

An appeal

- by -

Brian Britskey
("Britskey")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/154

DATE OF DECISION: June 4, 2002

DECISION

APPEARANCES:

This is a Decision based on written submissions by Brian Britskey, Tony Malyk on behalf of Mobilshred Inc., and Glen Smale on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal by Brian Britskey, pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 11, 2002. The Director found that Mobilshred Inc. ("Mobilshred") had not contravened the *Act*, and dismissed Mr. Britskey's claims for unpaid commissions, vacation pay and compensation for length of service.

ISSUE TO BE DECIDED

Whether the Director erred in concluding that Mr. Britskey had not been constructively dismissed, and that he was not owed commissions. There was no appeal of the Delegate's conclusion on the issue of vacation pay.

FACTS

Mobilshred, a paper shredding and recycling business, assumed control of Confidential Paper Destruction Co. Ltd. ("Confidential") in February 2001. Mr. Britskey worked for Confidential and then Mobilshred continuously from February 10, 1997 to April 3, 2001 as a salesperson.

When Mr. Britskey commenced his employment in 1997, his salary was \$40,000 per year plus a 15% commission on the net increase in average monthly sales for Confidential, paid year over year, commencing March 1997. Commissions were paid bi-monthly. The commission percentage decreased to 10% in March 1998, and to 5% in March 1999. In March, 2000, Confidential again changed the commission payment structure for all commissioned employees. The formula was "based on a base salary plus 5% commission paid on gross revenue generated by assigned accounts." Accounts were assigned to the salesman who opened and closed the sale.

While employed by Confidential, Mr. Britskey also received a monthly car allowance of \$500, 4 weeks vacation after 5 years employment, and a corporate credit card.

Mr. Britskey was paid a monthly advance of \$800 against his commissions from at least May 1998 to March 2001. The draws were maintained while Mr. Britskey was on sick leave for almost 3 months in 1999.

On March 30, 2001, Mobilshred presented a compensation package to Mr. Britskey. Although the facts are not at all clear from the Determination, I infer that Mobilshred proposed to change Mr. Britskey's title from Sales Manager to Corporate Accounts Executive, change his reporting relationship from the owner

to a Sales Manager, change the commission structure, cap his vacation pay at 3 weeks rather than 4 weeks, reduce his car allowance to \$350, and cancel his corporate credit card. As I understand it, the proposed commission structure included \$8000 on existing accounts, an incentive package of 7.5% on new sales, and bonuses of 12% of sales over a prescribed quota.

Mr. Britskey rejected the proposal, claiming that the unilateral changes were unacceptable to him, and that he considered that he had been constructively dismissed.

On April 4, 2001, Mr. Malyk wrote to Mr. Britskey indicating that his projected earnings with the new structure would have been substantially more than his previous earnings. He expressed his disappointment with Mr. Britskey's rejection of the compensation package, despite his offer to guarantee him \$800 per month commission for two months. Mr. Malyk advised Mr. Britskey that all employees had been made aware that a change in the compensation plan would be made to integrate Confidential's employees into Mobilshred. Mr. Britskey did not negotiate the terms of his employment with Mr. Malyk, and filed his complaint with the Branch.

Following an investigation, the Delegate concluded that, after reconciling advances and commissions, no commission payments were outstanding. The Delegate did not examine commissions paid before April 4, 1999, 24 months prior to the date Mr. Britskey's employment ended, as provided by s. 80 of the *Act*. The Delegate concluded that Mobilshred owed Mr. Britskey \$603.33 for commission wages on assigned accounts from July to November, 2000, and \$745.16 from December 1, 2000 to April 2001. Mr. Britskey was in fact paid \$603.33 in December 2000. Mobilshred offset his commission payment of \$745.16 from previous advances. The Delegate found that, even if annual vacation pay was outstanding, such amount could be offset against the overpayment of commissions.

Based on the yearly earnings of two fellow sales staff, the delegate concluded that Mobilshred's proposal to Mr. Britskey would have increased his compensation package. He further found Mr. Britskey's territory remained the same, 80 to 90 percent of the core functions of his position were retained, he was not required to be at the office daily, or report to Mr. Malyk daily. The Delegate determined that, when considered as a whole, Mr. Britskey had not been constructively dismissed, but resigned, and dismissed his complaint.

ARGUMENT

Mr. Britskey argues that the Delegate misunderstood the commission structure. He contends that the Delegate did not calculate the commissions owed to him, but merely set out the advances paid to him. He says that the delegate failed to calculate the commissions owed after advances were deducted, taking into consideration Confidential's gross revenues.

Mr. Britskey also argued that his original contract with Confidential Paper provided that he would be paid 5% commission on overall revenues, and that Mobilshred's contract substantially changed the basis of his remuneration. Consequently, he contends that the new proposal amounted to constructive dismissal.

The Delegate contends that he reviewed all the documents and arguments presented by Mr. Britskey and had several discussions about those documents with both parties prior to issuing a decision. The Delegate contended that, had Mr. Britskey stayed in his position, his actual remuneration would have been \$5000 to \$20,000 higher than it had been previously. The Delegate states that Mr. Britskey did not attempt to

negotiate any changes to the job offer, and simply resigned before he had any opportunity to determine whether the new compensation package was indeed inferior to his previous one.

The Delegate further notes the s. 80 limit on wage recovery to 24 months as a reason for limiting the review of commission wages to the time period April 4, 1999 to April 3, 2001.

Mobilshred argues that the commissions paid to Mr. Britskey between July 1, 2000 and April 4, 2001 far exceeds the commissions he earned, and that the Tribunal should order Mr. Britskey to refund the overpayment.

Finally, Mobilshred submits that the compensation package offered to Mr. Britskey would have increased his remuneration by over \$15,000. Mr. Malyk further suggests that he would have been open to negotiating a commission structure with Mr. Britskey, but that Mr. Britskey was not interested in doing so.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

The terms of Mr. Britskey's commission payment structure at the time Mobilshred assumed Confidential's operations is outlined in Confidential's March 13, 2000 letter. It states that a 5% commission will be paid on the gross revenue generated by assigned accounts (my emphasis). The commissions were not, as Mr. Britskey claims, based on total company revenue. Further, there is no evidence to support Mr. Britskey's initial allegations that the \$800 monthly commission payments formed part of his regular salary. Mr. Britskey conceded this point in later submissions. The delegate analyzed the commissions earned and paid to Mr. Britskey, and concluded that there were no outstanding commissions. I find no evidence to support Mr. Britskey's claim that the delegate's investigation was incomplete or in error.

Section 63 of the *Act* sets out an employer's liability for compensation for length of service. This obligation is discharged if the employee quits. The Director may determine that the employment of an employee has been terminated if a condition of employment is substantially altered. (s. 66)

The test to ascertain whether a substantial change has occurred is an objective one (see *Task Force Building Services Inc. v. British Columbia, (Director of Employment Standards)* [1998] BC EST # D047/98) In determining whether a condition of employment has been substantially altered, the director will have regard to the nature of the employment relationship, and may consider factors such as a change of working location, hours of work, a reduction of wages or a change in responsibilities.

There is no evidence that Mobilshred changed Mr. Britskey's work location, hours of work or limited his work responsibilities.

Mr. Britskey's allegation that the compensation package offered to him by Mobilshred amounted to a significant change to his remuneration is not borne out by the evidence. Provided that the basis for determining the commission structure is Confidential's letter of March 2000, there is no evidence that Mr. Britskey's net wages under Mobilshred's proposal would be significantly less than he previously earned. Further, while there were other changes to his position, I am unable to find that the Delegate erred in concluding that, as a whole, the changes were not substantial. Although Mr. Britskey's vacation

allowance was reduced by one week and his car allowance reduced by \$150 per month, he had the potential to earn much greater earnings. The evidence is that a colleague offered an identical package earned an additional \$15,000 per year. The removal of Mr. Britskey's corporate credit card is not significant, as Mobilshred reimbursed him for business related expenses.

I am unable to conclude that the Delegate erred in finding, after a consideration of all of the factors, that Mobilshred's proposal did not constitute a substantial alteration to a condition of Mr. Britskey's employment, and concluding that Mr. Britskey quit.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated March 11, 2002 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal