

**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 -

A.M.L. Holdings Ltd. operating as Woodgrove Chrysler Jeep ("AML")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Paul E. Love

**FILE NO.:** 98/175

**DATE OF HEARING:** MAY 19, 1998

**DATE OF DECISION:** JUNE 23, 1998

## DECISION

### APPEARANCES

Gordon Heyes for AML  
William Mercer

### OVERVIEW

This is an appeal by AML from a Determination of the Director dated February 23, 1997, which determined that Mr. Mercer was terminated without notice or compensation for length of service. The issue in this case was whether the employee resigned or was terminated. There were two equally probable interpretations of the meeting of June 24, 1996, and the adjudicator was not persuaded on balance, that the Director's Delegate erred in his assessment of those events.

### ISSUE TO BE DECIDED

Was Mr. Mercier dismissed or was he terminated?

### FACTS

AML is in the business of selling and leasing new and used vehicles in the city of Nanaimo. Gordon Heyes is a shareholder and president of AML.

William Mercier began working for AML on January 22, 1991. He continued to work for AML until June 24, 1996. On June 10, 1996 he gave five weeks notice to the employer of his intention to resign. On June 24, 1996 Mr. Mercier had a loud discussion with the new business manager, Harvey Appel. Gordon Heyes, the president of AML called Mr. Mercier up to his office. They had a discussion. As a result of the discussion Mr. Mercier ceased his employment with AML. The facts of what occurred in the meeting of June 24, 1996 are in dispute.

The Director's delegate found that during the course of that discussion Mr. Heyes purported to change Mr. Mercier's remuneration from a salary to straight commission. The Director's delegate found that Mr. Mercier expressed his dissatisfaction with this new arrangement, and found that Mr. Heyes terminated Mr. Mercier.

### Mr. Mercier's Version:

Mr. Mercier's version of the meeting of June 24, 1996 was that he had resolved to stay on at least until September, having earlier given written notice. Mr. Mercier says that Mr. Heyes said that he

was going to be on commission only. He protested. Mr. Mercier says that Mr. Heyes told him “you are out of here”, which he took to mean that Mr. Heyes was terminating his employment. Mr. Mercier does not recall the particulars of any discussion that he had with Harvey Appel after this meeting, as he was too upset.

**AML’s Version:**

Mr. Heyes argued at this hearing that he did not change Mr. Mercier’s remuneration from salary to commission. He gave oral testimony and provided documents that at all material times Mr. Mercier was remunerated by way of commission, and that he had a “guaranteed base” of \$2,500 per month. Up until June 10, 1996 Mr. Mercier was also the business manager and received \$500.00 per month plus a commission of 20% of certain sales from the store. Mr. Heyes indicated that during the June 24, 1996 meeting he was attempting to tell Mr. Mercier that Mr. Mercier would no longer be receiving remuneration as the “business manager” as Harvey Appel had taken over this position. He says that Mr. Mercier left the office upset saying “I’m out of here”. It was Mr. Heyes view that Mr. Mercier was unhappy that AML accepted his resignation when given on June 10, 1996, rather than paying 5 weeks severance. Mr. Heyes did not question Mr. Mercier on this point at the hearing.

Mr. Heyes indicated that prior to June 24, 1996, Mr. Mercier was A paid a guarantee of \$3,000 for being the assistant sales manager and fleet and lease manager. He was also paid \$500.00 per month and 10 % of the business office profit. Mr. Mercier does not dispute that Mr. Heyes was entitled to eliminate the payment of \$500 plus 10 % of the business office profit, as he was no longer going to be doing these duties.

Mr. Heyes indicated that the elimination of remuneration payable for the “business office duties” would not necessarily result in a reduction of Mr. Mercier’s overall income, as he would then have more time to concentrate on sales and he was a good salesman.

Harvey Appel, the business manager of APL, gave evidence in this proceeding. Mr. Appel had a vague recollection of the events on June 24, 1996, which occurred shortly after he commenced with APL. He was not present at the meeting between Mr. Mercier and Mr. Heyes. After Mr. Mercier left the meeting he had a discussion with Appel, and Appel recalls that Mr. Mercier told Appel that Mr. Mercier was fired or terminated by Mr. Heyes. Appel did not speak to Mr. Heyes about the meeting.

Ms. Sylvia Bandoian, a business consultant, retained by AML gave evidence in this proceeding. She was called for the purpose of supporting the employer’s view that the movement of Mr. Mercier from business manager to fleet sales and leasing was a justifiable business decision. Mr. Mercier’s sale statistics indicated that he was performing to a lower than average standard.

**ANALYSIS**

The central issue in this case is whether Mr. Mercier quit or was fired as the result of the June 24, 1996 meeting. The facts of what occurred in that meeting are in dispute.

In the written submissions and oral testimony, each party sought to impugn the credibility of the other party by referring to matters which did not touch on the central issue of whether Mr. Mercier quit or was fired during the meeting of June 24, 1996. There are no witnesses to that meeting other than Mr. Heyes and Mr. Mercier. There are two contradictory and plausible explanations for what occurred during the meeting of June 24, 1998.

On June 24, 1996 Mr. Mercier wished to remain employed until September. He was prepared to rescind his earlier given resignation. AML also wished the employee to remain. I also accept the evidence of the employer that it wished to reduce the employee's pay package by eliminating payments in respect of the business manager position for which Mr. Appel was hired.

Focusing just on the June 24, 1996 meeting, the version of facts given by each party appeared to be plausible. I am asked by the employer to prefer its submission that Mr. Mercier said "I'm out of here". I am asked by the employee to prefer his submission that the employer said "You're out of here". The only clear point is that the employer was in the process of making a change in the employee's remuneration. What I believe happened is that the employer sought to eliminate payments in respect of the business manager position, and that Mr. Mercier did not understand that he would still be receiving a base rate for the work he did perform. It was Mr. Mercier's view that at the relevant time he was receiving a salary of \$3,500 and that AML was seeking to place him entirely on commission.

Mr. Mercier argued at the hearing, that the fact that he was believed by both the Director's delegate, by an arbitrator in an earlier unrelated proceeding, and by the decision maker who decided his employment insurance appeal, that I should accept his version and disbelieve Mr. Heyes. In my view these matters do not assist in the assessment of credibility. Mr. Mercier also tendered a tape of a conversation, which he had with Mr. Heyes, about an unrelated matter, in which he sought to discuss with Mr. Heyes the facts surrounding the termination, and Mr. Heyes declined to discuss the facts. Mr. Heyes was not opposed to me hearing the tape, which was played during the hearing, and which I listened to again prior to writing these reasons. The tape was of no assistance in my determination of this appeal.

Mr. Heyes argued that he should be believed because Mr. Mercier's evidence was contradicted by events collateral to the June 24, 1996 meeting. The finding of facts in the first instance is the task of the Director's delegate. In a hearing before this Tribunal the burden is on the appellant to establish to a balance of probabilities that the Determination ought to be cancelled, varied or rescinded. The Director's delegate was apparently satisfied that at the June 24, 1996 meeting the employer sought to reduce the employee from a salary to pure commission.

I am not persuaded by AML's argument that Mr. Mercier lied about the compensation arrangement, and therefore must be lying about the events of June 24, 1998. The employer did not tender sufficient documentary evidence at this hearing for me to make a finding concerning whether the employee was remunerated by way of commission or salary or both at the time immediately

prior to the cessation of employment. While the employer filed some 1991 ledger sheets and a file note that he made during 1992 setting out the remuneration package, the employer did not file any ledger sheets showing the method of calculating Mr. Mercier's pay package in the periods prior to the cessation of employment. Mr. Mercier's evidence was that he was paid a salary of \$3,500. He filed some pay slips showing that he received at least \$3,500 per month. In some months he also received a commission. Mr. Mercier also did not file any pay slips that related to the period of time immediately before the cessation of employment. I conclude that each party had a different view of the compensation structure, but from the evidence given at the hearing I am unable to prefer the view of the employer.

There is likely more documentary evidence, which could have, but was not filed by both parties showing the remuneration in the period prior to the cessation of employment. The burden of proof, however, in this proceeding rests with the employer. It was apparent at the hearing that the employer felt it needed to respond to allegations Mr. Mercier made in writing, which the employer felt were untrue and slanderous. If the employer had spent less time at the hearing in addressing "credibility concerns" and proving that the compensation arrangement for Mr. Mercier was as AML alleged perhaps it might have met the burden of proof. In the approach taken by the employer, it neglected to focus sufficiently on proof of errors in the Determination, and particularly whether the Director erred in his assessment of the compensation arrangement in the relevant period. Perhaps the employer was "derailed" from the main issues by the employee's written submission. Had there been sufficient proof by the employer of the compensation arrangement at the time immediately prior to the June 24, 1996 meeting I would have been able to better assess whether Mr. Mercier was untruthful about the compensation package. I would then have been able to consider the argument that Mr. Mercier's version of the June 24, 1996 meeting was incorrect. As it stands I have found, on the evidence tendered there are two conflicting views of the compensation package, and I am not able to prefer the employer's view.

The employer filed with the Tribunal an unsolicited written submission dated June 3, 1998, which in effect was a request that I re-open the hearing and interview by telephone Marcel Compeau on a point which relates solely to credibility of Mr. Mercier. I decline to do so as this appears to be collateral to the main issue of quit or termination. The written submission further alleges that Mr. Mercier lied under oath at the Tribunal hearing about the facts.

On the basis of what I heard at the hearing of this matter, I am not persuaded that the Director's delegate erred in his assessment of the meeting of June 24, 1998. I find that I have two equally plausible explanations of that meeting. I have also considered that each party appears to have an interest in the outcome of this appeal, and that each party was somewhat evasive and argumentative in the evidence given. The person who is appealing must satisfy me on balance, that there was an error made. If the scales are equally balanced then the appeal must fail.

There was not sufficient evidence tendered by the employer from which I can conclude that the Director's delegate erred in his assessment of this matter. Therefore I confirm the Determination of the Director's delegate made February 23, 1997.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated February 23, 1997 be confirmed.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**