

An appeal

- by -

Lalit Wasdev
(“Wasdev”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/194

DATE OF DECISION: June 1, 2001

DATE OF DECISION: June 11, 2001

DECISION

APPEARANCES

Lalit Wasdev	on his own behalf
Henrique Rosa, President	for Lusitania Marble & Granite Ltd.
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Lalit Wasdev (“Wasdev”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Wasdev appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on February 8th, 2001 under file number ER 087811 (the “Determination”). Although the Determination addressed a number of issues, this appeal concerns the delegate’s finding that “there is insufficient evidence to prove that the complainant [Wasdev] is owed commissions” (Determination, p. 2). Mr. Wasdev appeals this latter finding.

This appeal was heard at the Tribunal’s offices in Vancouver on June 1st, 2001 at which time I heard the testimony of Mr. Wasdev who appeared as the sole witness on his own behalf. Mr. Henrique Rosa appeared at the appeal hearing on behalf of the respondent employer, Lusitania Marble & Granite Ltd. (the “employer”). The Director’s delegate did not attend the appeal hearing.

At the conclusion of Mr. Wasdev’s evidence, I issued brief oral reasons dismissing the appeal on the basis that even if Mr. Wasdev’s evidence was not contradicted in any fashion by the employer, Wasdev’s evidence did not raise even a *prima facie* case that the delegate erred in finding that there was no contractual agreement between the parties with respect to the matter of commission payments. These reasons for decision will, in a more complete way, explain why I dismissed this appeal.

ISSUE ON APPEAL

Wasdev asserts that his compensation agreement included, in addition to a monthly salary, a further commission or bonus entitlement based on his sales performance. As noted above, the delegate concluded that there was insufficient evidence of such an agreement and I entirely agree with that conclusion.

EVIDENCE AND ANALYSIS

Mr. Wasdev testified that in the spring of 1998 he approached the employer seeking a position as a sales representative. He was subsequently hired at a monthly salary of \$3,000 which was regularly paid to him throughout his tenure with the employer (a period of about 19 months). During his tenure, Wasdev never received any monies by way of a commission or bonus.

Indeed, by his own evidence, although Mr. Wasdev continually pressed the employer's principal, Mr. Rosa, for a supplemental commission entitlement, Mr. Wasdev conceded that Mr. Rosa never, at any time, agreed to such additional compensation. Mr. Wasdev raised the issue of a commission (in addition to his monthly salary) during his initial interview at which time Mr. Rosa demurred saying something to the effect that he (Rosa) "would have to see how you do" (referring to Wasdev's sales performance) before agreeing to such a compensation arrangement.

Mr. Wasdev raised the matter of a supplemental commission once again in May or June 1999 only to be told by Mr. Rosa that the company was not doing well enough financially to afford such a scheme. Mr. Wasdev testified that he continued to press for a supplemental commission well into the fall of 1999 but Mr. Rosa, in Wasdev's words, "kept putting me off". In November 1999 Wasdev apparently stated that if the commission arrangement was not put in place he would quit but Mr. Rosa nonetheless refused to agree stating only that: "I'll see into it". A few weeks later, Wasdev was terminated by way of proper written notice on the basis that the company was facing difficult market conditions.

In his own words, Wasdev stated that although he continued to press for a commission arrangement, Mr. Rosa "just kept putting me off" and "kept avoiding it".

In order to find a contractual obligation, there must be a clear offer and an equally clear and unequivocal acceptance of that offer. Based on the evidence before me, Wasdev obviously offered--seemingly on many occasions--to restructure his compensation package by including a supplemental commission agreement. Equally clearly, however, Mr. Rosa never agreed to such a supplemental commission arrangement. There never was a concluded agreement between the parties regarding the payment of commissions and, in my view, the delegate's conclusion to that effect is unassailable.

The burden of proof in this appeal rests with Mr. Wasdev; it is his task to prove, on a balance of probabilities, the existence of a supplemental commission agreement. There is no written memorandum of such an agreement. Mr. Wasdev worked for the employer for over 1 1/2 years without ever having received even a single commission dollar. There is no evidence that any other salesperson received a commission payment in addition to their salary. Finally, and most compellingly, based on his own uncontradicted *viva voce* evidence, there was no concluded agreement regarding the payment of commissions.

It follows that this appeal must be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal