

An appeal

- by -

Regency Motor Cars Inc. operating as Regency GM
(“Regency GM”)

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2006A/74

DATE OF DECISION: August 30, 2006

DECISION

SUBMISSIONS

John Rundle	on behalf of Regency Motor Cars Inc.
Taylor Hart Drew	on his own behalf
Rod Bianchini	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Regency Motor Cars Inc. operating as Regency GM (“Regency GM”) of a Determination that was issued on May 12, 2006 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Regency GM had contravened Part 3, Section 18 of the *Act* in respect of the employment of Taylor Hart Drew (“Drew”) and ordered Regency GM to pay Drew an amount of \$5,994.51, an amount which included wages and interest.
2. The Director also imposed an administrative penalty on Regency GM under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
3. The total amount of the Determination is \$6,494.51.
4. Regency GM says the Director erred in law and failed to observe principles of natural justice in making the Determination.
5. Regency GM alleges the Director erred in law by imposing interest for a period of time that was extended by a delay by the Director in issuing the Determination. Regency GM also alleges the Director erred in interpreting the contract of employment between Regency GM and Drew.
6. The appeal does not identify in what sense the Director is alleged to have failed to observe principles of natural justice in making the Determination. The absence of any particulars concerning this ground of appeal will be addressed later.
7. No oral hearing has been requested and the Tribunal has decided this appeal can be decided without an oral hearing.

ISSUE

8. The issues in this appeal relate to the calculation of interest on the wages found owing and the interpretation by the Director of the contract of employment between Regency GM and Drew.

THE FACTS

9. Regency GM operates an auto sales and leasing business. Drew was employed as a General Sales Manager from July 12, 2004 to July 11, 2005 under a contract of employment which, among other things, guaranteed him “a minimum income of not less than \$72,000.00” in the first year of employment.
10. Following the termination of his employment, Drew filed a complaint alleging Regency GM had failed to pay him all wages owed, specifically he claimed he was paid an amount of wages that was less than the minimum income guarantee in the contract of employment. Regency GM took the position that Drew had received more than the amount guaranteed to him and that nothing more was owed.
11. What separated the positions of the parties was whether Drew’s share of cash incentives, received through the participation of Regency GM in a “Sales Team Challenge” set up by General Motors of Canada Limited for General Motors of Canada Dealers and Saturn Saab Retailers, was or was not wages.
12. The Director concluded the cash incentive payments made to Drew were not “wages” under the *Act* and, based on his interpretation of the contract of employment, were not intended to be included in the minimum income guarantee. Based on those conclusions, the Director found Regency GM had not paid Drew the amount agreed in the contract of employment and ordered Regency GM to pay the difference between the amount of wages paid to Drew and minimum income guarantee.

ARGUMENT AND ANALYSIS

13. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:
 112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
 - (a) *the director erred in law;*
 - (b) *the director failed to observe the principles of natural justice in making the determination;*
 - (c) *evidence has become available that was not available at the time the determination was made.*
14. The burden of showing there has been a breach of natural justice is on Regency GM (see *James Hubert D’Hondt operating as D’Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144/04). The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).
15. Regency GM has framed its appeal as an error of law and a failure to comply with principles of natural justice in making the Determination. The arguments supporting these grounds of appeal, however, indicate the substance of the appeal is really only about the interpretation by the Director of the contract of employment.
16. Regency GM has not identified, or shown, a breach of natural justice. Accordingly, Regency GM has failed to meet the burden imposed on it and this ground of appeal is dismissed.

17. Regency GM has raised concerns about “additional” interest being added by the Director under Section 88 of the *Act*. The basis of the concern is that the delegate conducting the complaint hearing indicated his decision would be delivered in three weeks, but the Determination was not made until approximately four months from the date of the complaint hearing. Regency GM says it is unfair that interest should accrue where the Director takes longer than indicated to make a Determination.
18. The legislation is clear about the payment of interest. The language of Section 88 is mandatory. Subsection 88(1) says, in part, “the employer must pay interest at the prescribed rate on the wages or other amount”. It is payable on unpaid wages from the earlier of the date of termination or the date a complaint is delivered to the Director. Neither the Director nor the Tribunal have authority to relieve an employer from paying interest on unpaid wages.
19. There has been no error made by the Director in applying the provisions of Section 88 and this aspect of the appeal is also dismissed.
20. As indicated above, the main thrust of this appeal is a disagreement by Regency GM with the interpretation placed by the Director on the minimum income guarantee provision in the employment contract between Regency GM and Drew. That provision, which is found in paragraph 3, which sets out the “remuneration” which was to be paid to Drew, reads:
- (e) for the first year only, the company will guarantee a minimum income of not less than \$72,000.000. In the event that the total income is less than the above amount, the company will pay the balance on the anniversary of the employment start date.
21. Other aspects of the remuneration being paid to Drew included a monthly salary, a commission on vehicle sales and business office profits, an income guarantee for the first three months of employment, a vehicle and a gas allowance.
22. The Director noted there was no mention of bonuses, of any kind, in the employment contract. This fact, together with the fact of a continuing reference by both parties during the complaint hearing to the term “income” as being ‘wages’, led the Director to a finding that the minimum income guarantee in the employment contract was intended to be a guarantee of a minimum amount of wages. The Director concluded the bonus in question was not wages, but was similar to a gift or incentive that was paid in addition to the wages promised and that Regency GM could not use the bonus to offset wages which were promised.
23. Regency GM argues the Director erred in concluding the term “income” in the employment contract did not include bonuses paid to Drew from time to time by them. Regency GM characterizes this error as one of law, pointing out the term “income” is not defined in the *Act* or in the *Interpretation Act* [RSBC 1996] ch. 238. They rely on the definition of “income” found in the federal *Income Tax Act* which, they argue, is broad enough to have captured any bonuses paid to Drew. Regency GM says the Director should not have used the definition of ‘wages’ in the *Act* to determine what was included in the minimum income guarantee found in the employment contract.
24. In my view, the issue raised in this appeal does not turn on the definition of “income” found in federal tax legislation, or even on the definition of “wages” found in the *Act*. Rather, the key question – of whether Drew was paid the minimum income guaranteed by the employment contract – turns on what the parties to the employment contract intended to be included in that guarantee. The reliance by Regency GM on a

definition of “income” taken from federal legislation does not advance their appeal. The only aspect of their appeal which addresses the key question is their assertion that:

If Regency GM and Mr. Drew had wanted to say “salary” or “wages” in our agreement, we could have, but we said “income” . . .

25. Making that assertion, however, does not confirm what was intended to be included in “income” for the purposes of the guarantee. The Director was persuaded in his decision by the conduct of the parties during the complaint process and by the absence of any reference in the employment contract to bonuses.
26. The burden in this appeal is on Regency GM to show an error has been made by the Director that warrants the intervention of the Tribunal. I am not satisfied that burden has been met. There is nothing in the material or in the appeal that suggests the bonuses paid to Drew were intended to be included in minimum income guarantee set out in the paragraph of the employment contract describing Drew’s remuneration. Nor is there anything in the material or the appeal which suggests the reference to “income” in paragraph 3(e) of the employment contract was intended to be given the meaning attributed to that term in the federal tax legislation.
27. On the material, the Director was entitled to conclude the term “income”, for the purposes of the minimum income guarantee in the employment contract, was contemplated to include only what were “wages” under the *Act*. More particularly, the Director was entitled to conclude the minimum income guarantee was not intended to include any bonuses paid to Drew.
28. In sum, the appeal is dismissed.

ORDER

29. Pursuant to Section 115 of the *Act*, I order the Determination dated May 12, 2006 be confirmed in the amount of \$6,494.51, together with any interest that has accrued on that amount under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal