

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 -

Jeff Parsons
(" Parsons ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No: 1999/728

DATE OF HEARING: February 28, 2000

DATE OF DECISION: March 10, 2000

DECISION

APPEARANCES:

for the appellant	in person
for Business Loan Group Inc.	Rod Owens

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Jeff Parsons (“Parsons”) of a Determination which was issued on November 16, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination addressed several areas of complaint made by Parsons in respect of his employment with Business Loan Group Inc. (“BLG”), including claims for unpaid wages, unpaid vacation pay, length of service compensation and compensation for false representations. The Determination found the Act had not been contravened by BLG. The only one of those original areas of complaint that is raised in this appeal is the conclusion of the Director that no false representations relating to those matters enumerated in Section 8 of the Act were made to Parsons by BLG.

Parsons says that conclusion is patently wrong. He contends the Director never considered several areas where BLG made false representations. He identifies the following points as having been ignored by the Director:

- that BLG misrepresented the position, which was to manage 10 people;
- that BLG misrepresented the type of work by not disclosing there were other duties Parsons would be required to perform than what was outlined in his employment agreement;
- that BLG misrepresented the wages, which was to be a commission based on the productivity of the 10 people he was hired to manage; and
- that BLG misrepresented the conditions of employment, because it was promised to him that the principals of the company would work with him in hiring employees and did not do so.

ISSUES TO BE DECIDED

The sole issue in this appeal is whether Parsons has shown the Determination to be wrong in fact or in law.

FACTS

The following facts are relevant to this appeal:

1. BLG was, during the period of time relating to this appeal, a company specializing in providing financial services to small businesses. While it performed some financial consulting and was attempting to evolve into other areas of interest relating to its primary

objective, its main business was in brokering and administering loans for equipment purchases.

2. Parsons was hired by BLG as their Okanagan-Kootenay Territory Manager commencing November 12, 1998. He was hired from many applicants based on his qualification and experience as a licenced mortgage broker, his background as a manager in a collections and administration department and his experience in credit and collections.
3. During the hiring process, Parsons was interviewed on separate occasions by Arbur Fernets, who was the president of BLG at the time, and by Rod Owens, Mr. Fernets' partner in the business.
4. Parsons says that Mr. Fernets misrepresented a number of facts relating to the business. In a submission to the Director, dated August 3, 1999, Parsons made the following statement:

Arburs told me that BLG was so successful they had to hire my position and six more sales reps to handle the volumes of business. The existing 4 reps I was to supervise were all earning 6 figure incomes.

5. Parsons also says that Mr. Owens also made misrepresentations regarding the success of the company and the sales representatives.
6. Parsons was offered the position on or about November 4, 1998. On November 6, 1998, Parsons signed an employment agreement. The position offered is described as follows:
 1. **POSITION OFFERED:** You will commence employment as the Okanagan-Kootenay Territory Manager. The boundaries of that Territory generally extend from Kamloops and Golden in the North, to the U.S. border in the South, and from Flathead in the East to Osoyoos in the West. BLG may, in the future, assign you to a different Territory. A number of Finance Managers will report to you. While the number may change, there are currently four such Finance Managers in this Territory. You will report directly to Arbur Fernets.

The duties and responsibilities of the position were more specifically detailed in Schedule "B" to the agreement.

7. Paragraph 12 of Schedule "B" stated:
 12. However, this list is not taken to be fixed or exhaustive and you will be expected to perform any reasonable task given by a more senior officer of the company.

8. Parsons was given the responsibility to hire and train additional Finance Managers according to an attached schedule that showed locations within Parsons' Territory where BLG would have Finance Managers operating.
9. Another schedule, "C3" laid out the company's objectives for the Territory from October 1998 to July 1999 and showed that one of the objectives was to increase the number of Finance Managers from 4 to 10 by February 1, 1999 and to have those Finance Managers generating approximately \$375,000 in loans by that date. The objectives outlined in Schedule "C3" of the employment agreement were not met - by a significant margin.
10. Only two additional Finance Managers were hired during Parsons' period of employment. The Finance Managers reporting to Parsons averaged a total of approximately \$100,000.00 a month in loans during his 5½ months of employment. As Mr. Owens noted in his submission to the Director on behalf of BLG dated September 18, 1999:

After months of work we (the Company & Mr. Parsons) were unable to generate sufficient sales to support his position. Mr. Parsons refers to 20% or \$20,000 as being a significant amount that should be attributed to his management capabilities. In fact this represents on average 2 transactions. We expected a dedicated sales manager would generate 5 or 6 transactions himself and cause his employees to increase their sales a further 2 to 3 transactions each. Section "C3" of the employment agreement referred to by Mr. Parsons outlines some of our expectations.

11. The compensation Parsons was to receive was outlined as follows in the employment agreement:
 4. **COMPENSATION:** Your pay plan will be based on the commission totals generated in the Territory to which you are assigned by the Finance Managers who report to you. Schedule "A" sets out this compensation arrangement. Note that all commissions are calculated as percentages of moneys *actually received* by BLG after taking into account cancellation and charge back amounts. Schedule "A" also addresses expense amounts. BLG has the discretion to alter either the maximum amount (presently \$1400.00 per month) or its allocation amounts. You will be paid twice monthly, usually on the 1^{5th} and 30th of each month. Between November 16, 1998 and February 12, 1999, BLG agrees to pay you no less than \$3000.00 per month (pro-rated) for all services you perform as an employee.
12. The compensation paid to the Finance Managers who were or would be reporting to Parsons was also based on commission totals generated by profits on the loans they secured.
13. Parsons left a position where he had earned an average of \$50,000.00 a year over most of the last ten years to take the position offered at BLG.

ANALYSIS

Section 8 of the *Act* reads:

8. *An employer must not induce, influence or persuade a person to become an employee, or to work or be available for work, by misrepresenting*
- (a) *the availability of a position;*
 - (b) *the type of work;*
 - (c) *the wages; or*
 - (d) *the conditions of employment.*

Section 8 is a pre-hiring provision and covers only pre-hiring practices. The prohibition in Section 8 against misrepresenting is not a general prohibition, but is specific to the four matters identified: the availability of a position, the type of work, the wages and the conditions of employment. The tribunal has adopted and applied a basic legal definition of misrepresentation when considering whether an employer has misrepresented any of those four matters. That definition describes misrepresentation in the following terms:

Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false misrepresentation. That which, if accepted, leads the mind to an apprehension of a condition other or different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.

In a limited sense, an intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract and influential in producing it.

The Determination outlined the claim under Section 8 of the *Act* in the following way:

Mr. Parsons provided a detailed submission explaining his perception of the “. . . misrepresentations BLG used to hire me and mislead me about the Territory Sales Manager (TSM) position offered to me.”

He claims the picture the employer portrayed was that of success of the company and all its representatives.

Essentially, given his employment history, skills and experiences, he believes he was used for his contacts.

The Director concluded the facts did not support a conclusion that BLG had contravened Section 8 of the *Act*. As part of that conclusion, the Director stated the facts:

Mr. Parsons was indeed hired and worked for BLG - Business Loan Group Inc. in the position he applied for at the rate of pay offered. Accordingly, I cannot conclude the employer intentionally misrepresented the availability of a position, the type of work, the wages or the conditions of employment.

To argue that there should be additional compensation because the employer used you for your skills, contacts and experience is not what section 8 is intended to prohibit.

On its face, section 8 can only apply to the availability of the position, the type of work, the wages and the conditions of work. Clearly, Mr. Parsons, allegations are not an item enumerated under section 8.

I disagree with the above conclusion on two grounds.

First, as a matter of law it is wrong, as it suggests that the intention of the employer is relevant in deciding whether a misrepresentation had occurred. In fact, the employer's intention is not relevant to such a decision. As the definition of misrepresentation indicates, the matters of primary relevance are the untruth of the statement, its materiality to the contract and its influence on the party to whom it is made. The intention of the employer may bear on the remedy, but not on whether there has been a misrepresentation made.

Second, as a matter of fact, I disagree that Parsons' allegations were not "an item enumerated" in Section 8.

Parsons filed three submissions to the Director during the investigation, dated July 28, 1999, August 3, 1999 and October 6, 1999. In the first, Parsons identifies two areas of misrepresentation:

- False information regarding BLG's length of time in business, overall success and future plans for expansion.
- Misrepresentation that the Territory Sales Manager position (TSM) actually existed in their long range plans and would receive the support of management.

In his second submission, which laid out the details of his complaint, Parsons described several aspects of his hiring and employment with BLG. Clearly, some of the allegations raised in this submission were unrelated to any matter listed in Section 8 and I have no quarrel with the Director in respect of the conclusion on those matters. As well, several of the allegations made by Parsons were either not established on the facts or were unsupported by the facts.

There were, however, at least two allegations that warranted investigation by the Director and consideration under Section 8: the allegation that Mr. Fernets misrepresented the financial success of the company and, more specifically, of the Finance Managers Parsons was hired to manage; and the allegation that Mr. Fernets intentionally obstructed Parsons' efforts to hire

additional Finance Managers. In the circumstances, both allegations raised a legitimate concern about whether BLG had misrepresented the wages. The relevance to Section 8 of those allegations is that Parsons' wages were directly linked to both the number and the success of the Finance Managers in his territory. In respect of the former allegation, Parsons stated:

Here's the truth, one of the reps, Rich Zecchel was doing fairly well, while I don't think he was anywhere near earning a 6 figure income. Cheryl who I mentioned above had one good month and a lot of very weak ones that would at best put her in a mid 5 figure income. Ted Rowlan, Arbur's best friend was an ex logger who was no longer able to work in any physical activity was a sympathy hire with no background in sales or credit and was struggling and still struggled after I came to work for BLG. Francis Magnus was represented to me to be a thriving employee of BLG but in fact was still working for the Bank of Nova Scotia and did not really start working for BLG until Jan/99.

BLG never directly responded to Parsons' allegations. In their September 18, 1999 submission, Mr. Owens provided the following response to the allegation that he had been presented a false picture of the company by Mr. Fernets:

We are led to believe that an individual that managed a collection agency for many years was incapable of making an informed decision or performing the most basics in due diligence. The truth is that Mr. Parsons was given access to review the company records and to talk to whomever he needed, and to carefully review the employment agreements before assuming a senior management position with our little company.

In his third submission, Parsons replied to that comment:

[Mr. Owens] alleges I was permitted access to company records prior to being hired, that is a lie. I asked for more detailed information and Mr. Fernets told me they were very nervous about allowing any written material to be seen and I could ask him anything verbally and he would respond that way. That is where I got all the misleading information before accepting the position, from Arbur Fernets, but he's not responding to any of this is he, wonder why? Also note that Mr. Owens doesn't deny any of the misrepresentations I speak of. He seems pretty much to say if you couldn't figure out we were lying to you then that's your fault.

Parsons made the same statement at the hearing, saying he had asked Mr. Fernets for financial information, his request was denied and he took the representations of Mr. Fernets at face value. He was not challenged or contradicted on that. I accept Parsons' assertion that in his interview with Mr. Fernets in October, 1998 the picture painted by Mr. Fernets was of a successful company whose four existing Finance Managers were generating enough loans to secure 6 figure salaries. I also accept that Mr. Fernets told Parsons that BLG was so successful they had to hire six more Finance Managers to handle the volume of business.

Those statements were false and, under the circumstances, both statements were misrepresentations to Parsons about the wages of the Territory Manager position.

I also find that those misrepresentations were in respect of a matter enumerated in Section 8 - Parsons' wages. The Director says Parsons was hired "at the rate of pay offered". Technically that is correct. The wage offered to, and accepted by, Parsons was a 2% commission calculated on the profits generated by the Finance Managers who reported to him, with a guarantee that he would receive no less than \$3000.00 a month from November 16, 1998 to February 12, 1999. What the Director ignores however, as I noted earlier, was that the amount of the 2% commission was misrepresented by BLG. The four Finance Managers who would report to Parsons immediately upon his hire were not generating enough loans to secure six figure salaries, as stated by Mr. Fernets, and consequently the commission wage was, in fact, much lower than indicated by that false statement. The reality was more consistent with Parsons assertion that none of the Finance Managers reporting to him were anywhere near earning six figure salaries.

The statement made to Parsons by Mr. Fernets that 6 more Finance Managers needed to be hired to handle the volumes is an additional element of the misrepresentation. That comment was a false statement of fact giving Parsons the impression that his wage would be substantially higher than was justified from the true state of the company's business affairs.

As well, subsequent information provided by BLG to Parsons before he was hired, in my opinion, reinforced those misrepresentations. Parsons was given the employment agreement (according to Mr. Owens, "days before he accepted the position") to review. Schedule "C3" of the employment agreement outlined the loan "objectives" for a ten month period, commencing October, 1998. The schedule showed the loan "objective" for October was \$161,200.00. While that stated "objective" was consistent with the statements made about the success, and the salaries, of the four Finance Managers, it was quite inconsistent with the true state of affairs. In reality, the loans generated by the four Finance Managers in October were more than \$35,000.00 short of that "objective". Finally, although it is a small point, the "objectives" set out in Schedule "C3" had no empirical foundation and were totally unsupported by any previous experience. The employment agreement, by imposing on Parsons the obligation to achieve the objectives set out in Schedule "C3", virtually guaranteed his failure as Territory Manager.

As a result, I conclude that Parsons has shown that the Determination is wrong on the Section 8 complaint. As a result, that part of the Determination will be cancelled. There was no evidence or argument presented to me about what the appropriate remedy should be if I found merit in the appeal. Even if it had, the Tribunal has no originating authority to provide a remedy for contravention of Section 8. That authority is given to the Director under subsection 79(4) of the *Act*, which says:

79. (4) *In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following*
- (a) *hire a person and pay the person any wages lost because of the contravention;*

- (b) *reinstate a person in employment and pay the person any wages lost because of the contravention;*
- (c) *pay a person compensation instead of reinstating the person in employment;*
- (d) *pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.*

The appropriate response in this case is to have the Director consider the circumstances and decide, under Section 79, what BLG will be required to do.

One final matter requires comment. The employment agreement contains the following provision:

16. **ENTIRE AGREEMENT:** This Agreement contains the complete contract between BLG and you as an employee, and shall as of the date it is executed, supersede any and all other agreements or discussions. BLG and you agree that neither has made any representations to the other except such representations as are specifically contained in this Agreement, and that any statements or representations previously made to you by BLG or its representatives have not been relied upon in connection with your execution of this Agreement and are of no effect. BLG and you agree that no waiver or modification of this contract shall be valid unless executed by both parties in writing.

I have considered the effect of this provision in respect of the allegations made by Parsons and have concluded that, pursuant to Section 4 of the *Act*, it has no effect on the application of Section 8 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order that part of the Determination dated November 16, 1999 be varied to show that Section 8 of the *Act* was contravened by BLG. The matter of the consequential orders or remedies to be made under Section 79 of the *Act* are referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal