

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

Provider Marketing Limited

(“Provider”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/673

DATE OF HEARING: April 9th, 1997

DATE OF HEARING: April 15th, 1997

DECISION

APPEARANCES

William A. Sawyer
Melanie Jo Sawyer for Provider Marketing Limited

Dave Burkett on his own behalf

No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Provider Marketing Limited (“Provider” or the “employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 004403 issued by the Director of Employment Standards (the “Director”) on October 22nd, 1996. The Director determined that Provider owed its former employee, Dave Burkett (“Burkett”), the sum of \$438.99 on account of unpaid wages for the period April 1st to April 25th, 1996 and interest.

The appeal in this matter was heard in Nanaimo, B.C. on April 9th, 1997 at which time I heard evidence from William and Melanie Sawyer on behalf of the employer (both are directors and officers of Provider), and from Mr. Burkett on his own behalf. The Director was not represented at the hearing.

FACTS

Provider is a snack food distribution company; its head office is in Surrey, B.C. Burkett was hired by Provider to be a delivery driver/sales representative, covering a territory including Duncan and parts north, in mid-December 1995. Burkett was hired by Martin Young who was, at the time, the Sales Supervisor for Vancouver Island--Mr. Young is no longer with the company and I understand he now resides in Costa Rica.

The “standard” compensation package for Provider’s driver/sales personnel is a monthly salary of \$1,000 plus a commission based on sales volume. According to Mr. Sawyer, at the time Burkett was hired Provider was experiencing severe competitive pressures in the area that would be Burkett’s sales territory. Accordingly, the employer agreed to guarantee Burkett a monthly minimum compensation package of not less than \$1,500 (inclusive of commission earnings) for a period of three months. Due to some sort of administrative error on the employer’s part, this

arrangement was communicated to Burkett as a monthly salary of \$1,500 *plus* commission earnings. Later, this three month period was extended by the employer to the end of March 1997.

Burkett's evidence is that upon being hired he was told by Martin Young that his compensation would be based on a monthly salary of \$1,500 together with further commission earnings based on sales performance. Burkett denies that the employer indicated to him that his monthly salary of \$1,500 would be reduced to \$1,000, either after three months, or at any future point. Indeed, Burkett's evidence is that the first time he heard anything about a "3-month only guarantee" was after he was terminated (on April 25th) and had filed a complaint (on June 14th) with the Employment Standards Branch.

ISSUE TO BE DECIDED

What was the nature of Burkett's compensation package?

ANALYSIS

The arrangements regarding Burkett's compensation package were communicated to Burkett in a series of conversations with Martin Young. The employer never sent Burkett a letter of engagement and the basis upon which he would be compensated was never reduced to writing. Mr. Sawyer was not involved in the initial hiring of Burkett and Young never testified at the hearing. Although Mr. Sawyer says that he discussed Burkett's compensation arrangements (and confirmed the employer's position that Burkett would only receive a \$1,500 "guarantee" until the end of March 1997 at which time Burkett would revert to the company's "standard" compensation package) during a meeting with Burkett held in Surrey, B.C. shortly after Burkett was hired, Burkett denies that Sawyer did so.

The employer did submit, at the hearing, a letter dated April 4th, 1997 purportedly from Martin Young in which Young essentially corroborates the position advanced by Mr. Sawyer. However, the matters set out in the letter are not accepted by Burkett and Burkett says that this letter represents a changed opinion by Young. Indeed, Burkett's evidence was that Young encouraged Burkett to file an unpaid wage complaint as Young could not explain why Burkett's pay had been reduced effective April 1st, 1997.

The letter from Young, being in nature of hearsay evidence, and challenged as to its veracity by Burkett, does not have any probative value.

In my view, given the employer's admission that, even on its own evidence, the compensation package initially offered to Burkett was "exceptional", I cannot understand why it was not reduced to writing or why there is not some payroll record, somewhere, confirming this state of affairs. Nor can I understand why, at the end of March or at the beginning of April, Burkett was not advised in writing that his "guarantee period" had expired and that he would henceforth revert to

the employer's "standard" compensation package, namely, a \$1,000 monthly salary plus commission.

I am not satisfied that the employer has made out its burden to show, on the balance of probabilities, that the Determination is in error.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 004403 be confirmed as issued in the amount of \$438.99 together with whatever further interest has accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal