

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 -

566105 B.C. Ltd. o/a Consumers Choice
("Consumers" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No: 1999/733

DATE OF HEARING: February 14, 2000

DATE OF DECISION: March 22, 2000

DECISION

APPEARANCES:

Mr. Peter Smith on behalf of the Employer (“Smith”)
Mr. Henry Mallin on behalf of himself (“Mallin” or the “Employee”)

FACTS AND ANALYSIS

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on November 16, 1999 which determined that Mallin was owed wages (Section 18) and had been terminated from his employment with the Employer (Section 63). The Determination awarded him:

1. \$4,000.00 - wages for March 1999,
2. \$1,775.00 - outstanding commissions prior to March 1999,
3. \$ 923.07 - compensation for length of service, and
4. \$ 267.92 - vacation pay.

With interest, the Determination amount came to a total of \$7,230.13. There is no dispute between the parties that the Employer subsequently paid \$2,100 to Mallin, and that this should be deducted from the amount of the Determination.

The Employer appeals the Determination. The appellant Employer has the burden to show on the balance of probabilities that the delegate erred in making the Determination. For the reasons set out below, I am not satisfied that the Employer has met that burden.

Smith is a director of Consumers Choice. He explains that the day-to-day operations of the company was left to a Dennis Pool, who did not appear at the hearing. Mallin worked as a sales representative for the Employer and a related company between July 1998 and April 6, 1999. In my view, the fact that Pool did not testify leaves the Employer in a position where it cannot dispute the key factual underpinnings of the Determination.

1. With respect to the claim for wages for March 1999, Mallin testified that he made an agreement with Pool that he would be paid an increased base salary, up from \$2,000 to \$4,000 per month and that he would be entitled to a bonus as opposed to a 10% commission. Pool confirmed this in a letter “To whom it may concern”. Smith’s assertion that he did not agree to the salary increase, or did not know about it, is immaterial in my view. It appears that Smith may have been unfortunate in his choice of business partner. However, there is no doubt that Pool was the manager, indeed, Smith agreed with that characterization, and at the very least had the apparent authority to enter

into the agreement with Mallin on behalf of the Employer. Mallin says he worked in March and that he was not paid the agreed amount, the \$4,000. Smith does not have direct knowledge of this.

2. Mallin explained that the amount of the bonus awarded in the Determination was based on sales brought in. Smith acknowledged that he was not in a position to dispute the amount or the basis for the commissions.
3. With respect to compensation for length of service, Mallin explained that he considered his employment terminated when the Employer refused to pay his salary at the end of March 1999. Smith is not in a position to provide direct evidence on this point.

Smith's central contention at the hearing was that Mallin had been overpaid prior to March 1999 because he had been paid \$2,000 without statutory remittances. Smith estimated that each cheque for \$1,000 equals some \$1,350 when the statutory deductions are taken into account and he presented some payroll documents to that effect. He readily agreed that these documents were prepared after the fact for this hearing. Smith explained that he had, in fact, made the remittances to Revenue Canada on behalf of Mallin. First, there was no documentary evidence to support these payments and I am going to dismiss this ground of appeal as well. Second, I am not in a position to assess the correctness of the amounts attributed to the miscellaneous statutory deductions. In my view, these are better left with Revenue Canada.

I would like to add that both Mallin and Smith appeared to me to honorable and credible witnesses. I have a considerable amount of sympathy for Smith who, it appears, have been left "holding the bag" for his business partner and, according to his testimony, still owes considerable amounts of money to various creditors of the business.

ORDER

The Determination dated November 16, 1999 is confirmed, except to the extent that \$2,100 should be deducted from the amount of the Determination.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal