

**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 -

Scott Charban

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No:** 1999/72

**DATE OF DECISION:** April 8, 1999

**DECISION**

**OVERVIEW**

This is an appeal by Scott Charban ("Charban") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination bearing file No. 88608 and dated January 19, 1999 by the Director of Employment Standards (the "Director").

Charban had made a claim under the *Act* for commissions payable to him for the final quarter of his employment with Drew Chemical Limited, a subsidiary of Ashland Chemical Company, ("Drew Chemical"). The Director investigated and denied the complaint on the basis of his finding that a term of the entitlement to commissions was that the employee must be an employee at the time that incentives are paid. Charban terminated his employment during the fourth quarter and therefore was not an employee at the end of the quarter when incentives were paid.

Charban has appealed on the basis that he was never made aware of the company policy not to pay commissions after an employee has left the company. He denies any knowledge of the provision in the compensation program in this regard and denies that he was informed of this aspect of the plan.

**ISSUE TO BE DECIDED**

The issue to be decided in this case is whether the appellant has established that the Director made an error in law or fact in finding that the employer had paid to the appellant all the commissions to which he was entitled.

**FACTS AND ANALYSIS**

Charban was employed by Drew Chemical from January 18, 1993 to September 12, 1997. He was paid by way of base salary plus incentives or commissions. The fiscal year end for Drew Chemical was September 30th. Charban was paid his base salary bi-weekly and his incentive payments quarterly.

For the purpose of this appeal there is no issue over the base salary or any incentive payments prior to the last quarter of the 1997 financial year. Charban received all commissions for the first, second and third quarters of 1997.

Charban left his employment with Drew Chemical on September 12, 1997 approximately three weeks before the end of the fourth and final quarter of the financial year. He received no incentive payments for sales made in the last quarter of his employment.

Drew Chemical says that the Sales Compensation Plan for the 1997 year states clearly that:

*"An integral objective of this plan is continuity in business relationships with our customers; therefore, an employee in an eligible job must be an employee of Ashland Inc. at the time the incentive awards are paid to qualify for the receipt of incentive compensation."*

The Director's delegate who investigated Charban's complaint interviewed the Human Resources Manager for Drew Chemical who said that no employees were ever paid incentives beyond the last quarter in which they were employed. The Human Resources manager also stated that he had advised Charban about this term of the incentive plan on November 04, 1996. It was also confirmed that a complete copy of the incentive plan was given to Charban on June 09, 1997. The company claimed that this provision was not new to the 1997 incentive program but had been part of the employment contract for many years. This was confirmed by the company Account Manager.

In his appeal Charban says that he was never aware of the restrictive provision in the incentive scheme. He describes it as an "obscure policy". He claims that he only heard about the provision after he left his employment. He denies being informed in November 1996 or receiving a full copy of the plan in June, 1997. These arguments were made to the Director's delegate who investigated the matter.

There are two problems with Charban's appeal. The first is that there is nothing in his appeal that was not carefully investigated by the delegate and I am simply being asked to substitute my opinion of the evidence for that of the delegate as to whether the restriction on payment of incentives formed part of the employment contract. There is nothing in the material filed by the appellant to persuade me that this term was not part of the contract.

The second problem is that the evidence tends to be more consistent with the view that the restriction was part of the employment contract. Charban clearly had a very good knowledge of the Sales Compensation Plan evidenced by his careful and detailed calculation of incentives based on what is acknowledged to be a complex process. He says that he was not aware of the restriction but he acknowledges that he received hundreds of documents from the company including "terms and conditions of employment". It is evident that the company's practice was to provide copies of such documents to its employees. It appears very unlikely that the compensation plan would not have been provided to Charban.

In my opinion it is more in accordance with the preponderance of the evidence that the employment contract did indeed contain the restriction on payment of incentives as set out earlier herein. I am not satisfied that the appellant has met the onus of persuading me that the Director's delegate made a mistake in law or in fact that would warrant setting aside or otherwise varying the determination.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination is confirmed.

**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**