

BC EST #D195/96

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 -

Tandem Computers Canada Limited
("Tandem")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

Adjudicator: Jerry W. Brown

File No: 96/138

Hearing Date: May 23, 1996

Date of Decision: July 23, 1996

DECISION

APPEARANCES

David W. Andrews, C.A. VP, Financial Administrations	For Tandem Computers Canada Limited
Victor Lee	For the Director
B.J. Broitman	Complainant/Respondent

OVERVIEW

This is an appeal brought by Tandem Computers Canada Limited ("Tandem") pursuant to Section 112 of the *Employment Standards Act* (the "Act"), from Determination No. CDET 001022 issued by the Director of Employment Standards (the "Director") through its Delegate on February 5, 1996.

The Director determined that Tandem owed Benjamin J. Broitman ("Broitman"), the complainant, \$4,026.78 being the amount of outstanding commission plus four percent vacation pay plus interest from the period November 1, 1995 to February 5, 1996.

Tandem's reasons for appealing were as follows:

1. The Director's Delegate misinterpreted the intent of the letter agreement (confidential memo) dated April 24, 1995, in finding that it superceded a compensation plan normally in place;
2. That sections (D) and (P) of Tandem's compensation plan were the relevant sections to be applied and that Tandem was not in breach of its agreement with Broitman by withholding final commission payment according to its interpretation of the compensation plan;

3. That the compensation plan was modified by the letter agreement, only to the extent of extending the date of determining recognition of the revenue from Broitman's sales, and that no such amounts were owed by Tandem.

FACTS

Broitman was employed by Tandem on June 25, 1992.

On April 5, 1995 Broitman gave Tandem eight weeks notice of resignation to be effective May 31, 1995.

Tandem requested Broitman leave four weeks earlier and it was agreed that his last day of work would be Monday, April 24, 1995, but that he would be paid until Friday, April 28, 1995.

In a letter agreement sent by David Andrews ("Andrews") to Broitman regarding the resignation, he indicated that dental and extended health care coverage would continue to May 31, 1995, the date Broitman's resignation was originally to take effect.

Andrews also wrote in the memo the following paragraph:

"As discussed, you will also be paid for any business closed prior to April 28, 1995, per your signed Compensation Plan as well as pay you for MacMillan Bloedel, assuming all items of Revenue Recognition are met by May 31, 1995."

Tandem's Sales Compensation Plan contains section (D) which deals with commissions and states: "one-half of a commission is paid on revenue recognition (usually at shipment) and one-half is paid on receipt of final payment to Tandem."

The Sales Compensation Plan also includes section (P) which deals with terminations and which contains a table for payment of commissions that ends three months after the effective date of termination of the employee. Section (P) provides, in part, that payment is to be determined by considering "shipment and/or collection in relation to effective date of termination".

Tandem paid Broitman for half of the MacMillan Bloedel commission. Tandem did not pay Broitman the second half of the MacMillan Bloedel commission.

MacMillan Bloedel paid Tandem for its purchase in August of 1995.

ISSUE TO BE DECIDED

Did the confidential memo sent to Broitman by Andrews supercede, alter, or create a collateral contract to the sale compensation package and recognize the parties had an agreement that Broitman should be compensated completely for the MacMillan Bloedel sale?

ANALYSIS

Tandem, through its agent, Andrews, must bear the burden of establishing that the Director's Delegate erred in his ruling that the April 24, 1995 memo sent by Andrews did not clearly set out the terms and conditions of the agreement between the parties.

Andrews was the officer at Tandem who was dealing with the termination of Broitman from Tandem as evidenced by the April 24, 1995 memo dealing with the resignation of Broitman. At all times, it is clear that Andrews had or should have had a complete understanding of the agreement between the parties.

After Broitman tendered his resignation, effective May 31, 1995, there were discussions between Andrews and Broitman as evidenced by the April 24, 1995 memo. Andrews' testimony indicated that in part those discussions centered around acknowledging Broitman's efforts and long work in getting the MacMillan Bloedel contract for Tandem. It is Andrews' contention that at no time was the April 24, 1995 memo meant to supercede the sale compensation plan which governed Broitman's working relationship prior to the April 24, 1995 memo.

Andrews' evidence at the hearing was that any finalization of relations with respect to commissions for Broitman were to be dealt with by the normal compensation process set out in the sales compensation plan. Andrews' evidence was that the MacMillan Bloedel deal would be dealt with under the sales compensation plan but that there was to be an extension to May 31, 1995 and that the MacMillan Bloedel deal was not meant to be pulled out of the sales compensation plan payment scheme.

Andrews' evidence was that the sales compensation plan was never voided but just amended to extend it to the May 31, 1995 deadline. Andrews' evidence was that all conditions of revenue

recognition had not been met by May 31, 1995. Revenue recognition is defined in Tandem's general policy binder dated October 1, 1991 as:

"Recognition of revenue will take place once all of the following conditions have been met:

1. A firm order has been received by Tandem in writing;
2. A master purchase agreement, or similar document covering terms and conditions of the transaction, is in place;
3. Customer credit worthiness has been established and approved; and
4. Shipment of the product to the customer has occurred."

In Andrews' evidence he acknowledged that the revenue recognition elements had all been dealt with with respect to the MacMillan Bloedel deal.

The issue is whether paragraph #3 in the April 24, 1995 memo creates a collateral contract in which Broitman is to be paid for the entire commission notwithstanding the compensation plan. Paragraph #3 states: "As discussed, you will also be paid for any business closed prior to April 28, 1995, per your signed Compensation Plan **as well as pay you for MacMillan Bloedel, assuming all items of Revenue Recognition are met by May 31, 1995.**" (my emphasis).

This memo was drafted by Andrews in response to the conversations with Broitman about his resignation and leaving Tandem.

I find that the MacMillan Bloedel deal was to be considered separately from the regular compensation plan scheme of payment. Placing emphasis on the highlighted portion of the above paragraph, payment to Broitman was to be made if all the items of revenue recognition were met by May 31, 1995. Andrews' evidence was that this was done. Andrews' wording indicates that the intent of the arrangement with Broitman was that "all other items were to be dealt with according to the compensation plan as well as pay you for MacMillan Bloedel ...".

Based on Andrews' evidence and the memo, I find that at the time of Broitman's resignation the agreement between the parties was for Broitman to receive compensation for the complete MacMillan Bloedel commission if the revenue recognition items were all met. There was therefore a collateral contract created between the parties, consideration for which was Broitman's agreement to leave his employment with Tandem four weeks earlier than he had originally planned.

There was no evidence before me which persuades me that the Director's order was incorrect.

ORDER

I order that, pursuant to Section 115 of the Act, this appeal is dismissed and Determination No. CDET 001022 be confirmed.

JERRY W. BROWN
Adjudicator
Employment Standards Tribunal

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