

An appeal

- by -

North American Trailer Centers a Wabash National Company operating as
Breadner Trailer Sales now FTSI Canada, Ltd.

(“NATC” or the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Ib S. Petersen

FILE No.: 2002/535

DATE OF DECISION: January 15, 2003

DECISION

OVERVIEW

This is an appeal by the Employer, NATC, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination of the Director issued on October 2, 2002. The Determination concluded that Mr. Bellamy was owed \$6,037.11 by his Employer.

Mr. Bellamy was terminated from his employment as an account manager with NATC. He had worked from June 25 to December 28, 2001, when he was terminated for failing to follow procedure and not meeting sales expectations.

He brought a complaint against his former Employer alleging that he was owed wages for the last month he worked and did not receive his annual vacation pay. The Delegate concluded that Mr. Bellamy was entitled to wages and vacation pay, but dismissed the claim for compensation for length of service. In her view, he was dismissed with cause. However, the Delegate did not accept the Employer’s position that Mr. Bellamy was only entitled to be paid a draw against future commissions and that the Employer was entitled to recover unearned draws from amounts from the December wages and annual vacation pay. On the contrary, the Delegate accepted Mr. Bellamy’s position that a “salary” set out in his job offer was the minimum he was to be paid for the work performed.

FACTS AND ANALYSIS

The Employer, as mentioned, appeals the determination. As the Appellant, it has the burden to persuade me that the Determination is wrong. In the circumstances, I am not persuaded that it has met the burden and, therefore, the appeal is dismissed.

The Employer takes issue with the Delegate’s conclusion that the “salary” quoted was the minimum Mr. Bellamy was entitled to be paid. The Employer says that it was clearly explained to him, in detail, before employment commenced, that his “salary would be treated as a draw on commissions.” Draws are recoverable against commissions and there is a “cap” on the amount of arrears, in Mr. Bellamy’s case, \$15,000. The employer says that Mr. Bellamy’s was not adjusted in any month because his invoiced sales were never higher than the minimum amount he was paid. All its sales employees are paid in this manner.

Mr. Bellamy takes issue with some of the Employer’s factual assertions. He does not clearly contradict the Employer’s assertion that the “salary” would be treated as draws. He says, however, that during the discussions between him and the Employer, Mr. Bokor showed him commission statements for a previous sales representative indicating substantial commission earnings. He says, as well, that the “cap” was never discussed. He also says that the \$60,000 was a base salary, and explains that he was gainfully employed in Calgary before joining NATC--at a higher base salary.

The Appellant does not respond to Mr. Bellamy’s submission.

The job offer, dated May 23, 2001, stated, *inter alia*, under the heading “compensation”:

“60,000 salary that will be treated as a draw against commissions earned. The salary will be paid bi-weekly that equates to \$2,307.69 per pay period.”

Mr. Bellamy's monthly commission statements, or summaries, attached to the appeal submission, confirms that Mr. Bellamy was never paid less than this amount. These summaries stated clearly the commissions earned in the previous month and the "Monthly advance (if comm < advance) [sic]." Each of the summaries indicated the "Recoverable Advances (if any--forward to next month)." In Mr. Bellamy's case, these "recoverable advances" grew from \$1,097.93 (August 15, 2001 statement) to \$13,937.21 (January 15, 2002 statement). His commission earning ranged from \$668.68 (November) to a high of \$6,394.57 (October). According to the summaries, in each month the Employer clearly deducted the previous months "recoverable advances" from the net commissions. In each pay period, however, Mr. Bellamy was paid the amount set out in the offer (rounded up).

Despite the commission summaries, and the Employer's assertion that it was clearly explained to Mr. Bellamy that his "salary" was a "draw," I am not persuaded that the Delegate erred in her conclusion. The offer of employment, accepted by Mr. Bellamy, speaks to a "\$60,000 salary." I understand the Employer's argument to be that Mr. Bellamy--based on the written offer and its explanations during the discussions prior to hiring--accepted an employment agreement that provided for remuneration based on commissions exclusively with a draw of \$2,307.69 per bi-weekly pay period. I do not think the evidence supports the Employer's position. If that was what the parties intended, they could have stated that expressly. Quite the contrary, if I were agree with the Employer's argument, in my view, the phrase "\$60,000 salary" would be rendered meaningless. "Salary" had been defined as "a fixed regular payment made by an employer to an employee, esp. for ... non-manual work" (see: *The Canadian Oxford Dictionary*, Don Mills: Oxford University Press, 1998). The offer of employment speaks to the payment of a bi-weekly "salary." It sets out the amount payable. I do not think, as is suggested in a memorandum from the Employer to the Delegate, that "wages are draw and in BC salesmen are entitled to wages of no less than minimum wage." The Employer's interpretation, in my view, makes little sense and I reject it.

In short, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 2, 2002, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal