

An appeal

- by -

Canadian Truck Mart Ltd.
("CTM")

- 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: David B. Stevenson

FILE No.: 2002/286

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Canadian Truck Mart Ltd. (“CTM”) of a Determination that was issued on April 22, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that CTM had contravened Part 5, Sections 45 and 46 and Part 8, Section 63 of the *Act* in respect of the employment of James Evans (“Evans”) and ordered CTM to cease contravening and to comply with the *Act* and to pay an amount of \$9,063.76.

CTM says the Determination was wrong in concluding that Evans was not a manager for the purposes of the *Act*, that Evans was entitled to statutory holiday pay, as it was included in his salary, and that Evans was entitled to length of service compensation, as he had quit his employment.

ISSUE

The issues in this appeal are whether the Director was correct in concluding that Evans was not a manager or that he was entitled to statutory holiday pay and length of service compensation.

FACTS

CTM is a car dealership. Evans worked for CTM from March 16, 1998 to July 1, 2000. He was paid a sales commission plus a salary of \$1000.00 a month. During his employment, Cecil Aitchison and Bruce Robertson were owners of CTM. Mr. Aitchison was the general manager and Mr. Robertson had recently become involved in the business. Evans’ employment ended as a result of a dispute over the employment of Mr. Robertson’s son.

The Director found no evidence that Evans was a manager as that term is defined in the *Act*. While CTM alleged Evans hired and fired employees, made the schedule and signed time sheets, no evidence was provided to support these assertions. Two persons interviewed during the investigation said Evans had no authority to make decisions. Based on the available information, the Director concluded Evans’ primary employment duty was as a salesperson.

CTM alleged that statutory holiday pay was included in the commission amount. Total commission was 25% of net profit. CTM said that amount was actually 24% commission and 1% statutory holiday pay. That assertion was not supported by either Evans’ pay statements or by any other documentation. The Director also noted that payment of statutory holiday pay on every paycheque is not allowed under the *Act*. The Director found the evidence supported Evans’ claim that he had worked every statutory holiday, with the exception of Christmas Day and New Year’s Day, finding also that CTM’s information to be inconsistent and not credible.

Evans claimed that he was terminated from his employment as a result of a conflict between Mr. Aitchison, supported by him and another employee, Brent Hodges, and Mr. Robertson over the continued employment of Mr. Robertson’s son. The Director found no clear and unequivocal evidence of an intention by Evans to quit his employment.

CTM has filed some additional material with the appeal. The purpose of filing that material is unclear from the appeal submission, but it appears they have been submitted to support the argument that Evans was a manager. The Director contends these documents should be disregarded, as they were not provided during the investigation. I have considered the documents, but find them to be of no help to CTM in satisfying their burden of showing the conclusion of the Director on Evans' status for the purposes of the *Act* was wrong. As Evans correctly points out in his reply to the appeal, simply because he had authority to sign some documents does not make him a manager for the purposes of the *Act*.

ARGUMENT AND ANALYSIS

I can find no merit in any aspect of this appeal.

The burden is on CTM, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)).

On the issue of whether the Director correctly concluded Evans was not a manager for the purposes of the *Act*, it is worthwhile to reproduce the definition of manager found in the *Employment Standards Regulations*:

“manager” means

- (a) *a person whose primary employment duties consist of supervising and directing other employees; or*
- (b) *a person employed in an executive capacity.*

There is nothing in the material on file nor in the material added by CTM with the appeal that even remotely suggests Evans' primary employment duties consisted of supervising and directing other employees or that he was employed in an executive capacity.

Nor can I find anything in the appeal that persuades me the conclusion of the Director on either the issue of statutory holiday pay or the issue of length of service compensation was wrong. In respect of the former, CTM has done no more than to reiterate their position that Evans' commission included his statutory holiday pay. There was no evidence provided by CTM to support that position in the investigation and none in the appeal. Their burden has not been met. On the matter of length of service compensation, the Director, faced with differing versions of the events leading to Evans' employment being ended, applied the correct analysis and found the facts did not clearly and unequivocally support a conclusion that Evans had voluntarily terminated his employment. Once again, CTM has done no more in this appeal than reiterate the position taken during the investigation. An appeal to the Tribunal is not simply to provide an opportunity for a dissatisfied party to re-argue its position in the hope the Tribunal will view its arguments differently than did the Director. If the findings and the conclusions made by the Director are to be changed, the Tribunal must be satisfied there is reason for doing so.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 22, 2002 be confirmed in the amount of \$9,063.76, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal