

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 -

Robert H. Nelson
("Nelson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 98/181

DATE OF DECISION: July 7, 1998

DECISION

OVERVIEW

Robert H. Nelson ("Nelson" or the "employee") appeals a Determination CDET dated December 17, 1996 (should be March 13, 1998) issued by the Director of Employment Standards. The Determination dismissed Nelson's claim that Zephyr Lincoln Mercury & Ford Truck Sales ("Zephyr" or the employer) breached a number of provisions of the *Employment Standards Act* and a number of items in Zephyr policy. The Director's Delegate concluded that the evidence did not establish a breach of any provisions of the *Act* and there was no jurisdiction under the *Act* to enforce Zephyr policy.

ISSUES TO BE DECIDED

The issue is whether Zephyr failed to pay regular wages, commissions, overtime, "spiffs" and car allowance and breached the provisions in the *Act* governing hours of work notice, hours free from work, pay-days, wage statements, and termination pay-out time.

FACTS

Nelson was hired as a salesperson for Zephyr from August 1 to October 20, 1997. Following termination of his employment, Nelson filed a complaint alleging a breach of several provisions of the *Act*. In the Determination being appealed here, the Director's Delegate found that he was owed for 12 hours of overtime. This conclusion was based on Zephyr's records which showed that he worked 138 hours and 4 in preference to Nelson's records which consisted of a hand drafted calendar and annotated spread sheet. Zephyr submitted a cheque to the Branch for the amount; nothing further was owing. The Delegate found no evidence to substantiate the complaint that "spiffs" were not paid and found that Nelson had been paid in accordance with the Salesperson Pay Plan signed by him. The claim for car allowance was outside the *Act*, as were alleged breaches of Ford company policy. Finally, the Delegate found that all allegations surrounding hours of work, payments made on time and pay records were all addressed by Zephyr.

ANALYSIS

In the appeal, Nelson makes a number of claims, many of which are not relevant to any of the issues under consideration here. Thus, they will not be outlined here. It suffices to say that they relate to Nelson's record of sales over a 50 year career in the automotive sales business and to his personal record of integrity and customer service. They also relate to a number of disagreements with Dennis Connolly over matters that are not governed by the *Act*. Matters dealt with by the *Act* will be dealt with in turn, as will the submissions made on behalf of the Director and the employer.

Nelson maintains that that when he was interviewed by Dennis Connolly for a job as a salesperson, the offer of employment was falsely represented as including 50% over \$2,000 gross and not requiring work on Sundays. In support of this allegation Nelson offers an excerpt from the Zephyr Enterprises Employee Handbook and a "Guide to the Employment Standard Act" outlining the provisions of the *Act* with respect to corporate officer liability, false representations and human rights legislation. The Director's Delegate argues that Nelson signed a Salesperson Pay Plan which establishes the compensation package that governed Nelson's pay, and that nothing further is owed. I agree with the Director's Delegate that the evidence establishes that Nelson agreed to the pay plan as outlined in the Determination and that he was paid in accordance with its provisions. Thus, this ground of appeal is dismissed.

Nelson argues that Zephyr did not post his Hours of Work Notices and in support offers another excerpt from the "Guide to the Employment Standards Act". The Delegate argues that this matter was not covered by the original Determination and thus is not properly part of this appeal. I agree with the Delegate on this point, and in any event would not have been able to find a breach based on the evidence offered in support by Nelson.

Nelson further argues that he was required to work Sundays and did not have 32 hours in a row free from work each week during his employment. Again, he offers an excerpt from the "Guide to the Employment Standards Act" as evidence. The Delegate argues that Zephyr records showed no breach of these provisions and that nothing in the evidence offered in support of the appeal shows that this is incorrect. I agree and dismiss this aspect of Nelson's appeal.

Nelson also maintains that he is owed \$2,477.53 in unpaid commissions and \$1449.00 in unpaid overtime. Offered in support are "Worksheet" relating to the sale of 2 vehicles; "Commission Sheet" relating to the sale of 4 other vehicles; and handwritten calendars. Also offered is a list of names, telephone numbers and what appears to be vehicle descriptions. Zephyr submits that Nelson was paid the proper commission on sale of 6 vehicles and that 50% commissions are not owed until the gross sales exceeds 10% of the "packed cost". Zephyr also says that it paid the overtime in accordance with calculations completed by the Delegate. The Delegate submits that overtime was paid and that the evidence does not establish unpaid commissions. I agree with that conclusion and find that the evidence does not show that the Determination was incorrect on this matter.

Nelson claims that he is entitled to a further \$360.00 for "spiffs" and offers in support a hand written document labeled "Weekend Spiffs". Zephyr argues that according to its records, Nelson was owed \$60.00 in spiff money for the month of August and September and that the full sum has been paid. The Delegate submits that all "spiffs" had been paid and that Nelson does not indicate why \$360.00 is owing. I agree with the Delegate that Nelson has not submitted evidence to show that the Determination is lacking on this point. The significance of the document tendered in support of this allegation is unclear, as it the origin of the document itself. I also note that Zephyr records establish payment of any sums owed for this. Thus, this aspect of the appeal is also dismissed.

Nelson argues that Zephyr did not "pay me August 16,24, 1997" in violation of the *Act*, failed to give him a written statement of wages on August 16, 1997 and failed to pay him within 48 hours of his termination. In support he offers excerpts from the "Guide to the Employment Standards Act". Zephyr does not comment on these allegations, but the Delegate argues there is insufficient evidence to support Nelson's version of events or there is no remedy since Nelson is no longer employed by Zephyr. With respect to the August statement of wages or payment, it is unclear precisely what problem is being alleged by Nelson and thus, his appeal is dismissed on these grounds. As for the failure to pay within 48 hours of termination, I agree with the Delegate that the evidence does not substantiate this aspect of Nelson's claim.

Nelson is also seeking unpaid car allowance. Zephyr points out that their records show he had been paid \$400.00 in August and again in September and a prorated amount for October. The Delegate found that car allowance is not a matter under the *Act* and I agree with him. In any event, it appears that nothing is owed.

Nelson seeks reinstatement and compulsory settlement discussions with Zephyr. There is no breach of the *Act* so that this Tribunal lacks the jurisdiction to require his reinstatement and there is no jurisdiction to require the parties to enter into compulsory settlement discussions.

ORDER

Pursuant to Section 115 of the *Act*, I confirm the Determination CDET dated December 17, 1996 (should be March 13, 1998).

Lorna Pawluk
Adjudicator
Employment Standards Tribunal