

An appeal

- by -

John Bergeron
("employee")

- 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: Paul E. Love

FILE No.: 2000/844

DATE OF DECISION: February 6, 2001

DECISION

OVERVIEW

This is an appeal filed by an employee who claims commissioned earnings, in addition to a base salary. The employee alleges an oral contract made after he commenced employment. The oral contract is denied by the employer, and by a witness who the employee suggests could verify his version of the contract. The Delegate found that there was no proof of the contract. I confirmed the Determination as I was not satisfied that the employee established any error in the Determination.

FACTS

I decided this matter after reading the written file materials containing the Determination, submissions of the employee, employer, and the Delegate, and without a hearing.

John Bergeron was employed by Graffico Printers & Design Inc. (“Graffico or employer”) as a client services and salesperson from March 27, 2000 to September 11, 2000. He was hired at an annual salary of \$36,000. The dispute in this case concerns whether Bergeron is entitled to be paid, in addition to his base salary, commissions or a percentage which relates to sales variance. Bergeron alleges that he was entitled to 50 % of any excess revenue on a sale that was made over the price set by the company.

Mr. Bergeron alleges that there was an oral contract in support of this, which was effective as of July 2, 2000. Mr. Bergeron indicates that at the end of July he was told by the employer that there was no money to pay him, but maybe at the end of August. Mr. Bergeron indicates that the company reneged on the agreement after he resigned in the last week in August of 2000. Mr. Bergeron indicated to the Delegate that Chris Baker, the former sales manager of the employer, could support his version of the oral contract. The Delegate investigated Mr. Bergeron’s allegation, and confirmed that Chris Baker would not confirm the terms of an oral contract as suggested by Bergeron.

The employer’s written submission to the Tribunal attaches a written statement from Mr. Baker. In the statement, Chris Baker indicates that Mr. Bergeron had recently moved to Vancouver from the Ottawa area, and accepted a position with Graffico for a wage rate that Bergeron thought was not reflective of his experience in the industry. Bergeron was told that the company had aggressive growth plans, and that Bergeron would benefit from those growth plans in the future. Mr. Baker indicates that he told the complainant that he would “look into” Mr. Bergeron’s proposal concerning the commission based on variance, and asked Mr. Bergeron to “track” the amount of the sales variance. Mr. Baker indicates he and the president of the employer thought this might be an excellent way to compensate sales

employees, once the company was in better health. Mr. Baker says he communicated the company's position to Mr. Bergeron.

The company's position to the Delegate is that it agreed to study Mr. Bergeron's request over a two month period, but did not agree to a commission or percentage structure. The company advised the Delegate that Mr. Bergeron was paid a very good base salary uncommon for printing sales representatives.

Bergeron argues that the Delegate erred in failing to find an entitlement to commission earnings. He indicates that he would not have charged extra money if he was not going to be paid his share of the money as agreed.

ISSUE

Did the Delegate err in determining that Mr. Bergeron failed to establish an entitlement to commission earnings.

ANALYSIS

In an appeal under the *Act* the burden rests with the appellant, in this case the employee, to demonstrate an error in the determination such that I should vary or cancel the determination. Mr. Bergeron's case rests on proof of a contract. The Delegate followed the basic notion that "he who asserts must prove". The Delegate considered the information supplied by the employee, and checked with Chris Baker, who Mr. Bergeron suggested would confirm his story. The Delegate also investigated and obtained the employer's evidence.

As a result of her investigation the Delegate concluded that there was no agreement between the parties concerning a commission based on sales variance, because there was no agreement as to when the commission would be implemented. The Delegate concluded the *Act* was not contravened and closed the file.

I see no error in the manner in which the Delegate investigated Mr. Bergeron's complaint. The Delegate had a factual foundation for concluding that Mr. Bergeron's complaint could not be proven. I am not prepared to disturb the factual findings of the Delegate, as these findings appear to be reasonable, in the sense that the findings are supported by evidence. As a matter of law I am not satisfied that the evidence before the Delegate indicates that a "contract" was formed between the parties, for wages in excess of the base salary agreed to by the parties when Mr. Bergeron commenced his employment. I have no doubt that Mr. Bergeron did charge the variance in hopes of persuading the employer that sufficient value could be generated to support an increase in remuneration. This, however, is not proof of a contract between the parties. I, therefore, find that Mr. Bergeron has not established any error in the Determination.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated November 15, 2000 is confirmed.

PAUL E. LOVE

**Paul E. Love
Adjudicator
Employment Standards Tribunal**