the question of whether "advances" on commissions could be used to satisfy the minimum wage requirements of the *Act*, rejected them.

Kerr was paid his commission earnings on a monthly basis. There were four months during his period of employment where he was paid less than minimum wage, February and December 1997 and February and March 1998. The Determination found he was owed wages for those months and calculated the amounts as follows:

	minimum wage	what the employer paid
February 1997	$1,050.00	$843.12
December 1997	$787.50	$615.12
February 1998	$1,050.00	$508.10
March 1998	$1,155.00	$794.30

The Determination, among other things, ordered Jannex to pay the difference between what the employer paid in those months and the minimum wage. In April and May 1998, Jannex extended Kerr a total of $6000.00 ($3000.00 in each of those two months). This amount was shown on the employer's records as a "loan" to be repaid from commissions earned in August, 1998. The amount was recovered by Jannex from commissions payable to Kerr in August, September, October and November 1998. There was no analysis in the original decision whether the $6000.00 was "wages" under the *Act*.

ARGUMENT AND ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

> *116. (1) On application under subsection (2) or on its own motion, the tribunal may*
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> *(a) reconsider any order or decision of the tribunal, and*
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> *(b) cancel or vary the order or decision or refer the matter back to the original panel.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section.*
>
> *(3) An application may be made only once with respect to the same order or decision.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal noted:

> To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and the Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have

> their disputes heard, and would likely advantage parties with the resources to "litigate".

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. In *Milan Holdings Ltd., supra*, the Tribunal outlined that analysis:

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).
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> (b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).
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> (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.
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> (d) The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their

> importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in a previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96). . .

The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

Consistent with the approach outlined above, we will first assess whether the applicants have established any matters that warrant reconsideration.

We find both applications for reconsideration have been filed in a timely fashion. We will consider the application filed by Jannex first. Before considering the specific points raised by Jannex, it may be worthwhile to review some of the principles that were operating in their appeal and which have some bearing on the appropriateness of their reconsideration application.

First, Jannex was the appellant and as the appellant had a burden in the appeal to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. As stated in the original decision:

> The appellant has the burden of showing the Determination is wrong.

That is a correct statement of the obligation on a party who brings an appeal to the Tribunal. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

Placing the risk of non-persuasion on an appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director or to require the Director and the individual to re-establish the validity of the claim.

Second, where an appellant is challenging a conclusion of fact, the appellant must show that the conclusion of fact was simply based on wrong information, that it was manifestly unfair or that there was no rational basis upon which the findings of fact could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

Third, the Director is not the statutory agent for the employees named in a determination nor is the Director the "respondent" in an appeal. When a complaint is filed, the Director has a statutory obligation, subject to subsection 76(2), to investigate and, potentially, to issue a Determination. If the Determination is appealed, the Director has a right to participate in the appeal process. The Director's participation and attendance in an appeal is confined to explaining the underlying basis for the Determination, including showing the Determination was the product of a full and fair investigation (see *Re BWI Business World Incorporated*, BC EST #D050/96). The *Act* is broad based remedial legislation. The Tribunal made the following comments, in *Maurer Construction Ltd. operating Maurer Log Homes*, BC EST #D140/00, on what impact the conduct of the Director might have on an individual's right to claim for the minimum statutory terms and conditions of employment provided by the *Act*:

> The best position Mr. Maurer can take in all the circumstances is that, as a result of his dealings with Ms. Miller, he had been led to believe there was an agreement and expected the overtime issue would be resolved by having the employees sign a Release. Regardless of the legitimacy of his belief or his expectation, the circumstances in which they arose can neither create nor defeat substantive rights and, more specifically, cannot be relied on to deprive the individuals in this case of the minimum employment standards provided in the Act, which is, after all, broadly based remedial legislation. The following comments, expressed by the Ontario Court of Appeal in *Libbey Canada Inc. v. Ontario [Ministry of Labour]*, (1995) 26 O.R. (3d) 125, are in my view applicable:
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> > The *[Employment Standards Act]* was enacted for the benefit of the public, and in particular for employees. The statute imposes a positive duty on any employment standards officer who becomes seized of a claim for wages under the Act to investigate and decide that claim. See Part XV, and particularly ss. 61(3), 63, 64, and 65 of the Act. Having regard to the positive duty there is just no room for the setting up of an estoppel, based upon negligent or other misrepresentation on the part of a Ministry official to prevent the performance of that positive duty: see *Maritime Electric Co. v. General Dairies Ltd.*, [1937] 1 D.L.R. 609, [1937] A.C. 610 (P.C.). See also *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*, [1994] 1 S.C.R. 80, 110 D.L.R. (4th) 449, a decision of the Supreme Court of Canada dealing with common law estoppel as against a public utilities public body. It is noted that both the majority opinion of Major J. and the minority opinion of Iacobucci J. did not question the validity of this statement from the reasons of Lord Maugham at p. 613 D.L.R.:
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> > > The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case . . . where as here the statute imposes a duty of a positive kind, not avoidable by the

> performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence . . . it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part.

In our view the above comments apply generally to the conduct of the Director or a delegate of the Director during the investigation of complaint, unless such conduct raises natural justice concerns. In other words, Jannex cannot escape their obligation to comply with the minimum statutory requirements of the *Act* by showing the manner in which the Director carried her duty under the *Act* was unsatisfactory.

1. Jannex' Application

Returning to the application for reconsideration filed by Jannex, we have no difficulty at all concluding Jannex has not established any matter that warrants reconsideration and, accordingly, their application is denied. We will comment briefly on the arguments raised by Jannex.

(a) Factual Errors

We have reviewed the Determination and the appeal of that Determination filed by Jannex. The Determination finds, "Kerr worked from February 21, 1994 to November 30, 1998 . . .". That finding was not challenged on appeal, even as an alternative argument. It is not the function of the Tribunal on reconsideration to address arguments that could have and should have been raised in the appeal.

The Adjudicator in the original decision stated:

> . . . Jannex concedes that it withheld and remitted U.I. and C.P.P. It also provided disability benefits.

Jannex challenges that conclusion. In our view, however, there was ample material in the file to support the conclusion made. Even if that were not so, Jannnex has not shown the conclusion was wrong and has not justified its assertion that such finding was "significant" to the Adjudicator's conclusion on Kerr's status as an employee.

(b) Disclosure

There is nothing raised in the application for reconsideration on this point that was not raised and addressed by the Adjudicator, either in the preliminary decision of May 10, 2000 or in

the original decision. There is also nothing to support the allegation Jannex was denied a fair hearing. Jannex knew the complaint made against it and was given the opportunity to respond. There is no entitlement in the *Act* to either demand or be provided with "particulars" (see *Re Jack Verburg operating Sicamous Bobcat*, BC EST#D417/98). The decision of the Adjudicator to order disclosure of some documents went beyond what is contemplated in Section 77 of the *Act* and was viewed by the Adjudicator as an exercise of the discretion given to the Tribunal in Sections 108 and 109 of the *Act*. Similarly, the decision to deny the additional disclosure sought by Jannex can only be viewed as an exercise of that same discretion and Jannex has not shown any reason that would compel us to conclude such discretion was incorrectly or improperly exercised.

(c) Cross Examination of the Delegate

This point was fully argued to the Adjudicator. We agree completely with the original decision. The delegate did what she was statutorily directed to do. By its very definition, doing what the statute directs or requires to be done cannot be "improper". In any event, and in view of the comments of the Tribunal from *Maurer Construction Ltd. operating Maurer Log Homes, supra*, the conduct of the delegate, even if it could be considered "improper" in the sense alleged by Jannex[1], cannot be used to defeat Kerr's rights under the *Act* nor deny him a remedy provided by the *Act*.

(d) Other Arguments

The remaining arguments on the application filed by Jannex do little more than revisit all of the arguments made by Jannex on the appeal. Most of these arguments only challenge the findings of fact made by the Adjudicator. It is not the function of the Tribunal in a reconsideration application to simply re-weigh the evidence before the Adjudicator of the original decision. We have not been persuaded by Jannex that there was any reviewable error in the findings of fact made by in the original decision. As noted above, the burden on Jannex when challenging a conclusion of fact made by the Director was to show that factual conclusion was clearly wrong, manifestly unfair or that there was no rational basis for it. They failed to satisfy that burden on appeal and have done no better on reconsideration.

The remaining arguments challenge the application of Sections 80 and 88 of the *Act* to the circumstances. Jannex has not persuaded us that there was any error in how Sections 80 and 88 of the *Act* were interpreted and applied.

[1]Jannex alleged that the delegate acted improperly when she "added" additional matters to the complaint (*vis.* "illegal" deductions, minimum wage and potential penalties) for the purpose of compelling Jannex to settle the complaint.

2. The Director's Application

In our view, the issue raised in the Director's application is one that warrants reconsideration. The issue raises a significant question of law and fact under the *Act*. In reviewing the Director's application, we also have considered the arguments made by Jannex on this issue.

It is worthwhile, for the purposes of our analysis, to restate the finding in the Determination that was considered in the original decision:

> In the months of February and December 1997 and February and March 1998 Kerr received less than minimum wage. At the same time the employer indicated on Kerr's cheques a "loan" amount. Kerr characterizes this as a requested payroll advance that the employer recovered when the larger commission cheques were paid to him. This constitutes an offset, which is contrary to the Act.

The last sentence in the above passage refers to the prohibition found in Section 21 of the *Act*, which states:

> *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.*

There are exceptions to the above prohibition in Section 22 of the *Act*, but none of those had any particular relevance to the decision reached in the Determination.

In dealing with his aspect of the Determination the Adjudicator of the original decision stated:

> It does not appear from the Determination that [the Director] investigated the circumstances of these "loans". In any event, in this case there may or may not appear to have been an arrangement similar to that in *Athlone Travel*. Kerr, in one of his submissions to the Tribunal, takes issue with the employer's example based on his 1997 earnings. He says that:
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> > "During the period of January 1, 1997 to May 15, 1997, I was paid a total of $4, 287.85 including one month at $843.12."
>
> It may well be, therefore, that there was no arrangement whereby Kerr was paid at least minimum wage during each pay period, whether earned or not. In the circumstances, I prefer to refer this matter back to the Director for further investigation based on the principles set out in *Athlone Travel*.

(a) Preliminary Matter

Jannex says the application for reconsideration by the Director is premature, because the investigation directed by the original decision has not yet taken place. The Director replies that this application is based on the correctness of the original decision in respect of the "principles" to be applied in the event of a further investigation, the inference being that it is not appropriate to carry out a "further investigation" applying principles that are wrong, either in law or on the facts. The original decision was based on an agreement with the decision in *Re Athlone Travel (Oak Bay) Ltd.* and a conclusion that the facts in this case were consistent with those in that decision. Both of those conclusions are challenged. If the Director is correct on either of those points, no "further investigation" will be necessary and the Determination will stand as issued. On that basis, we do not agree that this application is premature.

(b) Re Athlone Travel (Oak Bay) Ltd. Does Not Apply

We agree with the Director's argument on this point.

The facts of *Re Athlone Travel (Oak Bay) Ltd.* that are relevant to this argument are found in the following passage from that decision:

> . . . for the first 6 months Ms. Holmes was paid a guaranteed minimum wage of $1,400.00 per month. Pay periods were bi-monthly so she was paid $700.00 each pay period. ***This amount was in excess of the minimum wage requirements of the Act.*** The employment agreement

> was that, if she earned commissions in excess of this guaranteed income, she would be paid an amount by which her commissions exceeded the $1,400.00.
>
> (emphasis added)

The decision in *Re Athlone Travel (Oak Bay) Ltd.* was predicated on evidence of an "express employment agreement" between the complainant and the employer that money paid to the complainant in each pay period which could not be attributed to commission sales earnings, would be treated as "advances" against future commission earnings and a concurrent finding that such an agreement did not offend the requirements of Sections 16 and 17 of the *Act*. That case did not address whether the employer could attribute future commissions, advances or loans to its obligation under Section 16 of the *Act* to pay minimum wage to an employee for all hours worked. As indicated above, the Adjudicator found the statutory obligation of the employer found in Section 16 of the *Act* was satisfied in every pay period.

It should also be recognized that *Re Athlone Travel (Oak Bay) Ltd.* was itself based on the approach taken by the Tribunal in *Re Wen-Di Interiors Ltd.* Like the decision in *Re Athlone Travel (Oak Bay) Ltd.*, the decision in *Re Wen-Di Interiors Ltd.* relied heavily on the terms of the employment contract. The Adjudicator in that case very clearly and carefully conveyed that his analysis and conclusion was based on what he found to be the mutual intention of the parties as expressed in the contractual arrangement:

> . . . 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.
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> (emphasis added)

The Adjudicator in *Re Wen-Di Interiors Ltd.* also reinforced in the clearest of terms the statutory obligation on an employer to pay minimum wage for each hour worked:

> In my view, the obligations set out in section 16 and 17, though obviously complementary, are nonetheless independent obligations. Employees must be paid, at least semi-monthly, 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.

The Adjudicator in *Wen-Di Interiors Ltd.* applied his analysis to the facts of that case as follows:

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

The original decision failed to take into account the effect of the "independent obligation" found in Section 16. The Adjudicator concluded that *Re Athlone Travel (Oak Bay) Ltd.* and *Re Wen-Di Interiors Ltd.* addressed the obligations of the employers in those cases under Section 17, not Section 16. The Adjudicators in the earlier cases clearly stated the statutory obligation created by Section 16, that employees must, for each pay period, be paid not less than the minimum wage for each hour worked. Jannex had the burden of showing that, contrary to the finding in the Determination, Kerr did receive the minimum wage in any of the four months in question. Jannex did not base its appeal on any such assertion.

In fact, Kerr did not receive the minimum wage in four months. We do not agree that the $3000.00 "loaned" or "advanced" to Kerr on April 16, 1998 can be viewed as satisfying minimum wage obligation in Section 16 of the *Act* for March 1998[2]. The only wages paid to Kerr in those months were his commission earnings, which fell below the minimum wage. The failure to pay the minimum wage in any pay period violates Section 16, the issue addressed in the Determination. The evidence shows that other amounts advanced were extraordinary transactions intended by the parties to be a loan, repayable from future commissions. Such transactions did not meet the statutory obligations to pay the minimum wage. Therefore, it was not necessary to require the Director to investigate whether a contract existed to permit such an arrangement, since any agreement to that effect would have violated the *Act*.

The original decision questions whether or not a contractual arrangement existed between Kerr and Jannex similar to those identified in *Re Athlone Travel (Oak Bay) Ltd.* and *Re Wen-Di Interiors Ltd.* Again Jannex bore the burden of establishing that such a contract existed and did not make such a claim in its appeal. Thus, it was not open to the Adjudicator to

[2]The $3000.00 "loaned" or "advanced" to Kerr in May 1998 is irrelevant to this issue, as it was unrelated to any period in which Kerr was paid less than minimum wage.

speculate about the existence of a contract. Neither *Re Athlone Travel (Oak Bay) Ltd.* nor *Re Wen-Di Interiors Ltd.* concluded that the *Act* allows wages to be "averaged" over multiple pay periods to meet the requirements of Section 16.

The reconsideration is successful. The conclusion in the Determination on the minimum wage issue should have been confirmed. In light of our conclusion on the above argument, it is not necessary to consider the other arguments raised by the Director.

ORDER

Pursuant to Section 116 of the *Act*, we order the original decision, BC EST#D438/00, to be varied to order the Determination dated January 14, 2000 be confirmed in the amount of $15,808.20, together with any interest that may have accrued on that amount under Section 88 of the *Act*.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal

FERN JEFFRIES

Fern Jeffries
Chair
Employment Standards Tribunal

MARK THOMPSON

Mark Thompson
Adjudicator
Employment Standards Tribunal