# 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 Stevenson

**FILE No.:** 2000/296

**DATE OF DECISION:** August 14, 2000

## DECISION

### OVERVIEW

This decision is being issued to complete 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 appeal considered the conclusion made in the Determination that no false representations relating to those matters enumerated in Section 8 of the *Act* were made to Parsons by his former employer, Business Loan Group Inc. ("BLG").

In *Jeff Parsons*, BC EST #D110/00, I concluded that BLG had contravened Section 8 of the *Act* and ordered that part of the Determination be varied to show that conclusion. The matter of the consequential orders or remedies to be made under Section 79 of the *Act* were referred back to the Director. The Director has completed that task. The Director has issued a decision (the "remedial decision") under Section 79 of the *Act* on the contravention of Section 8, ordering BLG to pay an amount of $15,947.04. The remedial decision has been referred to me for consideration.

### FACTS

The remedial decision contains the following facts:

Parsons was paid $15,000 in gross earnings during his employment;

He was also paid $400.00 a month as a taxable promotional allowance and received $1,000.00 a month as a travel allowance.

The earlier decision noted that November 6, 1998, Parsons and BLG signed an employment agreement. The above allowances were included in that agreement.

### ANALYSIS

The remedial decision notes that the Director was guided by the *Act* and the objective of placing Parsons in the same position as if the contravention had not occurred. The Director accepted Parson's claim that, if what BLG had misrepresented to him was true, he would have earned $14,950.00 more in wages than what he was paid. Parson's claim is stated in this way in a submission made to the Director on March 15, 2000:

> If what BLG told me verbally and in writing was true at the time of hiring my gross earnings should have been $29,500.00, less the $15,000 in wages I was actually paid would leave $14,950.00 owing to me.

In the same submission, Parsons also contended that he incurred an "expense shortfall of more than $2800.00 and, adding the value of depreciation on his automobile and the cost of repairs to his automobile, had "out of pocket expenses in excess of $5000.00", that should be paid under paragraph 79(4)(d), which reads:

> *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 any one or more of the following:*
>
> *. . .*
>
> *(1) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.*

The above submission was provided to BLG, but no response was received from them by the Director.

The Director noted that the employment agreement between Parsons and BLG contemplated payment for certain expenses and that Parsons was reimbursed for those expenses. The remedial decision states:

> I don't believe it would be reasonable to re-negotiate additional expenses after termination through the provisions of section 79(4) of the *Act*.

I agree with that view and, in any event, there is nothing in the material, or in the submissions of the parties on the remedial decision, that would associate those expenses with the contravention. There must be some causal nexus between the expenses claimed and the contravention that is not apparent here.

Following the remedial decision, BLG filed a submission, disagreeing with the Director's assessment. BLG argued that the conclusion concerning what Parsons would have earned was incorrect, as Schedule "A" of the Employment Contract, which laid out Parsons' commission salary structure, was based on 2% of total sales less any amounts paid under dealership agreements and any administrative allowance. BLG asserted, based on the example included in Schedule "A", that Parsons would only receive commission salary on 46.66% of total commissions and that the Director's calculation should have reflected this result.

I have two problems with this submission. First, it was not made to the Director during the investigation leading to the remedial decision. Second, the assertions made about the amounts that would be deducted is inconsistent with both the evidence I received at the hearing of the appeal and the position BLG took at that hearing. As Parsons correctly notes, in a June 3, 2000 reply, there were only 2 dealership agreements made in the 5½ months he was employed and the evidence showed that the amount paid on those agreements during his term of employment was minimal. At the hearing BLG had contended there were no dealership agreements.

BLG should have raised the matter of the alleged dealership agreements with the Director. They did not and I will not now accept an argument based on the alleged agreements, particularly in light of the evidence that I received during the appeal hearing.

In respect of the administrative allowance, there is some merit to this assertion, notwithstanding it was not raised with the Director. Parsons acknowledges that such allowance would have been deducted from total commissions and the evidence to support that was presented during the hearing on the appeal. The amount of wages owed to Parsons must be reduced to account for the administrative allowance that would have been deducted from total commissions.

The remaining matter is the amount that should be deducted. The figures in Schedule "A" suggest the administrative allowance could have reduced Parsons' commission earnings by about 14%. In his June 3, 2000 submission, Parsons filed material indicating an administrative allowance of approximately 9% was more consistent with actual experience. In fact, the percentage by which the administrative allowance would have reduced the commission earnings would depend on the amount of the loan. In the absence of any other information upon which I might base a conclusion about that amount and in light of the failure of BLG to raise this matter during the investigation, where the Director could have compelled better and more accurate information than was provided by BLG in their submission, I am not inclined to reduce the amount of wages owed to Parsons by more than 10% of $14,950 the Director concluded Parsons lost as a result of the contravention.

## ORDER

The remedial decision is accepted and, pursuant to Section 115, the Determination dated November 16, 1999 is varied to order BLG to pay a principal amount of $13,455.00, together with whatever interest that has accrued on that amount pursuant to Section 88 of the *Act*.

**David B. Stevenson**
**Adjudicator**
**Employment Standards Tribunal**