

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Adriano's Performance Imports Inc.  
operating as Adriano's Burnaby Hyundai

(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE NO.:** 1999/655

**DATE OF HEARING:** January 26, 2000

**DATE OF DECISION:** February 14, 2000

**DECISION**

**APPEARANCES**

Pat Pellegrino	For the Employer
Majid Rohani	For himself
Diane H. MacLean	For the Director of Employment Standards

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act*) by Adriano's Performance Imports Inc. operating as Adriano's Burnaby Hyundai (the "Employer") against a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 7, 1999. The Determination found that the Employer owed Majid Rohani ("Rohani") \$14,473.70 for regular wages, vacation pay and commissions under a contract of employment between the two parties, plus interest.

The Employer appealed the Determination on the grounds that the Director's delegate incorrectly interpreted its contract of employment with Rohani and made an error in the calculation of wages paid to Rohani.

The Director's delegate argued that the Employer had not cooperated in the investigation leading up to the Determination and should not be allowed to introduce evidence in support of its appeal that it had not produced during the investigation.

**ISSUE TO BE DECIDED**

The issues to be decided in this case are: whether the Employer should be allowed to introduce evidence in support of its appeal that it did not produce for the Director's delegate during her investigation of Rohani's complaint, and the contents of the contract of employment between the Employer and Rohani.

**FACTS**

The Employer operates a car dealership in Burnaby. Rohani worked as a salesperson and general manager from January 1997 to September 21, 1998, the effective date of his resignation. He filed a complaint with the Employment Standards Branch on December 14, 1998. Rohani and the Employer agreed that he received a combination of salary and commission for his work. The formula for determining Rohani's compensation was the heart of this dispute. Rohani maintained that he received a salary of \$1000 per month at the beginning of his employment and an increase to \$1500 per month in January or

February 1999. In addition, he stated that he received a commission of 40 per cent of the profits on each car he sold. Rohani calculated that the Employer owed him \$12,968 in commissions, plus vacation pay on all income earned during the period of his employment.

After receiving the complaint, the Director's delegate contacted Pat Pellegrino ("Pellegrino") a principal of the Employer. On February 22, 1999 she sent him a Demand for Employer Records and a summary of Rohani's complaint. Pellegrino replied by stating that Rohani owed the Employer \$16,185 and it owed Rohani \$2,752.08, a net of \$13,613.52 Rohani owed to the Employer. At the delegate's request, Pellegrino and Rohani met with her on May 15, 1999. At the meeting, Pellegrino and Rohani agreed that several debts should be subtracted from any wages or commissions owed to him. However, the parties were unable to agree on all of the alleged debts or losses on the sales of two vehicles and the commissions for some cars sold. In particular, they disagreed on the contract of employment between the Employer and Rohani. Pellegrino stated that the commission was 25 per cent of profits, less a deduction from profits for a "lot pack" of \$600 prior to the application of the commission. The lot pack was a charge for preparing a car for sale, security while the car was in the Employer's possession and the like.

Neither party had records to support its position, so the Director's delegate asked the Employer to provide detailed examples of commissions paid prior to Rohani's resignation. Pellegrino did send the delegate a statement of debts Rohani owed to the Employer and a list of commissions to which Rohani was entitled. The Employer did not produce payroll records. Nor did it produce the other records the delegate had requested. She contacted the Employer on several occasions and was told that the matter was settled. Rohani denied that any settlement had been reached. In addition, the Employer stated that it had sent Rohani a cheque for \$1000 in partial settlement of the amount it owed him. Rohani stated that he had not settled his dispute and had not received the cheque. On September 16, 1999, the delegate wrote to the Employer's accountant as follows:

Mr. Rohani denies that there was an agreement or that he received the cheque for \$1000. Unless I have further proof of this agreement and the payments made, I have no option but to issue a determination for the full amount of wages found to be owing. For example, if the cheque for \$1000 has been cashed, you will have a copy of the returned cheque. If so, I would like to see the original cheque right away.

Please note that I have been asking the employer for several months to provide any additional evidence in regard to the complaint, or in regard to the existence of a settlement. The employer has not been prompt in dealing with these requests, and I have not found it easy to contact you either. I must receive convincing evidence of a settlement or any other evidence about Mr. Rohani's wage claim by 4:30 p.m., Tuesday, September 21. If I do not receive the required information by then, I will be issuing a determination against the employer and taking appropriate collection action.

During her investigation, the Director's delegate asked the Automotive Retailers Association for information about industry practice. She was told that commissions varied according to the salary paid, but 25 per cent of gross profits was not unusual with a small lot pack. A salary of \$1500 per month plus 40 per cent commission would be unusual. Lot packs averaged between \$75 and \$100 per vehicle. If a lot pack of \$600 were charged, a 40 per cent commission might be appropriate.

In the absence of any of the Employer's records and taking into account industry practice, the delegate calculated wages owed to Rohani on the basis of a monthly salary of \$1500, plus a 40 per cent commission and a lot pack of \$600 per car sold. Rohani had alleged that he was not paid from August 1, 1998 to September 21, 1998. The Employer reported that Rohani had been paid in cash for his work during that time, but was unable to provide any proof of payment, so the Determination provided for compensation for his work during that period, plus vacation pay for the entire period of Rohani's employment. The delegate further found that the debts the Employer claimed that Rohani had incurred were in fact business costs as defined in Section 21 of the *Act*.

Pellegrino appealed the Determination, arguing that industry practice provided for a commission of 25 per cent of the net profit on the sale of a car, after a lot pack of \$600. He also argued that Rohani had been paid for August and September 1998. Pellegrino provided calculations for a number of vehicles sold in 1998, together with a calculation of a 25 per cent commission due to Rohani after the deduction of a lot pack. He offered a cheque for the net amount of commissions due to Rohani, plus vacation pay, less wages for August 1998 and authorized deductions, for a net amount of \$4902.03.

Pellegrino testified that he had never intended to be uncooperative with the delegate, but personal problems had delayed his response to her requests for information. He also provided a record of cheques issued to Rohani for 1997, ranging from \$1000 to \$5600. The total amount paid was \$29,535.62, from which he deducted \$8,951.40 as "amount on T4," leaving a net commission of \$20,584.22. He stated that these amounts were "salary advances," but could not provide any evidence of the method by which individual amounts were calculated. According to Pellegrino, he paid Rohani advances when Rohani requested them. His accountant, who was unavailable for the hearing, paid the appropriate amounts to Revenue Canada for withholding taxes.

Rohani argued that the business did not have a high volume, so overhead was high. He found cars to be offered for sale, which explained the 40 per cent commission rate. He maintained that he had always received the rate and had not heard of the 25 per cent rate until the investigation of his complaint was underway. The monthly salary was in compensation for his work as the general manager of the business. Rohani denied having been paid for August 1998.

**ANALYSIS**

The Director's delegate argued that the best evidence of the commission structure under which Rohani worked should have been a record of his compensation prior to his resignation. Despite repeated requests, the Employer did not provide that information. In the absence of any records or evidence of a contract, she had accepted Rohani's evidence. The Employer should not be able to withhold information during the investigation and then produce it before the Tribunal in support of its case. In addition, the Employer's accountant could not provide any evidence that Rohani was paid for August 1998, although he did receive cheques during that period. The Employer did not provide any payroll records for August 1998.

The Tribunal has consistently held that an employer cannot rely on evidence at a hearing that has been withheld from a delegate of the Director during her investigation of a complaint. Section 112 of the *Act* does not provide for a re-examination of the complaint, and the Tribunal will not allow the appeal procedure to make the case that should have been given to the delegate in the course of her investigation. See *Re Tri-West Tractor Ltd.* BCEST #D268/96, *Re Kaiser Stables Ltd.* BCEST #D058/97. This case falls squarely under the rule stated in the cases cited and numerous other decisions of the Tribunal.

Although the Employer did provide additional information after the Determination was issued, it never produced the payroll information required by Section 28 of the *Act*. If an employer has failed to keep payroll records, the Director's delegate may accept an employee's evidence in support of a complaint. *Re Rodigue*, BCEST #D600/97. In short, apart from the procedural issue discussed above, the evidence the Employer in this case produced at the hearing was insufficient to meet its burden of demonstrating that the Determination was incorrect.

**ORDER**

For these reasons, the Determination of October 7, 1999 is confirmed. The Employer is obligated to pay Rohani \$14,473.70, plus any additional interest due under Section 88 of the *Act* from the date of the Determination.

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**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**